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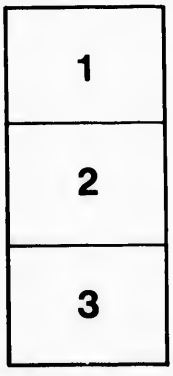

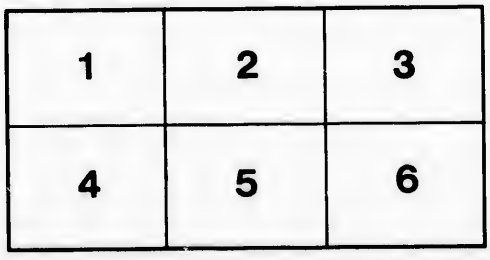

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SINCLAIR'S

G. A. Mc Gillivray

DIVISION COURTS ACT;

BEING A

FULL, CAREFUL AND EXHAUSTIVE ANNOTATION

OF THE

DIVISION COURTS ACT, RULES AND TARIFF,

AFTER THE MANNER OF

"HARRISON'S COMMON LAW PROCEDURE ACT,"

WITH INSTRUCTIONS TO CLERKS AND BAILIFFS ON QUESTIONS MOST FREQUENTLY ARISING IN THE COURSE OF THEIR DUTIES.

BY

J. S. SINCLAIR, Q. C.

JUDGE OF THE COUNTY COURT OF THE COUNTY OF WENTWORTH.

ASSISTED BY

E. E. WADE, ESQ.

BARRISTER-AT-LAW.

TORONTO:

HART & RAWLINSON, 5 KING STREET WEST.

1879.

TO

THE HONOURABLE

OLIVER MOWAT, Q.C.

ATTORNEY-GENERAL

FOR

THE PROVINCE OF ONTARIO,

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BY

THE AUTHOR.

PREFACE.

It is now several years since any work on Division Court law has been published, and the necessity for some work on that subject is the best excuse I can give for publishing this. After the thought first occurred to me of writing something to assist those actively interested in the administration of law in our Division Courts, I waited long for some one else to take up the subject which I had in mind. As no such work seemed to be forthcoming, I commenced the present volume, not expecting it would assume the proportions it has since attained to. I soon found that to be really useful, the work had to treat of a greater variety of subjects and assume a much wider range of authority than I at first anticipated. As our law so much depends on a vast mass of decided cases, I have tried, while avoiding an unnecessary citation of authority, to give the latest and most authoritative decision on each question discussed. The great point in legal research is to know *where* to find the authorities bearing upon any question arising in practice, and with a view of obviating the difficulty so often experienced in that respect, I have as much as possible given the digests and text-works where such are to be found. The English Courts, and our own, have of late years been so prolific of decisions, that anything more than a general reference to the works in which notes of them are to be found, and to some leading cases, would in a book of this nature be impossible. I have endeavoured to bring into practical application every English and Canadian case having especial reference to Division Court practice, and I sincerely hope that in that and other respects the result of my labours will be of service and general utility.

That many errors of a grave and serious nature, both omissions and mistakes, will soon be discovered, I cannot but expect. For these I have to ask the kindly indulgence of the critic, pleading as my excuse my inexperience, an earnest desire to be as correct as I possibly could in any exposition of law, and the conscious timidity that is so apt to seize one in his first attempt at book making. Those who are best acquainted with the intricacies of our law, its mazes and refinements, will, I am sure, be the first to overlook the imperfections of my work, and be most ready to pardon me if in many cases I have gone astray.

I have to thank most sincerely Mr. Wade, who has been associated with me from the first in this publication, and whose services have been so able and invaluable; and later on, Mr. Trevelyan Ridout, Barrister-at-Law, of Toronto, who has ably seconded our efforts.

J. S. SINCLAIR.

HAMILTON, June, 1879.

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LIST AND EXPLANATION

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Add. on Con.	Addison on Contracts, 7th Ed.
Add. on Torts	Addison on Torts, 2nd Ed.
A. & E.	Adolphus & Ellis.
Andr.	Andrews' Reports.
Anst.	Anstruther.
App. Cas.	Law Reports, H. of L. and Jud. Com., New Series.
App. R.	Appeal Reports, Ontario.
Arch. C. L.	Archbold's Criminal Law.
Arch. Pract.	Archbold's Practice, 12th Ed.
Bac. Abr	Bacon's Abridgement.
B. & Ald.	Barnewall & Alderson.
B. & Ad., or B. & A.	Barnewall & Adolphus.
B. & C.	Barnewall & Creswell.
B. C. C.	Bail Court Cases.
B. C. R.	Bail Court Reports.
Barnes	Barnes' Notes, C. P.
Beav.	Beavan's.
Benjamin	Benjamin on Sales, 2nd Ed.
Bing.	Bingham.
Bing. N. C.	Bingham's New Cases.
Black., W.	Sir Wm. Blackstone.
Black., H.	Henry Blackstone.
B. & L.	Bullen & Leake's Precedents in Pleading, 2nd & 3rd Eds.
Bull. N. P.	Buller's Nisi Prius.
B. & P.	Bosanquet & Puller.
B. & B.	Broderip & Bingham.
B. & S.	Best & Smith.
Bulst.	Bulstrode.
Burr	Burrows.
Byles on Bills	9th Ed.
Camp.	Campbell.
C. B.	Common Bench.
C. B. N. S.	Common Bench, New Series.
Chan. Cham.	Chancery Chamber Reports.
C. & J.	Crompton & Jervis.
Cham. R.	Chamber Reports, Com. Law.
C. & M.	Crompton & Meeson.
C. M. & R.	Crompton, Meeson & Roscoe.
Comm.	Kent's Commentaries.
Cro. Eliz.	Croke's Reports (*temp.* Eliz. Jas. Cha.)
C. & K.	Carrington & Kirwan.
Car. & M., or C. & Marsh,	Carrington & Marshman.
C. P.	Common Pleas Reports, Upper Canada and Ontario.

C. & P. ..... Carrington & Payne.
Chan. D. ..... Law Reports, Chancery Division.
C. L. P. Act. ..... Common Law Procedure Act.
Chitty ..... Chitty's Reports.
Chitt's Prec ..... Chitty's Precedents in Pleading, 3rd Ed.
Chitty on Carriers .... 1st Ed.
Cl. & Fin. ..... Clark & Finnelly.
C. P. D. ..... Law Reports, Common Pleas Division.
Co. Rep. ..... Coke's Reports.
Con. Stat. U. C. ..... Consolidated Statutes of Upper Canada.
Cowp. ..... Cowper.

Davis' C. C. ..... Davis' Practice of the English County Courts, 3rd Ed.
De Colyar on Guarantees, 1st Ed.
De G. M. & G. ..... De Gex, McNaughton & Gordon.
Den. C. C. ..... Denison's Crown Cases.
Dicey ..... Dicey on Parties to Action.
Draper, R. ..... Draper's Reports, U. C.
Drew. ..... Drewry.
Dowl. ..... Dowling.
D. & L. ..... Dowling & Lowndes.
D. & R. ..... Dowling & Ryland.
Dowlg. N. S. ..... Dowling, New Series.
Doug. ..... Douglas.
Dwarris on Statutes by Potter (Amer.)

E. & A. ..... Error and Appeal Reports, Upper Canada.
E. & B. ..... Ellis & Blackburn.
E. B. & E. ..... Ellis, Blackburn & Ellis.
E. & E. ..... Ellis & Ellis.
E. B. & S. ..... Ellis, Best & Smith.
East ..... East's Reports.
E. T. ..... Easter Term, U. C. Reports of the Reign quoted.
Esp. ..... Espinasse.
Ex. or Exch. ..... Exchequer.
Ex. D. ..... Law Reports, Exchequer Division.

F. ..... Form.
Farr. ..... Farresley's Reports.
F. & F. ..... Foster & Finlason.
Fisher's Dig. ..... Fisher's Digest, 1756 to 1870.
Freem. ..... Freeman.

G. & D. ..... Gale & Davison.
Gray on Costs ..... 1st Ed.
Gow. ..... Gow's Nisi Prius Cases.
Grant ..... Grant's Chancery Reports.

H. & C. ..... Hurlstone & Coltman.
H. & N. ..... Hurlstone & Norman.
H. & W. ..... Harrison & Wollaston.
H. L. Rep. or Cases. .. Clark & Finnelly's H. L. Reports.
Har. C. L. P. Act. .... Harrison's Common Law Procedure Act, 2nd Ed.
Har. Mun. Man. ..... Harrison's Municipal Manual.
Holt ..... Holt's Reports.
H. T. ..... Hilary Term, U. C. Reports of the Reign quoted.
Howard ..... U. C. Supreme Court Reports.

Irish Ch. R.	Irish Chancery Reports.
Irish C. L. R.	Irish Common Law Reports.
Irish Eq. R.	Irish Equity Reports.
John. & Hem.	Johnson & Hemming.
Jur.	Jurist.
Jur. N. S.	Jurist, New Series.
Kerr on Fraud	1st Ed.
Kay & J.	Kay & Johnson.
L. & C.	Leigh & Cave.
L. C. G.	Local Courts Gazette, U. C. & Ontario.
L. J. Chan.	Law Journal, Chancery.
L. J. Q. B.	Law Journal, Queen's Bench.
L. J. C. P.	Law Journal, Common Pleas.
L. J. Mag. Cas.	Law Journal, Magistrate's Cases.
L. J. Mat.	Law Journal, Matrimonial Cases.
L. J. N. S.	Canada Law Journal, New Series.
L. M. & P.	Lowndes, Maxwell & Pollock.
L. R. A. & E.	Law Reports, Admiralty and Ecclesiastical.
L. R. C. C.	Law Reports, Crown cases, reserved.
L. R. Ch.	Law Reports, Chancery Appeals.
L. R. C. P.	Law Reports, Common Pleas.
L. R. Digest.	Digest of Cases, 1866 to 1875.
L. R. Eq.	Law Reports, Equity Cases.
L. R. Ex.	Law Reports, Exchequer.
L. R. H. L.	Law Reports, English and Irish Appeals, H. L.
L. R. P. C.	Law Reports, Privy Council Appeals.
L. R. P. & D.	Law Reports, Probate and Divorce.
L. R. Q. B.	Law Reports, Queen's Bench.
L. R. Scotch App.	Law Reports, Scotch Appeals.
L. T.	Law Times.
L. T. N. S.	Law Times, New Series.
Ld. Ray.	Lord Raymond.
Lush's Pract.	Lush's Practice, 3rd Ed.
Mac. & G.	MacNaughton & Gordon.
Macq. H. L.	Macqueen's Scotch Appeal Cases.
Marsh.	Marshall.
Max. on Stat.	Maxwell on Statutes, 1st Ed.
Mayne	Mayne on Damages, 3rd Edition.
M. & S.	Maule & Selwyn.
M. & W.	Meeson & Welsby.
McCle.	McCleland.
McC. & Y.	McCleland & Younge.
M. & G.	Manning & Granger.
M. & R.	Manning & Ryland.
Mich. T.	Michaelmas Term, U. C. Reports of the reign quoted.
Mod.	Modern.
Moore	Moore's Reports.
M. & M.	Moody & Malkin.
Moore P. C.	Moore's Privy Council Cases.
Moo. & R., or M. & Rob.	Moody & Robinson.
Moore, J. B.	J. B. Moore's Reports.
M. & P.	Moore & Payne.

New Sess. Cas.	New Sessions Cases.
N. R.....	Bosanquet & Puller's New Reports.
Nev. & M.	Neville & Manning.
Nev. & P.....	Neville & Perry.
O. S.....	Old Series, U. C.
Oliphant	Oliphant's Law of Horses, 3rd Ed.
Paley on Con.....	Paley on Convictions, 4th Ed.
P. D.....	Law Reports, Probate Division.
P. & D.....	Perry & Davison.
Peake	Peake's Nisi Prius Cases.
Peake Ad. Cas.	Peake's Additional Cases.
P. R.....	Practice Reports, U. C. & Ontario.
Price	Price's Reports, Ex.
Q. B.....	Adolphus & Ellis, New Series.
Q. B. D.	Law Reports, Queen's Bench Division.
Rawle	Rawle's Pennsylvania Reports.
Raym.	Raymond.
Rev. Stat.....	Revised Statutes, Ontario.
Rob. & Har. Digest ..	Robinson & Harrison's Digest.
Rob. & Jos. and R. & J. Digest	Robinson & Joseph's Digest.
Roscoe Crim. Ev.	Roscoe's Criminal Evidence, 8th Ed.
Roscoe's N. P.....	Roscoe's Nisi Prius Evidence, 13th Ed.
R. & R.....	Russell & Ryan.
R. & M.	Ryan & Moody.
Russell.....	Russell on Arbitration and Awards, 4th Ed.
R.....	Rule.
Salk	Salkeld.
Saund.....	Saunders.
Scott	Scott's Reports.
Scott N. R.....	Scott's New Reports.
Sess. Cas.....	Sessions Cases.
Smith's L. C.	Smith's Leading Cases at Law, 6th Amer. Ed.
Stark. Ev.	Starkie's Evidence.
Stark. N. P.	Starkie's Nisi Prius Reports.
Stephen	Stephen on Evidence, 2nd Ed.
Story Eq. Jur.....	Story's Equity Jurisprudence.
Strange	Strange's Reports.
Sup. C. R.	Supreme Court Reports, Canada.
Swa. & Tri.....	Swabey & Tristram.
Swans	Swanston.
Taunt.....	Taunton.
Tay. on Ev.....	Taylor on Evidence, 4th Ed.
Tay. R.....	Taylor's Reports, Upper Canada.
T. R.....	Term Reports (Durnsford & East).
Tidd.....	Tidd's Practice.
T. T.....	Trinity Term, U. C. Reports of the Reign quoted.
Tyrw	Tyrwhitt.
Tyrw. & G.....	Tyrwhitt & Granger.

U. C. L. J. ..... Upper Canada Law Journal.
U. C. R. ..... Upper Canada and Ontario Q. B. Reports.

Ves. ..... Vesey's, sen., Reports.

Waterman ..... Waterman on Set-off, 2nd Ed.
Watson on Sheriff.... 2nd Ed.
W. R. ..... Weekly Reporter in all the English Courts.
Wharton..... Wharton's Law Lexicon, 3rd Ed.
Woodfall's L. & T.... Woodfall's Landlord & Tenant, 8th Ed.
Wils..... Wilson.
Wms. on Exrs. ..... Williams on Executors, 5th Amer. Ed.
Worcester ..... Worcester's Dictionary, Unabridged Edition of, 1859.
W. N. ..... Weekly Notes.

Y. & C., or Yon. & Coll. ..... Younge & Collyer.
Y. & J ..... Younge & Jervis.
Younge ..... Younge's Reports, Ex.

G. A. Mc Gillivray

THE

DIVISION COURTS ACT.

REVISED STATUTES, ONTARIO, CAP. 47.

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1. This Act may be cited as "*The Division Courts Act.*" (*) Short title of Act.

(*) By the Statute of 4 & 5 Victoria, chapter 53, what was then known and used as a means of collecting small debts, the Court of Requests, was abolished, and was supplanted by what has since been familiarly known as the Division Court. That Act, and amendments to it, continued in force until the year 1850, when the Legislature determined to consolidate and reduce into one Act the several laws then in force referring to Division Courts in Upper Canada; and on the 29th day of May of that year leave was granted in the House of Assembly of the old Parliament of Canada to bring in a bill for that purpose. On the same day Hon. Mr. Sherwood introduced a bill (afterwards substantially adopted), which was then read a first time, and was ordered to be read a second time on the 19th day of June following. On this last mentioned day the bill was read a second time and referred to a Select Committee, composed of the then Solicitor-General (the late John Sandfield Macdonald), Hon. Mr. Sherwood, Mr. Richards (the late Chief Justice of the Supreme Court), Mr. Ferguson, Mr. Seymour, Mr. Flint and Mr. Thompson, with instructions to report thereon with all convenient speed.

On the 17th of July, 1850, Mr. Solicitor-General Macdonald reported the bill from the Select Committee, with amendments; and it was ordered that the bill and report be committed to a Committee of the whole House for the then following Tuesday, and that the bill should be reprinted.

On the 31st of July, 1850, the bill being read, the House accordingly resolved itself into Committee. Notice having been taken that there was no quorum, Mr. Speaker resumed the chair, and the names of the members present were taken down as follows:—Mr. Speaker, Messieurs Attorney-General Baldwin, Bell, Crysler, DeWitt, Flint, Fournier, Hopkins, Laurin, Solicitor-General Macdonald, McConnell, McFarland, Richards, Robinson, Scott (of Bytown), Seymour, Smith (of Frontenac), Stevenson and Thompson; and at a quarter of an hour after midnight the House was adjourned by Mr. Speaker, without the question being first put.

On the 2nd of August, 1850, the order of the day for the House in Committee on the bill being read, the House resolved itself into Committee, Mr. Laurin again in the chair. The bill was reported with amendments.

On the 5th of August, 1850, when the amendments were read, it was moved by Mr. Solicitor-General Macdonald, and seconded by Mr. McLean, and the

question being proposed that the amendments be then read a second time, Mr. Smith (of Durham) moved an amendment to restrict the incomes of certain Division Court Clerks, which, after debate, was negatived.

On the 6th of August, 1850, Mr. Lyon (the late George Byron Lyon Fellowes) moved in amendment to the question, "that the bill be re-committed for the purpose of inserting a clause for granting an appeal to the Courts of Queen's Bench or Common Pleas, or a Judge of any of such Courts in Chambers, in all cases of assumpsit, debt, or contract, when the amount claimed is between the sum of ten pounds and twenty-five pounds inclusive, and in all cases of tort." This amendment was lost in a House of 48 members by a division of 3 yeas to 45 nays. The minority was composed of Cauchon, Lyon and Smith, of Frontenac (the late Sir Henry). The bill, as amended, was read a second and third time that day.

On the 7th of August, the House ordered that Mr. Solicitor-General Macdonald should carry the bill to the Legislative Council and desire their concurrence.

The bill passed the Legislative Council on the 9th of August, 1850, and on the following day it received the assent of His Excellency (Lord Elgin); and that which has since become so familiar to the people of this Province, and which has become so interwoven with their business interests, and forms such an important part of our administration of justice, became law.

Very few of those now remain who twenty-nine years ago were instrumental in consolidating and re-forming the Division Court system. Some are yet with us to see the effect of their handiwork, and to contemplate the advantages or mischief that it has produced. We know not whether this Act (which was known as the 13 & 14 Vic. cap. 53), met the hopes and expectations of its friends and advocates of that day; but with all its imperfections and defects, it may safely be said of it, that it forms so important a part of our legal system that the disposition appears to be gaining ground rather to extend the boundaries of its jurisdiction than to narrow its limits or authority. If such a view is gaining ground among the laymen throughout the country, as it appears to be, it cannot be said that the law has not been productive of some good results, or that the fruition of the hopes of the Legislature of 1850 has not been attained.

It is to be observed by what a decisive majority the proposition to give an appeal to one of the Superior Courts of Common Law, or a Judge of either of them, was rejected. We think, after so many years' experience, that public opinion would now sustain the view so unequivocally pronounced at the passage of the bill; and unhesitatingly declare that, with the Courts as at present constituted, it is better to suffer an occasional wrong through the mistake of a Judge than that people should suffer the delay and expense of appeals, and be harassed by the litigation of small matters in the Superior Courts. If the day has come for changing the character of these Courts from what they have been—the easy and ready means, at comparatively little expense, of collecting debts, or of parties having their differences settled in their own localities—it is also time for the consideration of the broader question, whether the *whole* local Court system could not with advantage be revised and reformed. Any material change in the Division Court system appears to necessitate a reconstruction of the County Courts; and if one should be attempted without the other, it will shortly be found out that, if reforms be needed, the mistake will be in not considering both questions together. The extension of the jurisdiction of the Division Courts appear to us necessarily to raise the question of extending the jurisdiction of the County Courts. The people, we feel assured, are quite prepared for and would accept this as legislation in a proper direction; and such a measure is one which, it is hoped, will ere long be carried out.

Interpretation.

2. In the construction of this Act, "County" shall include two or more Counties (*a*) united for judicial purposes; and in any form or proceeding the words "United Counties" shall be introduced where necessary. C. S. U. C. c. 19, s. 1.

THE COURTS.

Courts continued.

3. The Division Courts, and the limits and extent thereof existing at the time this Act takes effect, (*b*) shall continue until altered by law. C. S. U. C. c. 19, s. 2.

Number of Courts in Counties and Cities.

4. There shall not be less than three or more than twelve Division Courts in each County, (*c*) of which Division Courts there shall be at least one in each City (*d*) and County Town. C. S. U. C. c. 19, s. 3.

Designation of Court.

5. The Court in each division shall be called "The First Division Court in the County of (*e*) ", (*or as the case may be.*) C. S. U. C. c. 19, s. 9.

Each Court to have a Seal.

6. Every Division Court shall have a seal, (*f*) with which

(*a*) This is in effect repeating the 12th sub-section of section 8, cap. 1, of the Revised Statutes (Interpretation Act).

(*b*) The Revised Statutes of Ontario (of which this is one) came into force on the 31st of December, 1877, by proclamation, under section 5 of the Act respecting the Revised Statutes of Ontario, passed on the 2nd day of March, 1877, and confirmed by the Act of 41 Vic. cap. 6.

(*c*) Or union of Counties as the case may be. See section 2.

(*d*) Should there be a City in the County other than that in which the court house is situate and the Assizes are held (Rev. Stat. cap. 174, s. 2, sub-sec. 6), a Court would necessarily have to be established there. The word "City" here might be considered as equivalent to "County Town," but it is submitted that its meaning should not be so restricted.

(*e*) Usually numbered in consecutive order, commencing with that at the County Town as Number One: 7 U. C. L. J. 147.

(*f*) Chancellor Kent says, "The Common Law intended by a seal an impression upon wax or paper, or some other tenacious substance capable of being impressed;" 4 Comm. 452, 9th Ed.

Lord St. Leonards was of opinion that sealing by an impression on paper was good at Common Law. The same view has been expressed by many of the State Courts in the United States, and also by the Supreme Court of that country in *Pillow* v. *Roberts*, 13 Howard, 472.

In *Hamilton* v. *Dennis*, 12 Grant 325, affirmed on appeal 14th March, 1867, it was held that in an instrument, instead of wax or wafer being affixed thereto for seals, slits had been cut in the parchment, and a ribbon woven through so as to appear on the face of the document at intervals opposite one of which each of the parties to the deed signed, that it was duly sealed. See also *Foster* v. *Geddes*, 14 U. C. R. 239

all process (*g*) of the Court shall be sealed or stamped, (*h*) and such seal shall be paid for out of the Consolidated Revenue Fund (*i*). C. S. U. C. c. 19, s. 4.

Not to be Courts of Record.

7. The said Division Courts shall not be held to constitute Courts of Record, (*k*) but the judgments in the said Courts shall have the same force and effect as judgments of Courts of Record (*l*). C. S. U. C. c. 19, s. 5; 32 V. c. 23, s. 1.

The seals usually adopted by Division Court Clerks, by which an impression is made on the process issued from their Courts, shewing the number of the Court and County in which it is, without any wax or other foreign substance, are no doubt valid and within this clause of the Statute: *Ontario Salt Co.* v. *Merchants Salt Co.* 18 Grant, 551. Should a clerk use an improper seal, or one that does not clearly authenticate the Court from which the process purports to be issued, it would be the duty of the Judge to see that this mistake and omission were corrected: see Rule 9.

(*g*) Means in the interpretation of the Rules of Court "any summons, writ or warrant issued under the seal of the Court, or Judge's summons or order." Rule 2. But in this section it cannot properly be applied to Judges' summonses or orders.

(*h*) Should this not be done, the process would be irregular and liable to be set aside (*Smith* v. *Russell*, 1 Cham. R. 193), unless an amendment were allowed, which should be done as a matter of course; the mistake being a misprision of the Clerk: *Cheese* v. *Scales*, 10 M. & W. 488; also, see Rule 118.

(*i*) The Clerk should render the account to the Provincial Treasurer for payment.

(*k*) Such Courts are defined to be those "where the judicial acts and proceedings are enrolled for a perpetual memorial and testimony, which rolls are called the records of the Court, and are of such high and supereminent authority that their truth is not to be called in question:" Wharton's Law Lexicon, 2nd Ed. 641.

(*l*) At pages 54 & 55 of Stephen's Digest of the Law of Evidence, it is laid down that "all judgments whatever, are conclusive proof as against all the world of the existence of that state of things which they actually affect; and they are relevant when their own existence or the existence of the state of things so affected is a fact in issue or relevant to the issue:" see cases there cited and illustrations given.

At section 1480 of Taylor on Evidence, that learned author says, "If the object be merely to prove *the existence of the judgment, its date or its legal consequences*, the production of the record or the proof of an examined copy, is conclusive evidence of the facts against all the world. This rests on the ground that a judgment is a public transaction of a solemn character, which must be presumed to be faithfully recorded." But what parties are to be affected by a judgment? It is said that "every judgment is conclusive proof as against parties and privies of facts directly in issue in the case actually decided by the Court, and appearing from the judgment itself, to be the ground on which it was based:" Stephen, 56.

"Privity denotes mutual or successive relationship to the same rights of property; and the reason why persons standing in this relation to the litigant, can rely upon and are bound by the proceedings to which he has been a party, is that they are identified with him in interest. Hence all privies, whether in blood, in estate or in law, are estopped themselves, and can estop others from

litigating that which would be conclusive either against or in favor of him with whom they are in privity:" Taylor on Evid. s. 1501; Roscoe's N.P. 13th Ed. 206.

But an important exception has been engrafted on this rule, which is, that if evidence was admitted in the action in which judgment was recorded, which is excluded in the action in which that judgment is offered in evidence, then such judgment is irrelevant testimony.

The illustration given by Mr. Stephen for this at page 57 is in these words: "A. obtains a decree of judicial separation from her husband B. on the ground of cruelty and desertion *proved by her own evidence*. Afterwards B. sues A. for dissolution of marriage on the ground of adultery, in which suit neither B. nor A. can give evidence. A. charges B. with cruelty and desertion. The decree in the first suit is irrelevant to the second:" *Stoate* v. *Stoate*, 2 Swa. & Tri. 223; 30 L. J. Mat. cases, 102; 3 L. T. N. S. 756, s. c.

Statements in judgments as to facts upon which the judgments are based, are irrelevant as between strangers, or as between a party or privy and a stranger. Taylor on Evid. sec. 1505; Stephen on Evid. pp. 57-60; Roscoe's N. P. 206; Alison's case, L. R. 9 Ch. 24. As against a stranger, a judgment is evidence *of the fact* of its recovery, but not of its contents: Roscoe's N. P. 207. As between parties and privies, in courts where written pleadings are requisite, a judgment is only a relevant fact, if not pleaded by way of estoppel whenever any matter which was or *might have been* decided in the action in which judgment was given is in issue, or relevant to the issue in any subsequent action: *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454; *Conradi* v. *Conradi*, L. R. 1 P. & M. at page 518; *Carr* v. *Tannahill*, 31 U. C. R. at page 211; *Vooght* v. *Winch*, 2 B. & Ald. 662. It is also conclusive proof of the facts which it decides or might have decided, if the party giving it in evidence had no opportunity of pleading it as an estoppel: Stephen, 59; Roscoe's N. P. 205; *Feversham* v. *Emerson*, 11 Ex. 385; *Whittaker* v. *Jackson*, 2 H. & C. 926.

Then what is the effect in Division Courts where there are no pleadings of a judgment being given in evidence? It is submitted that its effect is the same as if the party giving it in evidence had been in a position to plead it, and had actually done so. A party should not be prejudiced by the procedure of the Court not affording him the same rights as in other Courts. The rule only applies where an "*opportunity*" of pleading the judgment in estoppel is given. "We apprehend that the rule is now too well settled to be disturbed, that a judgment containing the other elements of an estoppel is conclusive, if pleaded where there is an opportunity of pleading it; that where the frame of the pleadings does not afford any such opportunity, it is conclusive as evidence; but that where the party claiming its benefit has not chosen to plead it, although there was an opportunity, he is deemed to have waived the absolute estoppel, and to leave the judgment as evidence for the jury:" *per* Moss, J. A. in *Brown*, v. *Yates, et al.*, 1 App. R., at page 374.

It is no default of a party's, and therefore it would be unjust that he should be prejudiced. The law is not so unreasonable as to ask impossibilities, and to take away the right which a person possesses by reason of the impossibility of its performance. "The law does not seek to compel a man to do that which he cannot possibly perform:" Broom's Legal Maxims.

The American Courts, as a rule, hold the judgment an estoppel, whether pleaded or not: *Marsh* v. *Pier*, 4 Rawle, 288 & 289; Tay. on Ev. s. 1487, Note 3; Greenleaf on Evidence, 12th Ed. sec. 531a. The author submits that the same rule should prevail in Division Courts.

The section makes the judgments in Division Courts have "the same force and effect . . judgments of Courts of Record." The section positively declares that Division Courts shall *not* be Courts of Record, but that the judgments of such Courts shall have the same force and effect" as if they had originally been recovered in Courts of Record. The latter part of the clause was not in the

Time and place of holding Courts.

8. A Court shall be holden in each Division (*m*) once in every two months, (*n*) or oftener (*o*) in the discretion of the Senior or the acting County Judge; and the Judge may appoint and from time to time alter the times and places

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original statute, but was enacted in the Act of 32 Vic., cap 23, to remove the doubt that existed of the judgments of Division Courts being of any higher value than simple contract debts: see remarks of Lord Campbell, C. J., at page 809 of 1 E. & B.; and of Hagarty, J., at page 399 of 25 U. C. R. In *Corsant qui tam* v. *Taylor*, 10 L. J. N. S. 320, the County Judge of Middlesex expressed the opinion, that Division Courts are by this section, necessarily *Courts of Record*. With all due respect, it is submitted that the plain words of the statute, declare Division Courts *not to be Courts of Record*, but for the purpose of enforcing the judgments of such Courts then entered, or that might subsequently be entered, parties should have the same rights *as in Courts of Record*. By the third section of the English Statute, 9 & 10 Vic., cap. 95, a consolidation of The Small Debts' Courts Acts, and from which our Act was in a great part taken, such Courts were, according to judicial interpretation, only made Courts of Record for certain purposes. The concluding words of that section are, "and every Court holden under this Act *shall be a Court of Record*." Yet in *Owens* v. *Breese*, 6 Ex. 916. a County Court was held not to be a Court of Record to which a writ of trial could be directed. In *Berkeley* v. *Elderkin*, 1 E. & B. 805, it was held that an action was not maintainable on a County Court judgment. If it had possessed all the strength of a judgment of a Court of Record, an action would have been maintainable: Dicey on Parties to action, 16. In *Austin* v. *Mills*, 9 Ex. 288, the authority of previous cases was recognized, and it was again decided that no action would lie on a County Court judgment. Such is analogous to a judgment under our Act. In *McPherson* v. *Forrester*, 11 U. C. R. 362, it was *held* that no action was maintainable in Superior Courts on Division Court judgments; and in *Donnelly et al.* v. *Stewart*, 25 U. C. R. 398, it was decided that no action would lie in either a Superior or County Court on a Division Court judgment. It is therefore submitted that the Legislature, in giving to judgments of these Division Courts the force and effect of judgments of Courts of Record, was giving a certainty and stability to such judgments, which from the remarks made by Lord Campbell in *Berkeley* v. *Elderkin*, 1 E. & B. 805, and by Hagarty, J. in *Donnelly et al.* v. *Stewart*, it was feared they did not then possess, but not making them *for all purposes* Courts of Record.

A judgment in a Division Court is a bar to an action for the same cause in any other Court: *Austin* v. *Mills*, 9 Ex. 288.

(*m*) The sittings of the Court must be held *within* the division. One object in establishing the Division Courts was to afford easy and ready facilities, and at small expense, for litigants to have their disputes settled; and in furtherance of that view, the holding of the sittings *within* the division was no doubt considered an essential ingredient. The Clerk's office must also be within the division: Rule 76.

(*n*) There cannot be a literal compliance with the Statute. That would be impossible; but a substantial compliance with it would be the holding of the sittings in each division six times during the year, and as nearly as possible, at regular intervals.

(*o*) In cities and towns there are usually required more than six sittings a year; and any additional number which the business may render necessary is properly left to the discretion of the Judge.

(*p*) within such Divisions, when and at which such Courts shall be holden. C. S. U. C. c. 19, s. 6.

Division Courts accommodation.

9. The Municipality (*q*) in which a Division Court is held shall furnish a Court room and other necessary accommodation (*r*) for holding said Court, not in connection with any hotel (*s*). 36 V. c. 48, s. 362.

(*p*) The Judge, from necessity, or for the convenience of the public, might have to alter the times and especially the places of holding Divison Courts. The want of proper accommodation is frequently a ground for the latter; but nevertheless the altered time or place can only be for sittings *within* the division: see note (*m*) to this section. It is important that the place of holding the Court should be changed as seldom as possible; not only that the place of sittings should be well known, but because questions of jurisdiction frequently arise which have to be determined by reference to the primary question—the *place* of sittings: see section 63.

At page 312 of 7 U. C. L. J., it is said: "In determining then where the sittings of the Court are to be held, it becomes necessary to ascertain what building accommodation can be secured for the *decent* and *orderly* conduct of business. If a Town or Township Council chamber, school house or other public building in a division, will be placed at the disposal of the officers of the Court on court days, lighted and warmed as occasion requires, it should be chosen. The appointment of two places in a division for holding the Court alternately seems warranted by the very broad language used in section 6 (now section 8). "The Judge may appoint, and from time to time alter, the time and places within such divisions where and at which said Courts shall be holden;" and although such an arrangement tends to produce errors and confusion in the business, cases may occur where the public convenience can possibly be served by shifting the places of sittings from one place to another and back again. It will be seen from the foregoing consideration that no general rule can be proposed as to the place where the sittings of a Court should be held in a division; the question as it arises in each case must be settled with reference to the particular circumstances involved."

(*q*) See Municipal Institutions Act, s. 7 (Rev. Stat. page 1589.)

(*r*) This was a most necessary provision. The court-room should be situate so as to be free from noise or disturbance, and otherwise reasonably suitable for the purpose required; due regard being had for the circumstances of each place. It should also, under this section, be duly heated and lighted, and have suitable accommodation for seating the officers of the Court, professional gentlemen, litigants and others attending Court. What is "necessary accommodation" cannot be particularly defined, for in a city better accommodation would be expected than in a newly settled part of the country; but it might in general terms be said to be that proper and becoming provision for the comfort and convenience of those attending Court, which, under the particular circumstances of a municipality, its Council would be expected to provide for that purpose.

(*s*) The chief object of the Legislature no doubt, was to prevent Courts being annoyed or disturbed by the consequences of too easy access to a place where intoxicating liquors were sold, or the rights of parties prejudiced from any such cause. Probably a Judge would feel warranted in holding that not only does the section prohibit the holding of Courts at licensed houses, but at all taverns, inns or houses of public entertainment.

If there be no proper court-room, &c., the Judge may hold Court in any suitable place.

2. In case a proper Court-room, and other necessary accommodation for the holding of a Division Court are not furnished by the Municipality in which the Court is held, (*t*) the Judge may hold the Court in any suitable place in the Division, or in any other Division of the County in which suitable accommodation is provided; (*u*) and the owner, lessee or tenant of the building in which the Court is so held, shall for the use of the said building be entitled to receive (*v*) from the Municipality whose duty it was to provide proper accommodation for the Court, the sum of five dollars for every day (*w*) on which the Court is held in said building. 37 V. c. 7, s. 72.

Expenses for rent.

The Lieutenant-Governor may in certain cases, regulate holding of Courts.

10. If the Justices of the Peace for any County, in General Sessions assembled, (*x*) certify to the Lieutenant-Governor that any Division of the County, from the amount of business or remoteness or inaccessibility, it is expedient that the Court should not be held so often as once in every two months, (*y*) the Lieutenant-Governor in Council may order the Court to be held at such periods as to him seems meet, and may revoke the order at pleasure, but a Court shall be held in the Division at least once in every six months. C. S. U. C. c. 19, s. 7; 38 V. c. 12, s. 1.

(*t*) Where one division comprises more than one municipality, there is no provision for making any other than that in "which the Court is held" contribute a share of the expenses.

(*u*) This is an exception (through the necessity of the case) to the rule, that Courts must be held within their divisions, according to section 8.

(*v*) Without this provision, the only course to compel a delinquent municipality to fulfil its duty in this respect would be by *mandamus*: *Dark* v. *The Municipal Council of Huron & Bruce*, 7 C. P. 378. In *Lees* v. *The Corporation of the County of Carleton*, 33 U. C. R. 409, it was *held*, that where a statute compelled a municipality to afford suitable accommodation to a County Attorney and Clerk of the Peace, an action was maintainable for the expenses he incurred in consequence of the default of the Municipal Corporation.

(*w*) The right and remedy being statutory, no more than this sum could, under any circumstances, be recoverable: 33 U. C. R. page 419.

(*x*) That is at the sittings "commencing on the second Tuesday in the months of June and December respectively in each year:" Rev. Stat. cap. 44, s. 4. It must be done during the Sessions: *In re Coleman*, 23 U. C. R. 615.

(*y*) "Where a judicial district is extensive, and portions of it but thinly populated, the public interests may require the formation of a Court Division in a remote or isolated settlement, perhaps approachable only at some seasons of the year, while to hold a Court in such division six times in the year would be uncalled for and unnecessary, the local magistracy, who have the best means

11. The Justices of the Peace in each County in General Sessions assembled, may, subject to the restrictions (*z*) in this Act contained, appoint, and from time to time alter the number, limits and extent of every Division, (*a*) and shall

General Sessions may alter number and limits of Divisions.

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of knowing, are made the judges of this, and may certify as to the expediency of reducing the number of Court sittings. The considerations upon which this question of expediency is to be resolved are: 1—The amount of business for the particular Court; 2—The position of the division as to distance from the more settled parts, *i.e.*, its 'remoteness;' and 3—Its unapproachableness, not absolutely of course, but its comparative inaccessibility. If, then, the particular locality would furnish only a few cases in the year, or is far away from the business part of the County, or from want of roads or other causes, is accessible by the ordinary modes of conveyance only in midsummer or in sleighing time, these or any one of these facts would form grounds for a certificate under the section, and two or all three of them prevailing, would shew the inexpediency of holding more than two Courts in the year. To occupy the Judge's time in holding such Courts, would be to provide for the possible accommodation of the few at a certain loss to the many. It will be seen that Magistrates acting in (Quarter) Sessions are invested with very extensive power for the appointing new divisions, thus calling Courts into existence, as well as for altering from time to time the number, limits and extent of existing divisions; and this power, like all powers in law, must be duly executed at the times, and in the manner, and to the extent prescribed by the statute, and Magistrates have no authority out of the Act in respect of the Division Courts. So that if the power be not duly followed up in any act or order of Session, it would be without authority, and so void:" 7 U. C. L. J. 177–178.

Since the law allowing Clerks to enter judgments by default in certain cases, there is not the same reason as formerly for having so many sittings of the Courts.

NOTE.—In the County of Wentworth, the sittings of five of the Courts have been reduced under this section to four a year, and one Court to five sittings annually, without any injury to suitors, or diminution of the business.]

(*z*) Under the 8th section of the old statute (Con. Stat. U. C. cap. 19), a change could not be made by any less number of Justices than were present when the order of Sessions proposed to be changed, was made. This is not now law, but instead of it, notice must be "made and proclaimed in open Court, at the next previous sittings" of the Sessions: s. 17, sub-sec. 3 (and see notes thereto).

(*a*) "Justices of the Peace, in altering old divisions or forming new, can act only in General (Quarter) Sessions. It would not be competent for Justices, however numerous, to meet in *Special* Sessions and appoint or alter the Court limits; but a General (Quarter) Sessions may, of course, be adjourned to a time anterior to the first day of the next General (Quarter) Sessions for the purpose of acting under this clause. The power conferred is to be exercised by the Magistrates assembled *in* Sessions, in other words, the business is an act of the Court, and must, it is presumed, be done in open Court, and recorded as provided for in section 15 (now section 18). In the exercise of this duty, a large discretion has been given to Magistrates as ministers of the law and custodians of the public interests; and the Legislature evidently contemplated open deliberate action at periods when the Courts are most numerously attended. If the appointment or alteration of divisions is to be made at a general adjourned Sessions, public notice should be given of the business to be transacted at the Court:" 7 U. C. L. J. 112.

Resolutions and orders as to Divisions not to be altered till after notice.

number the Divisions beginning at number one; (*b*) but no resolution or order made under the provisions of this section shall be altered or rescinded, unless public notice of the intention so to alter (*c*) or rescind is made and proclaimed in open Court, (*d*) at the next previous sittings of such General Sessions of the Peace. C. S. U. C. c. 19, s. 8; 38 V. c. 12, ss. 2 & 3.

(*b*) "In appointing or altering divisions, the limits and extent" of every Court division must be ascertained and fixed with precision. This may be done by tracing the outer boundary in each case, or by setting out the Towns, Townships or detached parts thereof, intended to be within the division; but whatever mode of description be adopted, the established territorial divisions of the country, and the authorized sub-divisions and description should be followed. Thus, a division may be composed of so many Townships, or of one or more Townships and so many concessions or lots from another Township, and that is the usual method taken for fixing "the limits and extent," and the one evidently contemplated by the Legislature; for if we look at the 121st and 122nd sections (now 111th and 112th sections) of the Act, we see at once a difficulty in carrying out their provisions, unless the established and recognized divisions are adhered to. The Jurors are to be taken from the Collectors' Rolls for the Townships and places wholly or partly within the division; and for this purpose, the Collector for each place, wholly or partly within any division, shall furnish the Clerk of the Court with a list of Jurors; and under the Consolidated Assessment Act, the number of concession, lot or other authorized designation, or the local division is shewn on the roll in connection with the name of the party assessed. Moreover, in reference to the execution of process from the Courts, the lot or concession, &c., where a party resides being known, mere inspection of the order appointing Court limits should show the Court that has cognizance where residence enters into the question of jurisdiction:" 7 U. C. L. J. 146 & 147.

(*c*) "Every division, when appointed, is to be numbered 1st, 2nd, 3rd, and so on. There is no clue given in the Act as to which should be 'the first' or number *one* division; but in practice the division including the County Town is generally named the first division, and the others follow either in the order of importance or extent, or arbitrarily, as the Justices may determine, the numbers being consecutive from number one:" 7 U. C. L. J. page 147.

(*d*) "To some extent Magistrates are made the sole judges as to the fitness or expediency of things upon which they are authorized to act; but, like all other judges, they must be governed by a sound discretion in the exercise of this authority; and should they act corruptly, a criminal information would lie: see Cole on Criminal Information, 26. Moreover, as the power conferred is for the public benefit—relates to the administration of justice—in cases of neglect to use it within the time prescribed, or within a reasonable time, where the statute is silent on the point, a *mandamus* would be granted, and the Courts would compel the execution of the duty imposed: see Tapping on *Mandamus*, 9. Should Magistrates exceed their authority, or use it in an unauthorized manner, a writ of prohibition would lie in certain cases; but the peculiar and appropriate remedy would be to quash the order of Sessions: Archbold's Crown Office, 178. This, there can be no doubt, the Superior Courts of Common Law would do, if an order was made without jurisdiction, or if the conditions precedent to an order, as set down in the statute, were not properly complied with. Magistrates cannot *acquire* any more than they can *exceed* the jurisdiction given in respect to the Division Courts, their authority in respect

Establishment by the County Judge of a Division Court in Townships, on petition of Township Council.

12. The Judge of a County Court may, in his discretion (*e*), upon the petition (*f*) of the Municipal Council of any Township or United Townships in which no Division Court has already been established, praying that a Division Court may be established in and for such Township or United Townships, establish and hold a Division Court therein, and the Court so established shall be numbered and called the Division Court of the County in which such Township or United Townships is or are situated, taking the number next after the highest number of the Courts then existing in such County.

Court must be confirmed by Lieutenant-Governor in Council.

2. No business shall be transacted in any such Court until after the establishment thereof (*g*) has been certified by the County Judge to the Lieutenant-Governor in Council, together with the petition praying for the same, nor until after an order has been passed by the Lieutenant-Governor in Council approving thereof. 29 V. c. 31, s. 1.

On separation of Junior from Senior County, Courts to continue same till altered by Sessions.

13. Where a Junior County separates from a Senior County (*h*) or Union of Counties, the Division Courts of the United Counties which were before the separation wholly within the territorial limits of the Junior County, shall continue to be Division Courts of the Junior County,

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to these Courts being purely statutory: Stones' Petty Sessions 11. The proper mode of quashing an improper order of Sessions would seem to be, by writ of *certiorari* to bring up the order, with a view to its being quashed,—a rule to show cause being first issued, calling upon the Justices to show cause why the writ should not issue: Archbold's Crown Office, 178, 187;" 7 U. C. L. J. 228.

(*e*) It is not compulsory upon the Judge, but no doubt he would "establish" a Division Court under this section where the public interests required it. The "discretion" should not be capriciously exercised.

(*f*) This is a corporate act of the Municipal Council, and should be adopted at a regular meeting, or at a special meeting duly convened for the purpose, of which due notice should be given (*Rex* v. *Hill*, 4 B. & C. 441, *per* Bayley, J.), and should properly be attested by the corporate seal: Grant on Corporations, 55.

(*g*) This presupposes the appointment of the Clerk and Bailiff and the place of sittings. The Court should as such be complete before the certification to the Lieutenant-Governor, but the transaction of business is suspended until approved of by him.

(*h*) That is the County in which the court house and gaol are situate: Municipal Institutions Act, sec. 33 (Rev. Stat. 1599).

and all proceedings (*i*) and judgments (*k*) shall be had therein, and shall continue proceedings and judgments of the said Division Courts respectively; and all such Division Courts shall be known as Division Courts of such Junior County by the same numbers respectively as they were before, until the Justices of the Peace of the Junior County, in General Sessions assembled, (*l*) appoint the number, limits and extent of the Divisions for Division Courts within the limits of such Junior County, as provided in the eleventh section of this Act. C. S. U. C. c. 19., s. 10; 38 V. c. 12, s. 2.

On alteration of Divisions, Judge to direct in what Court proceedings to be continued.

14. Wherever the Justices of the Peace of any County, in General Sessions assembled, alter the number, limits or extent of the Division Courts within such County, all proceedings and judgments (*m*) had in any Division Court before the day when such alteration takes effect shall be continued in such Division Court of the County as the Judge directs; (*n*) and shall be considered proceedings and

(*i*) Taxation of costs would be a proceeding under this section: *Reg.* v. *The London, Chatham and Dover Railway Co.*, L. R. 3 Q. B. 170. So would a writ of revivor or suggestion: *Caspar* v. *Keachie et al.* 41 U. C. R., page 601. This case was overruled, but not on this point: see also *Holme* v. *Guy*, 5Ch. D. 901.

(*k*) The decision of the Judge only becomes a "judgment" when duly entered in the procedure book by the Clerk: *Stratton* v. *Johnson*, 7 L. C. G. 141. The proceedings of the Court can only be proved by such entries (*Reg.* v. *Rowland*, 1 F. & F. 72, *per* Bramwell, B.), or a certified copy under sec. 37, and cannot be contradicted even by the evidence of the Judge: *Dews* v. *Riley*, 11 C. B., *per* Jervis, C. J., at page 443. Where the entry was, "struck out for want of jurisdiction, a disputed title having been sworn to," *held*, not a judgment: *Tubby* v. *Stanhope*, 5 C. B. 790.

(*l*) Thus by operation of law certain Court Divisions may be established, as for a junior county, and will continue as they were before the séparation, until altered by order of Sessions. But as the number, limits, and extent of such Divisions, and the designation of the Courts, will in general but ill accord with the new order of things, the obvious duty of the Magistrates assembled at the *first* General (Quarter) Sessions of the Peace for the new (junior) county is to exercise the power given to them by the Act for the appointment of new divisions for the County. The words "*until* the Justices," &c., plainly assume that such is to be done at an early day; in the "meantime provision is made by the clause for continuing the Courts as established and the business thereof:" 7 U. C. L. J. 176.

(*m*) See notes to section 13.

(*n*) It is submitted that the most convenient course is to allow the proceedings and judgments to be continued in the Court in which they have been entered or recovered.

judgments of such Court (*o*). C. S. U. C. c. 19, s. 11; 38 V. c. 12, s. 2.

Clerks and officers to deliver papers to such persons as Judge directs.

15. In case a Junior County is separated from a Union of Counties, or the proceedings of any of the Division Courts of a Senior County are transferred to any other Division Court within the County upon the order of the Judge, the Clerks or other officers of such Division Courts who hold any writs or documents appertaining to any such Courts or the business thereof, shall deliver up the same to such persons as the Judge directs, and any person refusing to deliver up the same shall be liable to be proceeded against (*p*) in the same manner as persons wrongfully holding papers and documents under the provisions of the forty-eighth section of chapter nineteen of the Consolidated Statutes of Upper Canada. C. S. U. C. c. 19, s. 12.

C. S. U. C. c. 19, s. 48. *See p.* 491 (Rev. Stat.)

After separation of Junior from Senior County, proceedings in certain cases to be continued in Senior County.

16. If, after the separation (*q*) of a Junior County from a Union of Counties, the territorial limits of any of the Division Courts of the former Union are partly within the Junior and partly within the Senior County, all proceedings commenced in such Division Courts of the former Union shall be continued to completion in the Court where the proceedings were originally commenced, (*r*) or in such other Division Court of the Senior County as the Judge thereof directs; and the Clerks and other officers of the said Division Courts of such Senior County in possession of any writs or documents appertaining to any such Court or to the business thereof, shall deliver over the same to the Clerk of such Division Court of such County as the Judge thereof directs. C. S. U. C. c. 19, s. 13.

General Sessions of Senior

17. At the first sittings (*s*) of the General Sessions of the Peace for any Senior County, after the issue of any pro-

(*o*) That is, the Court in which the Judge directs proceedings to be continued.

(*p*) See section 48 of Consolidated Statutes U. C., and notes thereon, inserted between ss. 44 and 45 of this Act.

(*q*) See Municipal Institutions Act, s. 40, *et seq.*

(*r*) That is, in the Court from which the first process issued: Rule 10.

(*s*) "The language of this section is, it will be noticed, express and positive. The Justices of the Senior County *shall* (the direction is imperative), at the first sittings of the Court of (Quarter) Sessions, appoint new Court divisions, as

County to regulate Divisions of Senior County after separation.

clamation (*t*) for separating a Junior from a Senior County, the Justices there present shall appoint the number (not less than three, nor more than twelve), the limits and extent of the several Divisions within such County, and the time when such change of Divisions shall take effect.

2. If the Justices do not make such change at the first sittings they may do so at any other sittings (*u*) of such Court.

Resolutions and orders as to Divisions not to be altered till after notice

3. No resolution or order made under the provisions of this section shall be altered or rescinded unless public notice of the intention so to alter or rescind is made and proclaimed (*v*) in open Court at the next previous sittings of such General Sessions of the Peace. C. S U. C. c. 19, s. 14; 38 V. c. 12, ss. 2 & 4.

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under section 8 (now section 11); and, moreover, *shall* appoint the time when such change of divisions is to take effect. The Justices neglecting to make the change at the proper time are not indeed *concluded* from acting; but the permission to do so at another sittings would not justify the omission to perform the duty at the first sittings of the Court.

Every order of Sessions altering Court divisions ought to be made to take effect at a future day, and so appear on the face of the order. Sudden changes in the Court divisions would produce confusion in the business of the Courts, and cause public inconvenience; and a reasonable interval should be allowed between the publication of the order and the time it is to take effect, to enable proper arrangements to be made for continuing to completion pending business, and to give the officers of the Courts affected, and to the public resorting to the Courts, timely notice of the change. That such orders were not designed by the Legislature to come into force at once, may be collected from the language used in the 11th (now 14th) and 14th (now 17th) sections; and indeed the practical difficulty attendant on an abrupt change is so obvious that it need not be enlarged upon:" 7 U. C. L. J. 177.

(*t*) See Municipal Institutions Act, sec. 44.

(*u*) Without this provision, the change could not be made at any sittings but the first after the dissolution: *Reg.* v. *Murray*, 27 U. C. R. 134; *Reg.* v. *Great Western Railway Company*, 32 U. C. R. 506.

(*v*) The giving of this notice is a condition precedent to the alteration of any previous resolution or order affecting the limits and extent of any Division Court: *Myers and Wonnacott, In re*, 23 U. C. R. 611; *Griffiths* v. *The Municipality of Grantham*, 6 C. P. 274; *Shaw et al.* v. *The Corporation of Manvers*, 19 U. C. R. 288; *Askew* v. *Manning et al.* 38 U. C. R. 349. "Public notice" is to be made and proclaimed. The section does not say at what time or times during the Sessions that is to be done. It should be given in the most public manner, and at a time when the information would likely be most widely communicated. After the delivery of the charge to the Grand Jury (see Rev. Stat., cap. 25, s. 17; 31 Vic. cap. 66, s. 5, Canada), and again at the close of the Court, would, it is submitted, be the most appropriate times for making proclamation of such notice. The notice should set out particularly the changes or alterations proposed, and the "limits and extent" of each division to be

Clerks of the Peace to record time and place for holding Courts.

18. The Clerk of the Peace, (*w*) in a book to be by him kept, shall record the Divisions declared and appointed, and the times and places of holding the Courts, and the alterations from time to time made therein, (*x*) and he shall forthwith (*y*) transmit to the Lieutenant-Governor a copy of the Record. C. S. U. C. c. 19, s. 15.

THE JUDGE.

County Court Judges to preside.

19. The Division Courts shall be presided over by the

affected by it: *Haacke* v. *The Municipality of Markham*, 17 U. C. R. 562; *In re Simmons* v. *The Corporation of Chatham*, 21 U. C. R. 75; *The Chief Superintendent, In re Shorey* v. *Thrasher et al.*, 30 U. C. R. 504.

The notice and its proclamation should be carefully entered by the Clerk of the Peace in a book to be kept by him, so that in the event of any change being made, there would be a record of what was done; also, that at the subsequent sittings of General Sessions the Justices of the Peace might see that the giving of notice had been complied with. The order of Sessions need not recite the notice (*In re Ness and The Municipality of Saltfleet*, 13 U. C. R. 408), but it would be better to do so. The order should follow the notice in defining "the limits and extent" of the divisions affected by it.

(*w*) As to appointment of this officer, see Rev. Stat., cap. 44, s. 11.

(*x*) "This record may be made by entering the orders of Sessions with a proper caption, shewing the Court at which they were made, and the names of the Magistrates present. *The places of holding the Courts* cannot be entered by the Clerk of the Peace till he is informed thereof by the Judge, whose duty it is, under the 6th section (now 8th), to appoint them. *As to the times of holding the Courts*, it is not so clear what is the proper course; it may be that instantly the entry is to be made 'once in every two months' in such and such Courts, and 'once in every six months' (or, *as the case may be*), in such divisions as the Justices, acting under section 7 (now section 10), may certify to the expediency of holding a Court less frequently than once in every *two* months; or that the Clerk of the Peace first receives information from the Judge, and then makes the entries. * * * The entries in this book are of such a public nature that an examined copy or extract therefrom, certified as such, and signed by the Clerk of the Peace, would be admissible in any court of justice, or before any person having, by law or consent of parties, authority to hear, receive, or examine evidence:" 7 U. C. L. J. 177.

(*y*) This means within a reasonable time: *Reg.* v. *The Justices of Worcester*, 7 Dowl. 789; *Toms* v. *Wilson*, 4 B. & S. 455; *Costar* v. *Hetherington*, 1 E. & E. 802; *Reg.* v. *Price*, 8 Moore P. C. 203; *Roberts* v. *Brett*, 6 C. B. N. S. p. 631; *In re Lake and The Corporation of the County of Prince Edward*, 26 C. P. 173; *Thomas* v. *Nokes*, L. R. 6 Eq. 521.

The words "immediate" and "forthwith" occurring in a statute are not construed in their strictest sense, "on the instant," but mean with reasonable promptness, having regard to all the circumstances of the particular case: Paley on Convictions, 4th ed. 45, and cases cited in note (*x*); Maxwell on Statutes, 311; *Massey* v. *Sladen*, L. R. 4 Ex. 13. The Clerk of the Peace is not obliged to notify the Lieutenant-Governor of anything but the acts of the General Sessions as to the limits of the different divisions, nor the orders of the Judge as to the times and places of holding the Courts; and if the latter is done, nothing can be allowed the Clerk of the Peace for it: *Poussett and the Quarter Sessions of Lambton*, 22 U. C. R. 412.

County Court Judges or Junior (*z*) or Deputy Judges (*a*) in their respective Counties. (*b*) C. S. U. C. c. 19, s. 16; 40 V. c. 7, *Sched. A* (67). See Rev. Stat. c. 42.

Junior Judge to hold Division Courts.

2. The Junior Judge for any County shall (subject to any other arrangement from time to time made with the Senior Judge or made by the Judges of a County Court

(*z*) As to the appointment of Senior or Junior Judge, see Rev. Stat. cap. 42. They hold office during good behaviour, but subject to be removed by the Lieutenant-Governor "for inability, incapacity or misbehaviour, established to the satisfaction of the Governor in Council:" sec. 2.

(*a*) The Deputy Judge holds his office during pleasure, and in case of "the death, illness or absence of the Judge," he has authority to perform all the duties of County Court Judge: Rev. Stat. cap. 42, s. 7. He may also practise his profession: sec. 8. Unlike the Senior or Junior Judge he is not *ex-officio* a J. P. for "every County and part of Ontario:" sec. 10. The prohibition on the appointment of Junior Judges, unless the population of the County or union of Counties exceeds forty thousand, under this Act does not apply to the appointment of a Deputy Judge: see sec. 6. He cannot give judgment after the expiration of the period for which he was appointed Deputy: *Hoey* v. *M'Farlane*, 4 C. B. N. S. 718.

(*b*) A County Judge is not answerable in an action of trespass for an erroneous judgment or for the wrongful act of his officer, done not in pursuance of, though under color of, a judgment; but he is responsible for an act done by his command and authority when he has no jurisdiction: *Houlden* v. *Smith*, 14 Q. B. 841. If an order of commitment were made under the judgment summons clauses, to any but the gaol of the County in which the party summoned resided or carried on business, trespass would lie against the Judge if warrant issued by his authority. So also it would be a want of jurisdiction to summon a person under such circumstances: *Ib.* 853. See also *In re Dalmage* v. *Judge of Leeds and Grenville*, 12 U. C. R. 32. He is also entitled to notice of action if he acted honestly believing that his duty as Judge called upon him to do so: *Booth* v. *Clive*, 10 C. B. 827. If a Judge allows a Clerk to enter upon his duties without giving security, he is liable to any party grieved: *Parks* v. *Davis*, 10 C. P. 229. Want of jurisdiction must be made to appear to the Judge, and if there is no evidence of that either on the face of the proceedings (*Houlden* v. *Smith*, 14 Q. B. 851, *per* Patterson, J.), or given before the Judge, he is not liable in trespass (*Graham* v. *Smart et al*, 18 U. C. R. 482), nor are the Officers of the Court acting in execution of the order, *Ib*; *Andrews* v. *Marris*, 1 Q. B. 3; *Watson* v. *Bodell*, 14 M. & W. 57; *Thomas* v. *Hudson*, 14 M. & W. 353, in Ex. Cham. 16 M. & W. 885. "The Judge of the Division Court," says Robinson, C. J., at p. 487 of 18 U. C. R., "was bound to act upon what appeared before him, and cannot be made a trespasser by proof of facts given at any other time or in any other Court."

At page 489 of the same report, Burns, J., says: "It appears to me the plaintiff, by suffering judgment by default against him, is not in a position to dispute the jurisdiction of the Court. If the want of jurisdiction was apparent upon the proceedings, then of course it would be open for him to question the right upon any steps taken upon a proceeding in that manner, as *coram non judice*; but I do not think he can question the jurisdiction, by bringing evidence to dispute the place where the cause of action arose in whole or in part, after he has acquiesced in it by suffering judgment by default; and in an action against the Judge, the Judge of the County Court would be in a serious predicament if he were obliged to be prepared with evidence to sustain his judgments

against persons simply because it be shewn that the parties sued do not reside within his County. The effect of what the plaintiff contends for in this case would compel the Judge to do that, if such a proposition be established. The plaintiff should have appeared to the summons, and have raised the question, and the Judge would then have tried the question of jurisdiction; or if he did not wish the Judge of the County Court to have determined the point, he might have applied to one of the Superior Courts for a prohibition."

As regards Judges and judicial officers, the general rule is, that if they do any act beyond the limit of their authority, causing injury to another, they are liable for it; but if the act be done within that limit through an erroneous or mistaken judgment, they are not liable: *Doswell* v. *Impey*, 1 B. & C. 163; *Gahan* v. *Lafitte*, 5 Moore P. C. 382; *Garner* v. *Coleman*, 19 C. P. 106. Trespass will not lie for a judicial act done without jurisdiction, unless the Judge knew or had the means of knowing of it: *Calder* v. *Halkett*, 3 Mooro P. C. 28; *Garner* v. *Coleman*, 19 C. P. at page 109; *Kemp* v. *Neville*, 10 C. B. N. S. 545, and cases there cited; Davis' C. C. Acts, 3rd Ed. 180, *et seq.* Judicial functions cannot be delegated: *Andrews* v. *Marris*, 1 Q. B. 3. A Superior Court can order a County Judge to proceed with the hearing of a case, but cannot deal with any order which he may make: *Churchward* v. *Coleman*, L. R. 2 Q. B. 18. The signature to a Judge's order need not be by *the hand* of the Judge himself. If impressed with a stamp by the Clerk in his presence it is good: *Blades* v. *Lawrence*, L. R. 9 Q. B. 374. Words spoken by a County Judge sitting on the trial of a cause, though irrelevant to that matter, are not actionable: *Scott* v. *Stansfield*, L. R. 3 Ex. 220. No action lies against the Judge of a Superior Court for a judicial act, though alleged to have been done maliciously and corruptly: *Fray* v. *Blackburn*, 3 B. & S. 576; *Ward* v. *Freeman*, 2 Irish C. L. R. 460. A Judge cannot try a cause in which he is interested: *The Queen* v. *Meyer*, 1 Q. B. D. 173. But even in a case of imputed interest he is not incapacitated from making an order if refusing to do so would be a denial of justice: *Grand Junction Canal Company* v. *Dimes*, 18 L. J. Chan. 365; 19 L. J. Chan. 345, s. c. The Lord Chancellor was held disqualified to hear a case in which a company were plaintiffs, owing to the fact that he had an interest as a shareholder: *Dimes* v. *Grand Junction Canal Company*, 3 H. L. cases, 759; see also *London & North Western Railway Company* v. *Lindsay*, 3 MacQueen H. L. cases, 99; *Medwin, ex parte*, 1 E. & B. 609; *Reg.* v. *Cambridge* (Recorder), 8 E. & B. 637; *Reg.* v. *The Justices of Suffolk*, 18 Q. B. 416; *Reg.* v. *Rand*, L. R. 1 Q. B. 230; *Hayman* v. *The Governors of Rugby School*, L. R. 18 Eq. 28; *Bigelow* v. *Bigelow*, 6 P. R. 124. A counsel in a cause, being afterwards raised to the Bench, is not precluded from taking part in the hearing and discussion of that cause, but he may properly decline: *Thellusson* v. *Rendlesham*, 7 H. L., cases 429. Private communications to a Judge upon a matter publicly before him are highly improper, and amount to contempt of Court: *Dyce* v. *Sombre, In re*, 1 Mac. & G. 116; 13 Jurist, 857, s. c.

An attachment will not lie against a County Court Judge for not obeying a *certiorari*, unless it clearly appears that he acted contumaciously: *In re Judge of Niagara District*, 3 O. S. 437. Nor can he be arrested on mesne or final process: *Adams* v. *Ackland*, 7 U. C. R. 211. A County Court Judge cannot refuse to attend under a subpœna *duces tecum* to produce a deed, on the ground of private business, or that he obtained the deed or became possessed of his information as an Attorney, or that he had a lien on the deed or was entitled to witness fees as an Attorney: *Deadman* v. *Even*, 27 U. C. R. 176. He cannot directly or indirectly practice as a Counsel, Attorney or Solicitor, Notary Public or Conveyancer, under penalty of forfeiture of office and further penalty of $400: Rev. Stat. cap. 42, s. 5; see also *Allen qui tam* v. *Jarvis*, 32 U. C. R. 56. Change of venue was ordered in ejectment where County Court Judge was defendant, where plaintiff might otherwise have proceeded under Overholding Tenants' Act: *Anon*, 4 P. R. 310. Where a reference is made at *Nisi Prius*

District (*c*) which includes such County) preside over the Division Courts of the County. 40 V. c. 7, *Sched. A* (67). *See* 32 V. c. 22, s. 4; 36 V. c. 8, s. 47; 37 V. c. 7, s. 58.

Senior Judge to hold Division Courts when expedient.

3. The appointment of a Junior Judge shall not prevent or excuse the Judge of the County Court from presiding at any of the Division Courts within his County when the public interests (*d*) require it. C. S. U. C. c. 15, s. 7.

Who to preside in case of illness or absence of Judge.

20. In case of the illness or absence (*e*) of the Judge, a Judge of the County Court (*f*) of any other County may hold the Court, or the first mentioned Judge may appoint some barrister of the Bar of Ontario to act as his Deputy; and the barrister so appointed shall, as Judge of the Division

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to a County Judge by name, though his description as Judge is added, he is entitled to his fees as arbitrator: *Wood* v. *Foster*, 6 P. R. 175. As to the effect of the death of Judge on cases pending, see *Leslie* v. *Emmons*, 25 U. C. R. 243, and *Hoey* v. *M'Farlane*, 4 C. B. N. S. 718; *Appelbe* v. *Baker*, 27 U. C. R. 486. See *Smith* v. *Rooney*, 12 U. C. R. 661, as to irregular practice of County Judge concerning Term business.

(*c*) See Rev. Stat. cap. 42, s. 16, *et seq.*

(*d*) Should the Junior Judge be sick, absent, or otherwise unable to hold the Division Court, it would be the duty of the Senior Judge, under this sub-section, to hold such Court.

(*e*) Under the Consolidated Statutes of Upper Canada, cap. 19, s. 17, the absence of the Judge was required to be "unavoidable." It is not so now. It is not necessary that any order made by the Barrister so appointed Deputy Judge should shew the reason for such appointment. The maxim, "all acts are presumed to be rightly done," applying: *In re Hawkins*, 3 P. R. 239.

(*f*) By Rev. Stat. cap. 42, s. 13, such Judge "may, if he sees fit, perform any judicial duties in any County other than his own, on being requested to do so by the Judge to whom the duty for any reason belongs." By the 15th section of the same statute, full power and authority is given such Judge to perform all judicial duties which could have been performed by the Judge of the County, so that in that case another County Judge could act whether there was "illness or absence" of the Judge or not. By section 11 of the Act just referred to, in such a case, as well as in all others, the Junior Judge would have equal powers. It is submitted that "absence" in this section does not mean being out of the County, but absence of the Judge *from the Court*. In the event of there being a Junior Judge of a County, does the "illness or absence" apply both to the Judge *and* Junior Judge (See Rev. Stat. cap. 1, s. 8, s.s. 23, Interpretation Act), and if not, to which one of them? We think, in view of sub-section 2 of section 19 of this Act and sec. 11 of cap. 42, it is clear that the Junior Judge would have power to appoint a Barrister as his Deputy to hold a Division Court. The latter is to "have all the powers and privileges, and be subject to all the duties vested in or *imposed by law on the Judge by whom* he has been appointed." When there is a Junior Judge, he *shall* (subject to any arrangement with the Judge) *preside* over the Division Courts. A *duty* is therefore "imposed by law" on the Junior Judge, and as such is imposed on him, a reasonable construction would be that he has, in the event of either contingency mentioned in the statute,

Court, during the time of his appointment, (*g*) have all the powers and privileges, and be subject to all the duties vested in or imposed by law on the Judge by whom he has been appointed. (*h*) C. S. U. C. c. 19, s. 17; 40 V. c. 7, *Sched. A* (68).

Lieutenant-Governor to be notified of appointment of Deputy.

21. The County Judge (*i*) so appointing or the barrister so appointed Deputy shall forthwith (*k*) send to the Lieutenant-Governor notice of such appointment, specifying the name, residence (*l*) and profession of such Deputy Judge, and the cause of his appointment. C. S. U. C. c. 19, s. 18.

Appointment, how long to continue.

22. No such appointment shall be continued for more than one month (*m*) without a renewal of the like notice; and in case the Lieutenant-Governor disapproves of such

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the power of appointing a Deputy to hold a sitting for him. A different construction would lead to the anomalous position that a Junior Judge doing all the work of both County and Division Courts, owing to the absence of the Judge on leave or through illness, could not appoint a Barrister to hold a Division Court for him; nor even if, in such a case, the Junior were himself ill, could an appointment be made by him. This might work great injustice to suitors, which Courts should avoid: *per* Morrison, J., in *Appelbe* v. *Baker*, 27 U. C. R. 489.

(*g*) A question frequently arises whether a Deputy Judge, appointed under this section, can reserve his decision under the 106th section to a subsequent day, or whether his authority ceases at the close of the sittings. It is submitted that he can. He has under this section "all the powers and privileges" of the Judge, and, by the 106th section, judgment delivered by the Judge on a subsequent day "shall be as effectual as if rendered in Court at the trial." If he possesses all the powers, it would be a fallacy to say he could not exercise them. The death of the Judge ends the authority of such a Deputy: *Hoey* v. *M'Farlane*, 4 C. B. N. S. 718 and 732.

(*h*) The appointment had better be in writing, but is it necessary to be so? See *Rex* v. *Justices of Salop*, 4 B. & Ald. 626, *per* Bayley, J., at page 629, and *Rex* v. *Justices of Surrey*, 5 B. & Ald. 539, *per* Abbott, C. J.

(*i*) The Judge usually sends this notice. He is best able to give "the cause" of such appointment.

(*k*) See notes to section 18.

(*l*) See notes to section 62. A person may be said to have more than one residence. If he have houses at different places, at each of which he keeps an establishment, such may be called his residence, though he may not go there for years. But the meaning of the word *residence* is different from domicile, for an infant has the domicile of his parents until he attains twenty-one years, and does some act to acquire a new one, and thus his domicile may be in a country in which he has never personally been; whereas residence implies personal presence at some time or other: *Walcot* v. *Botfield*, 18 Jurist, 570.

(*m*) This is a calendar month: Rev. Stat. cap. 1, s. 8, s.s. 15. The day on which the appointment was made would be included: *Lester* v. *Garland*, 15 Vesey, 248.

appointment, he may annul the same. C. S. U. C. c. 19, s. 19.

Clerks or Deputy Clerks may adjourn Court if Judge does not arrive in time.

23. In case the Judge or the acting Judge, (*n*) from illness or any casualty, (*o*) does not arrive in time or is not able to open a Division Court on the day appointed for that purpose, the Clerk or Deputy Clerk (*p*) of the Court shall, after eight o'clock in the afternoon, by proclamation, adjourn the Court to an earlier hour (*q*) on the following day, and so from day to day adjourning over any Sunday or legal holiday, (*r*) until the Judge or acting Judge arrives to open the Court, or until he receives other directions from the Judge or acting Judge. C. S. U. C. c. 19, s. 20.

THE CLERKS AND BAILIFS, &c.

Every Court to have Clerk and Bailiffs.

24. For every Division Court there shall be a Clerk and a Bailiff or Bailiffs, (*s*) who shall be British subjects, and

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(*n*) This means the Judge of any other County, the Junior Judge or a Deputy appointed under section 20.

(*o*) The difference in the words used in section 20 and this, is to be observed. "Casualty" here may, we submit, be taken to mean some unforeseen accident or other cause preventing the Judge's attendance.

(*p*) See section 35.

(*q*) *i. e.*, than eight o'clock p.m.

(*r*) By section 8, sub-section 16, of the Interpretation Act (Rev. Stat. cap. 1), this includes "Sundays, New Year's Day, Good Friday, Easter Monday and Christmas Day, the days appointed for the celebration of the birthday of Her Majesty and of her royal successors, and any day appointed by proclamation of the Governor-General or Lieutenant-Governor as a public holiday or for a General Fast or Thanksgiving." A judgment entered on any of such days would perhaps be questioned: *Trust & Loan Company* v. *Dickson*, 2 L. J. N. S. 166; *Connelly* v. *Bremner*, L. R. 1 C. P. 557. As to holding Division Courts in Territorial Districts, see Rev. Stat. cap. 7, s. 18, *et seq.*

(*s*) In the administration of law it is necessary that there should be officers for its execution. This section renders it imperative that there shall be a Clerk and "a Bailiff or Bailiffs" for every Court. The qualification is that each be a British subject. As a general rule, all persons of sane mind are capable of holding office: 2 U. C. L. J. 63. A Clerk and Bailiff could not be in the same person: 2 U. C. L. J. 64. "Want of skill is either *implied by law*, as in the case of minors, or is *apparent in fact*. Persons under 21 years are deemed by law incapable of the skill necessary in such an office": 2 U. C. L. J. 64. "Skill and ability *in fact* are matter of determination for the Judge:" *Ib.*; see also 8 U. C. L. J. 34. If more than one Bailiff, each should do his work independently of the other: 2 U. C. L. J. 64, and cases there cited, where a form of appointment is also given. At page 108 of 4 U. C. L. J., the following admirable advice is given: "If it be the duty of the Judge to select men fitted for

shall respectively perform the duties (*t*) of their office as regulated by Act of the Legislature and by Rules or Orders made by the Board of County Judges. C. S. U. C. c. 19, s. 21; 32 V. c. 23, s. 23. Duties of Clerks and Bailiffs.

25. ~~No County Court Clerk (*u*) or~~ practising barrister or solicitor (*v*) shall be appointed Clerk of a Division Court. C. S. U. C. c. 19, s. 22. Who disqualified.

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the office as well as they *can* be in such cases at first, it can be no less so to see that they take measures to qualify themselves more fully, and to keep pace with the continual development of the laws that they assist to administer."

(*t*) A refusal to do so without a colour of right would be a misdemeanor, punishable with fine or imprisonment, or both: Roscoe's Crim. Ev., 8th Ed., 811. So also would acts totally illegal committed by a Bailiff under color of his office: *Idem*, 810.

(*u*) Appointed under Rev. Stat., cap. 43, sec. 4.

(*v*) As a rule of exposition, statutes are to be construed in reference to the *principles* of the Common Law, "for it is not to be presumed that the Legislature intended to make any innovation upon the Common Law further than the case absolutely required:" Potter's Dwarris on Statutes, 185. It is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief or benefit the Act was intended to give: *per* Draper, C. J., in *Kraemer* v. *Glass*, 10 C. P., 475. "When a statute alters the Common Law, the meaning shall not be strained beyond the words, except in cases of *public utility*, when the end of the Act appears to be larger than the enacting words": Dwarris, 186. Again, at page 187, it is laid down that "This cause and reason of the Act, or, in other words, *the mischief requiring a remedy*, may either be collected from the statute itself or discovered from circumstanees extrinsic of the Act." The general principles of construction of contracts should be applied in construing statutes: Dwarris, 178. Then what construction should be placed on the prohibitive words of this section? How long must a Barrister or Solicitor have ceased to practice before he is eligible for appointment? the day previous, or when? Can an Attorney be appointed during the currency of his certificate, and does the existence of that prevent his appointment? This is a Statute in restraint of a citizen exercising a calling for which he is otherwise qualified. It should not, it is submitted, be extended beyond its object and scope, being to a very great extent akin in principle to Statutes or contracts in restraint of trade (Harrison's Municipal Manual, notes to section 384: *Allsopp* v. *Wheatcroft*, L. R. 15 Eq. 59), but should receive that construction as the "mischief requiring a remedy may demand." Now, the "mischief" which the Legislature meant to provide against was, that a practising Barrister or Solicitor might use his position as Clerk to further his professional interests. In view of the principles of construction which obtain in such cases, it is submitted that it does not matter how short a time before the appointment of a Barrister or Solicitor to a Division Court Clerkship, he has ceased to practice his profession; and if from the moment before his appointment he declares his intention of not practicing, and acts accordingly, then he is not prohibited from accepting. It is further submitted that the fact of his certificate being in existence makes no difference. That confers a personal right which he might waive: Broom's Legal Maxims.

Judge to appoint and remove Clerk and Bailiffs.

26. The Judge shall (*w*) from time to time (*x*) appoint (*y*) and may at his pleasure remove (*z*) any Clerk or Bailiff. C. S. U. C. c. 19, s. 23.

SECURITIES.

Clerks and Bailiffs of Division Courts to give security.

27. Subject to the provisions of section twenty-four of *The Act respecting Public Officers* (*a*) every Clerk and Bailiff of a Division Court shall give security, (*b*) by a covenant (*c*) according to the form of the Schedule to this Act, or in words to the same effect, (*d*) with so many sureties, (*e*)

(*w*) Imperative on the Judge, and if he omitted to make appointment in the event of a vacancy, *mandamus* must lie. It would go to command the performance by the Judge of a public duty, for which there is no specific remedy: Tapping on *Mandamus*, page 12; *Reg.* v. *W. R. Justices*, 1 New Sess. Cas. 247.

(*x*) See the construction placed on a statute where such words were omitted: *Neilson* v. *Jarvis*, 13 C. P. 182.

(*y*) This means also the power of removal: Interpretation Act, s. 8, s.-s. 25. See excellent article at page 63 *et seq.* of 2 U. C. L. J. as to appointment of Bailiff and form of appointment; and further, at pages 34, 121 & 202 of 8 U. C. L. J., will be found an equally instructive article on the appointment and duties of Clerks and Bailiffs. At page 202 will be found a form of appointment of Clerks. It is submitted that the second order is unnecessary.

(*z*) Independently of the Interpretation Act, express power is given to the Judge to remove any Clerk or Bailiff at pleasure. Although no Judge would remove an officer without cause, yet he can do so. He is not bound to give any reasons, take any evidence of misbehaviour or neglect on the part of the officer, or assign any cause for his action. This subject will be found fully discussed in the case of Dr. Hayman against the Governor of Rugby School: L. R. 18 Eq. 28 & 68, and the cases there cited; and *Osgood* v. *Nelson*, L. R. 5 H. L. 636. See also *Hammond* v. *McLay* (in Appeal), 28 U. C. R. 463, and notes to section 12.

(*a*) See Rev. Stat. cap. 15, ss. 24-27 inclusive.

(*b*) "The word *security* shall mean sufficient security; and where these words are used one person shall be sufficient therefor, unless otherwise expressly required:" Rev. Stat. cap. 1, s. 8, s.-s. 18. As to the object of this security, see 8 U. C. L. J. 263, and 9 U. C. L. J. 9.

(*c*) It is a joint and several covenant, and enures to the benefit of any person "suffering damages by the default, breach of duty, or misconduct" of the Clerk or Bailiff: sec. 29. All can be sued together, or any one separately, on this covenant, but any two of them cannot be sued in the one action: Dicey on Parties to Action, 11, 12.

(*d*) A substantial compliance is all that is required: *Re Allison*, 10 Ex. at page 568, *per* Parke, Baron; *Reg.* v. *Hyde*, 7 E. & B. 859 (note); *Eggington* v. *Lichfield* (Mayor, &c.), 5 E. & B. 100; *Reg.* v. *Justices of Cheshire*, 3 D. & L. 337.

(*e*) "The word *sureties* shall mean sufficient sureties:" Interpretation Act, s. 8, s.s. 18. The contract or undertaking of a surety is a contract by one person to be answerable for the payment of some debt, or the performance of some act or duty in case of the failure of another person, who is himself primarily

being freeholders (*f*) and residents (*g*) within the County, (*h*) and in such sums, (*i*) as the County Judge (*k*) directs, (*l*) and, under his hand, (*m*) approves and declares sufficient. (*n*) C. S. U. C. c. 19, s. 25. Rev. Stat. c. 15, s. 24.

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responsible for the payment of such debt, or the performance of the act or duty: Addison on Contracts, cap. V.; *Merner* v. *Klein*, 17 C. P. 293, *per* Richards, C. J.; *Cripps* v. *Hartnoll*, 4 B. & S. 414, and the notes to the Amer. Ed.

(*f*) A freeholder is one who is possessed of an estate for life or in fee simple in land, or in some interest issuing out of or annexed to land: Wharton, 321. Although the sureties are not freeholders of the County they are liable: *Parks* v. *Davis*, 10 C. P. 229.

(*g*) In the case of *Rex* v. *Inhabitants North Curry*, 4 B. & C., at page 959, Bayley, J., said: "What is the meaning of the word *resides?* I take it that that word, where there is nothing to shew that it is used in a more extensive sense, denotes the place where an individual eats, drinks and sleeps, or where his family or his servants eat, drink and sleep." "The term *resident* does not necessarily import permanence, nor yet any definite stay:" *per* Draper, C. J., in *La Pointe* v. *Grand Trunk Railway Company*, 26 U. C. R. 487; *In re Ludouceur* v. *Salter*, 6 P. R. at page 307. Sureties who are non-residents are nevertheless liable: *Parks* v. *Davis*, 10 C. P. 229. They are also liable although their principal has neglected to execute the covenant: *Miller* v. *Tunis*, 10 C. P. 423. So also are they liable if the covenant has not been filed: *Parks* v. *Davis*, 10 C. P. 229.

(*h*) This simply means that the sureties should be "freeholders" residing within the County or union of Counties, as the case may be.

(*i*) It is the duty of the Judge to fix the amount for which the sureties become bound, before the Clerk or Bailiff enters on his duties: *Parks* v. *Davis*, 10 C. P. 229. And if the Judge should fail to perform his duty under this section, an action is maintainable against him, but not unless there is actual damage: *Parks* v. *Davis*, *supra*.

(*k*) That is, the Senior Judge where there is a Junior Judge in the County.

(*l*) "In practice two sureties are commonly required to join in the covenant, but where the amount is large, it is not unusual to have three or four. The sums in which the sureties are to be bound will be regulated by the probable amount of business in the particular Court:" 8 U. C. L. J. 121. It is the duty of the Judge to fix the number of sureties: *Parks* v. *Davis*, 10 C. P. 229.

(*m*) The Judge usually approves and declares the covenant sufficient, in his own handwriting, but it could be done in his name by the hand of another in his presence: *Blades* v. *Lawrence*, L. R. 9 Q. B. 374.

(*n*) The Judge should carefully examine the covenant to see that it is a substantial (10 C. P. 424) compliance with the statutory form. It is submitted that there should be an affidavit of execution of the covenant and of justification of the sureties. The following are given as forms of both, for either Clerk or Bailiff (Rev. Stat. cap. 63, s. 9);

County of } We of the of in the County
To wit. } of and of the of in the County
of within named, severally make oath and say:

1. And first, I, this deponent (*naming him*), for myself, say, that I am a freeholder and resident within the County of

2. That I am one of the sureties mentioned in the annexed covenant, for the due performance by (*name of the Clerk*) of the duties of the office of Clerk of the Division Court for the County of

Before Clerk or Bailiff enters on his duties

28. Before (*o*) any such Clerk or Bailiff enters upon the duties of his office, the covenant of himself (*p*) and sureties,

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3. That I reside at in the said and am worth real property to the amount of dollars over and above all encumbrances, and over and above what will pay all my just debts, and every other sum for which I am now bail, or for which I am surety.

4. That I am not surety for any public officer except for the said

5. And I, the said (*naming him*), for myself, say, that I am a freeholder and resident within the County of

6. That I am one of the sureties in the annexed covenant, for the due performance by (*name of the Clerk*), of the duties of the office of Clerk of the Division Court for the County of

7. That I reside at , and am worth real property to the amount of dollars over and above all encumbrances, and over and above what will pay all my just debts, and every other sum for which I am now bail, or for which I am surety.

8. That I am not surety for any public officer except for the said

The above-named deponents (*naming them*) were severally sworn before me at in the County of this day of A.D. 18 .

A Commissioner for taking Affidavits in and for the County of

County of } I, of the of in the County of
To wit. } make oath and say :

1. That I was personally present, and did see the foregoing covenant duly signed, sealed, and executed, by (*naming them all*), the obligors therein named, on the day of the date thereof, at .

2. That I am a subscribing witness to the execution of such covenant, and the signature " " thereto affixed is in my own proper handwriting.

3. That I am personally acquainted with the said (*naming the sureties*), who severally reside at the of in the County of

Sworn, &c.

(*o*) "The covenant so given must be approved of by the Judge, and be filed in the office of the Clerk of the Peace for the County before the Bailiff can enter on the duties of his office, or can be said to be completely appointed ; but even if he were to act before such an approval, and in case such approval were not afterwards obtained, his acts would be good for some purposes : Ld. Raymond, 661 ; Cro. Eliz. 669, pl. 13, 2, s. 184 ; 2 Inst. 381. In case any of the sureties in the covenant die, remove out of Upper Canada, or become insolvent, it is obviously the duty of the Bailiff to inform the Judge of the fact ; and should the officer, after receiving a formal notice thereof from the Judge, neglect to renew his security within one month, he incurs a forfeiture of office :" 2 U. C. L. J. 65 ; see also 9 U. C. L. J. 9.

(*p*) Properly the covenant should be executed by the Clerk or Bailiff; but his omission to do so does not discharge the sureties who have executed it: *Miller* v. *Tunis et al.*, 10 C. P. 423 ; *Rastall* v. *The Attorney-General*, 18 Grant, 138 ; see, however, *The Corporation of Huron* v. *Armstrong*, 27 U. C. R. 533 ; *Austin* v. *Farmer et al.*, 30 U. C. R. 10.

approved (*q*) as aforesaid, shall be filed (*r*) in the office of the Clerk of the Peace in the County in which the Division Court is situate; and for filing and granting a certificate thereof the Clerk of the Peace may demand from such Clerk or Bailiff the sum of one dollar. C. S. U. C. c. 19, s. 26. duties, covenant to be filed with Clerk of the Peace.

29. Such covenant shall be available to (*s*), and may be sued upon in any Court (*t*) of competent jurisdiction by any person suffering damages (*u*) by the default, breach of duty or misconduct of any such Clerk or Bailiff (*v*). C. S. U. C. c. 19, s. 26. To be available to suitors, &c.

(*q*) See notes to section 27.

(*r*) The Judge is not legally responsible for the filing of the covenant: *Parks* v. *Davis*, 10 C. P. 229. But it is submitted that he should, for the protection of the public, see that it is done. No paper is properly filed, until marked "filed" by the public officer: *Campbell* v. *Madden*, Draper R. 2; but see *Reg.* v. *Gould*, Mich. Term, 3 Vic.

(*s*) The previous words "available to" mean that the covenant may be used to the success or advantage of any one having a right to sue (Worcester, 101), and taken in connection with the words "sued upon," the right and remedy are complete: *Atkinson* v. *The Newcastle and Gateshead Waterworks Company*, 2 Ex. D. 441.

(*t*) The question of which Court to sue in depends on the amount which the person claims under the covenant, and the nature of the action; and if in a Division Court, with reference also to *where* the action should be properly brought.

(*u*) This does not mean merely sustaining damages as for a tort, but is intended to cover damages or injury in the most comprehensive sense of these words as applied to civil action. "Damages are the pecuniary compensation which a plaintiff may obtain in a civil action:" Mayne on Damages, 3rd Ed. 1.

(*v*) The Clerk's sureties are liable to be sued on the covenant for Bailiff's fees of service of process received by the Clerk and not paid over; and in such action the declaration need not specify the names of the parties from whom or suits in which the Clerk received such moneys: *Cool* v. *Switzer et al.*, 19 U. C. R. 199. At page 202 of that report, Robinson, C. J., says: "Whether in each case the money received for the Bailiff had become before this action money which the Clerk was bound to pay over to him, or whether the Clerk was justified in withholding it, as he might be, either for a time or entirely under some of the provisions of the statute, would be a matter of evidence to be gone into in regard to each charge."

In an action against a Division Court Clerk for moneys received by him by virtue of his office, the entries by him in books which, by law he is bound to keep, are evidence against his sureties: *Middlefield* v. *Gould et al.*, 10 C. P. 9; *The Carmarthen and Cardigan Railway Company* v. *The Manchester and Milford Railway Company*, L. R. 8 C. P., 685; *Irwin* v. *The Corporation of Mariposa*, 22 C. P., at page 371, *per* Hagarty, C. J.

The action on this covenant may be brought against the Bailiff and his sureties jointly though the latter may be bound in different sums; but the wrongful act of the Bailiff in seizing the goods of a stranger by mistake was held not

within the covenant: *McArthur* v. *Cool*, 19 U. C. R. 476; see also *Preston* v. *Wilmot et al.*, 23 U. C. R. 348. Money received by a Bailiff, though not received in virtue of his office, may become money held by him as Bailiff, and for the non-payment of which the sureties would be liable: *McArthur* v. *Cool*, *supra*; In *Franklin* v. *Gream et al.*, 20 U. C. R. 84, it was *held* in an action against a Clerk's sureties for money received by the Clerk, that they could not obtain credit for a sum of £30 0*s.* 8*d.*, Clerk's fees set off in a former action by the plaintiff against the Clerk for goods sold, and that as the Clerk could not take credit a second time for this sum, neither could his sureties. The plaintiff having previously sued the Bailiff alone for misconduct in selling his goods, and recovered damages, for which a *fi. fa.* was issued and returned *nulla bona*, then sued the Bailiff and his sureties for the same misconduct, it was *held* that the plaintiff, having sued the Bailiff alone for the tort could not afterwards sue on the covenant for the same cause of action: *Sloan* v. *Creasor et al.*, 22 U. C. R. 127; 9 U. C. L. J. 10 s. c.; see also *Miller* v. *Corbett et al.*, 26 U. C. R. 478.

The fact of a Bailiff's sureties being non-residents does not avoid the covenant into which they have entered. That provision is merely directory and for the guidance of the Judge: *Pearson* v. *Ruttan et al.*, 15 C. P. 79. In that case it was also *held* that in an action against a Bailiff for his own torts, a demand of perusal and copy of warrant is not requisite under sec. 226. Also that a Bailiff is entitled to notice of action, even if action is on the covenant for tort. It was also *held* in this last mentioned case that the action had been brought against principal and sureties jointly, and that as the recovery must be against all or none, the discharge of the principal was a discharge of the sureties. (As to discharge of sureties, see Fisher's Digest, from pages 8270 to 8282; Rob & Jos. Digest, from pages 3031 to 3051; L. R. Digest, from pages 1019 to 1027; and *Polak* v. *Everett*, 1 Q. B. D. 669). A Bailiff is entitled to notice of action for a seizure and sale of goods under execution even though indemnified: *Lough* v. *Coleman et al.*, 29 U. C. R. 367; *McCance* v. *Bateman*, 12 C. P. 469. Where a Bailiff acts in what he believes to be the *bona fide* performance of his duty, he is entitled to notice of action: *Hermann* v. *Seneschal*, 13 C. B. N. S. 392; *Roberts* v. *Orchard*, 2 H. & C. 769; *Chambers* v. *Reid*, 13 L. T. N. S. 703; *Neill* v. *McMillan*, 25 U. C. R. 485. But he must have reasonable ground for so believing: *Leete* v. *Hart*, L. R. 3 C. P. 322; *Griffith* v. *Taylor*, 2 C. P. D. 194; *Heath* v. *Brewer*, 15 C. B. N. S. 803, and the honesty of this belief must, if the plaintiff desire it be left to the Jury: *Roberts* v. *Orchard* and *Neill* v. *McMillan*, *supra*. "I agree," says Blackburn, J., at page 727 of 6, L. R. Q. B. in *Selmes* v. *Judge*, "that if a person knows that he has not under a statute authority to do a certain thing, and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out that Statute." The later cases qualify the rule as broadly laid down in *Dale* v. *Cool*, 4 C. P. 460. An action brought against a Bailiff to recover excess of money levied on execution does not entitle him to notice of action: *Dale v. Cool*, 6 C. P. 544.

He is entitled to such notice if he acts on warrant without a seal: *Anderson* v. *Grace*, 17 U. C. R. 96. Want of notice can be given in evidence under the plea of not guilty "by statute," see section 232; and in Division Court actions by notice of statutory defence. The plaintiff in the execution under which the Bailiff commits the supposed trespass is not entitled to notice of action: *Timon* v. *Stubbs*, 1 U. C. R. 347. To render liable the sureties of a Clerk for money received by him, it must be shewn that he received such money by *virtue of his office: Preston* v. *Wilmot et al.*, 23 U. C. R. 348; *Kero* v. *Powell et al.*, 25 C. P. 448. A Bailiff would be liable for neglecting to execute a warrant of commitment (2 L. C. G. 62), but not necessarily for the full amount of debt and costs: *Brown et al.* v. *Paxton et al.*, 19 U. C. R. 426; but see *Kerr* v. *Fullarton*, 10 C. P. 250. Not only the debtor's own resources would have to be considered, but all reasonable probabilities founded on his

30. A copy of every such covenant, certified by the Clerk of the Peace, (*w*) shall be received in all Courts, (*x*) as sufficient evidence of the due execution and of the contents thereof, without further proof. (*y*) C. S. U. C. c. 19, s. 28. Certified copy of covenant to be received as evidence.

31. If any surety in any such covenant dies, becomes (*z*) resident out of Ontario, or insolvent, (*a*) the County Judge shall notify the Clerk or Bailiff for whom such person If surety dies, a new surety to be furnished.

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position in life that the debt would have been discharged if the Bailiff had done his duty: *MacRae* v. *Clarke*, L. R. 1 C. P. 403; see also *Arden* v. *Goodacre*, 11 C. B. 371. Without negligence of the Bailiff in not arresting, under warrant of commitment, his sureties would not be liable: *Nelson* v. *Baby et al.*, 14 U. C. R. 235. But for neglect in returning process they would: *Ib.* It is submitted that, in the event of any change in the limits, extent or number of a Division Court, a fresh covenant should be entered into by the Bailiff, to save all questions on the point that arose in *The Corporation of Ontario* v. *Paxton et al.*, 27 C. P. 104. Should the limits of the new division be more extensive than the old, it is difficult to see how the sureties could remain liable after the change: *Skillett* v. *Fletcher*, L. R. 2 C. P. 469; *Thompson et al.* v. *McLean et al.*, 17 U. C. R. 495; see also *Harrison* v. *Seymour*, L. R. 1 C. P. 518; Addison on Contracts, 7th Ed. 862, *et seq.*; *Polak* v. *Everett*, 1 Q. B. D. 669. A Bailiff and his sureties are not liable for not selling goods under seizure by him when the defendant became insolvent, as the goods passed to the Assignee under the Insolvent Act: *Brown* v. *Wright et al.*, 35 U. C. R. 378. See a very instructive article on the liability of officers and their sureties at pages 180-204 and 207 of 4 U. C. L. J. As to the particulars of claim in actions against officers and their sureties, see Rule 6 and Form 18.

(*w*) The certificate could be in this form:

"I hereby certify that the within is a true copy of the covenant of *A. B.* (*Clerk or Bailiff*) of the Division Court for the County of and *C. D.* and *E. F.* his sureties, together with all copies of affidavits of execution and justification and endorsements thereon, filed in the office of the Clerk of the Peace for the said County of on the day of A.D. 18 .

Given under my hand, this day of A.D. 18

Clerk of the Peace in and for the County (or United Counties) of

(*x*) As this provision was in force in the Consolidated Statutes U. C., before the passing of the British North America Act, it would apply to *Criminal* as well as Civil Courts under the 129th sec. of that Act.

(*y*) This mode of proving the covenant is only cumulative evidence, not substitutionary: Tay. on Ev. 4th Ed. s. 1391; see also *Lynch* v. *O'Hara*, 6 C. P. 259; *Graham* v. *McArthur*, 25 U. C. R. 478; *Warren* v. *Deslippes*, 33 U. C. R. 59.

(*z*) See note to section 27 as to the meaning of "resident."

(*a*) The term "insolvent" here means a general inability to pay debts, and does not signify taking the benefit of any Act for the relief of insolvent debtors: *Biddlecombe* v. *Bond*, 4 A. & E. 332; *Parker* v. *Gossage*, 2 C. M. & R. 617. In speaking of a man being in "insolvent circumstances," Graham (Baron)

became surety, of such death, departure or insolvency, and such Clerk or Bailiff shall, within one month after being (*b*) so notified, give anew the like security, and in the same manner as hereinbefore provided, or forfeit his office (*c*) of Clerk or Bailiff. C. S. U. C. c. 19, s. 29.

Sureties of Clerks and Bailiffs of Division Courts may discontinue suretyship.

32. Any person who has become surety (*d*) for any Clerk or Bailiff, and who is no longer disposed to continue such responsibility may give notice (*e*) thereof to the Clerk or Bailiff, and to the Judge of the County Court, and in such case the said Clerk or Bailiff shall, under penalty of forfeiture of his office, furnish the security of a new surety in lieu of the surety so giving notice, and shall have the necessary bond or covenant approved by the Judge and

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said, in *Teale* v. *Younge*, McClel. & Younge, 506, "One must understand that in the popular sense of the words, the man was not in a condition to pay readily when called upon; in other words, that he was in tottering circumstances." Garrow (Baron) says, at page 506 of the same report, "My understanding of insolvency is a man's not being in a condition to pay twenty shillings in the pound in satisfaction of all demands."

(*b*) The month would not commence to run until the day after the notice was given: *Weeks* v. *Wray*, L. R. 3 Q. B. 212; *Young* v. *Higgon*, 6 M. & W. 49.

(*c*) By neglect of the officer in furnishing the fresh security, his office becomes forfeited: see page 10 of 9 U. C. L. J.

(*d*) See the nature and relationship of this contract at page 854 and subsequent pages of Addison on Contracts, 7th Ed., title, "Bonds to secure faithful services:" *Corporation of Ontario* v. *Paxton et al.*, 27 C. P. 104. The executors of the sureties would be liable on this covenant: *Reg.* v. *Leeming et al.*, 7 U. C. R. 306; *Provisional Corporation of Bruce* v. *Cromar*, 22 U. C. R. 321, The covenant only binds the sureties for moneys received: *Canada West Farmers' Mutual and Stock Insurance Company* v. *Merritt et al*, 20 U. C. R. 444; *Corporation of Rawdon* v. *Ward et al.*, 27 U. C. R. 609; *Montefiore* v. *Lloyd*, 15 C. B. N. S. 203. A person having a right of action on the covenant by discharging one of the sureties would discharge both: *Evans* v. *Bremridge*, 2 Jur. N. S. 134; 25 L. J. Ch. 102 s. c. But see *Burwell* v. *Edison*, M. T. 3 Vic. There is a right of contribution between co-sureties, whether by separate instruments or by the same instruments: *Mayhew* v. *Crickett*, 2 Swanst, 189, 192; *Pendlebury* v. *Walker*, 4 Y. & C. 424; *Deering* v. *Winchelsea*, 2 B. & P. 270; *Reynolds* v. *Wheeler*, 10 C. B. N. S. 561; White & Tudor's L. C. 106, *et seq.* The amount recovered is the aliquot proportion of the money paid by him under the covenant, regard being had to the number of sureties (*Cowell* v. *Edwards*, 2 B. & P. 268), and it is recoverable under the common [illegible] money paid: *Kemp* v. *Finden*, 12 M. &. W. 421. Where a surety pays money for his principal, he is entitled to interest from the time of payment: *Ware* v. *Duncombe*, 2 L. M. & P. 107. So also is he entitled to recover interest from a co-surety: *Hitchman* v. *Stewart*, 1 Jur. N. S. 839, s. c. 24; L. J. Ch. 690; *Margrett* v. *Gregory*, 6 L. T. N. S. 543 Ex. See Rob. & Jos. Dig., 3048, *et seq.*

(*e*) The notice need not be in writing (*Reg.* v. *Justices of Salop*, 4 B. & Ald. 626; *Reg* v. *Justices of Surrey*, 5 B. & Ald. 539), but for safety had better be so.

completed (*f*) within one month after (*g*) such notice; and all accruing responsibility (*h*) on the part of the person giving such notice shall cease upon and after the perfecting and approval by the Judge of the new security. 39 V. c. 17, s. 3; 40 V. c. 7, *Sched. A* (69).

Certain sections 15-20 of Rev. Stat. c. 15 to apply to securities given by Division Court Clerks and Bailiffs.

33. Sections fifteen to twenty both inclusive of *The Act Respecting Public Officers*, shall, with the substitution of "The Judge of the Court" for "The Lieutenant-Governor," apply to securities given by a Clerk or Bailiff of a Division Court. (*i*) 39 V. c. 17, s. 4. *See also ss. 24–27 of Rev. Stat.* c. 15.

Liability of former sureties.

34. Nothing hereinbefore contained shall discharge or exonerate any of the parties to such former covenant from their liability on account of any matter done or omitted before the renewal (*k*) of the covenant as aforesaid. C. S. U. C. c. 19, s. 30.

Clerk's Duties. (*l*)

When Clerk may appoint Deputy.

35. The Clerk may (with the approval of the Judge), from time to time, when prevented from acting, by illness

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(*f*) *i. e.*, When duly filed under sec. 28.

(*g*) See notes to section 31.

(*h*) This means that the liability of the sureties shall cease, except as to all past transactions and matters, when the new security is duly executed, approved and filed.

(*i*) As to Clerks and Bailiffs giving security in this way, see Rev. Stat. cap. 15, and especially sections 24, 25, 26 and 27.

(*k*) It is submitted that this section is only declaratory of the Common Law: *Reg. ex rel Flanagan* v. *McMahon*, 7 U. C. L. J. 155; see also 9 U. C. L. J. 10. The taking of a fresh covenant could not discharge any liability on the former one.

(*l*) It would be impossible to give in a work of this nature any proper idea of the different and varied duties of Clerks and Bailiffs of Division Courts. They are so multifarious that the space at command renders it impossible to give the subject anything more than a passing notice. The writer has examined the early volumes of the Upper Canada Law Journal, and there finds that which, if read by Division Court officers, will be of more practical service to them, and better point out their duties, than anything that can be said here. In most of the articles and answers to correspondents which we are about to refer to, the writer thinks he can discover the careful opinion of one deservedly at the head of the County Court Bench; one who has done more to popularise and raise the standing of Division Courts than any other man in the Province. These opinions in matters of Division Court law and practice are given *as authority*; and from the high position that the Law Journal has always so

or other unavoidable accident, appoint a Deputy(*m*) to act for him, with all the powers and privileges and subject to like duties, and may remove such Deputy at his pleasure, and the Clerk and his sureties shall be jointly and severally responsible for all the acts and omissions (*n*) of the Deputy. C. S. U. C. c. 19, s. 33.

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deservedly occupied among lawyers as well as laymen, the writer offers no apology for here citing them as authority. To any Clerk or Bailiff who has an anxious desire to learn and understand the duties of his office, we commend a careful perusal of the articles and opinions given at pages 2, 21, 22, 41, 42, 62, 81, 101, 121, 141, 201 and 221 of Vol. I.; and pages 1, 41, 45, 61, 81, 85, 94, 101, 161, 163, 182, 201, 202 and 220 of Vol. II.; and page 1 of Vol. III., U. C. L. J.

(*m*) It is only in case of "*unavoidable* accident" that a Deputy can be appointed. (See the difference in section 20). The office of Division Court Clerk is not intended to be a sinecure, the Clerk receiving the emoluments and another performing the duties. The Legislature purposely prevents this by allowing the appointment of a Deputy in these two cases only. "The Clerk may have as many assistants as he thinks necessary in doing the work of his office, receiving papers, filling in process, copying papers, receiving moneys or the like, under his direction; but they are not recognized as Deputy Clerks in the proper signification of the word, though they would be held in law to be the principal's deputy when doing any particular act under his direction. In signing process, administering affidavits, approving instruments, taking confessions, recording judgments, or doing such matters as the Legislature evidently trusted to be done by the Clerk personally, it is doubtful if assistants would have the power to act; but in carrying out the mere manual work of the office, under the Clerk's directions, there seems to be no objection to their employment. (Such Assistant Clerks are employed in the offices of the Superior Courts and County Courts; but any writs or documents they issue are previously signed by the principal officer, whose agents they are for the particular act). The term deputy applies only to one who has all the authority which the principal has by virtue of his office. A deputy, then, is one who acts by the right, in the name of, and for the benefit of some one else: he is a mere servant of his principal, though he has the power, by operation of law, to do any act which his principal might do (1 Salk. 95); and by making a deputy, the whole power of the principal passes to him: 2 Salk. 468; and see 1 Salk. 96; *Reg.* v. *Smith*, Farr. 78."

"Ministerial officers can, by Common Law, make a deputy: 4 Bulstr, 78; 3 Mod. 150. Whether Division Court Clerks come within the general rule is not material to be considered, for the statute has expressly provided for the appointment of deputies, thus rather diminishing than enlarging any Common Law power, for the express provision would appear by implication to exclude the power of appointment, except as provided for:" 9 U. C. L. J. 32 & 33. The death or removal of the Clerk would put an end to appointment of the deputy: *In re Hoey* v. *M'Farlane*, 4 C. B. N. S. 718.

(*n*) As the Clerk has the appointment of this Deputy, it is but right that he should be held responsible for his acts. It is suggested that a Clerk desiring a Deputy appointed should produce to the Judge the consent of his sureties. As they are by this section responsible for "all the acts and omissions" of the Deputy, they should know for whom they continue their responsibility. It is to be observed that it is the Clerk, and not the Judge, who appoints the Deputy.

Clerk to issue summonses and furnish copies, &c.

36. The Clerk shall issue all summonses, (*o*) which summonses shall be by him filled up and shall be without blanks either in date or otherwise (*p*) at the time of delivery for service; he shall also furnish copies of the same with the notice thereon, (*q*) according to the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts. C. S. U. C. c. 19, s. 34.

all notices typed by any party in this action

Clerk to keep a record of writs and judgments.

37. The Clerk shall cause a note of all summonses, orders, judgments, executions and returns thereto, to be from time to time fairly entered (*r*) in a book (*s*) to be kept in his office; and shall sign (*t*) his name on every page of such book; and such signed entries, or a copy thereof certified as a true copy (*u*) by the Clerk, shall be admitted in all

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(*o*) The summons is the commencement of the action (Rules 9 to 17 inclusive;) and no valid decision or judgment can be given unless a summons is issued and served (*Thorburn* v. *Barnes*, L. R. 2 C. P. at p. 401), or waived by the defendants' appearance: *Reg.* v. *Smith*, L. R. 1 C. C. 110; *Blake* v. *Beech*, 1 Ex. D. 320. In *Bonaker* v. *Evans*, 16 Q. B. 171, Parker, Baron, says: "No proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence, by a judicial proceeding, until he has had a fair opportunity of answering the charge against him, *unless indeed the Legislature has expressly or impliedly given an authority to act without that necessary preliminary.*" In *Cooper* v. *The Board of Works for the Wandsworth District*, at p. 190 of 14 C. B. N. S., Willes, J. says: "I apprehend that a tribunal, which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds, and that that rule is of *universal application* and founded on the plainest principles of justice:" see also *Bullen* v. *Moodie et al.*, 13 C. P. 126; and in Appeal, 2 E. & A. 379; *Nicholls* v. *Cumming*, 1 Sup. Court, R. 395; *Reg.* v. *Cheshire Lines Committee*, L. R. 8 Q. B. 344.

(*p*) It should be a perfect process when delivered to the officer for service. It is submitted that after that an amendment can only be made by order of the Judge.

(*q*) See Forms 22, 23, 24 and 26, and Rule 15.

(*r*) Each entry should be made so as to shew plainly its purport and meaning. As to the mode of entering, see Form 4.

(*s*) As to the form of the Procedure Book, see Rule 148 and Form 4.

(*t*) This is imperative, and its omission is one of the most serious cases of neglect on the part of a Clerk. If omitted, perhaps neither the original entries, certainly not copies, could be given in evidence. The statute says "*such* signed entries:" see *Reg.* v. *Rowland*, 1 F. & F. 72.

(*u*) The certificate may be in the following form:—

"I hereby certify that the annexed (*or within*) paper is a true copy of the signed entries appearing in the Procedure Book of the Division Court for the County of , as there noted, of all summonses, orders, judgments, executions, and returns thereto, in a certain cause in said Court of (*A. B.*), plaintiff, against (*C. D.*), defendant; and on the page of the said book in which said entries were so noted is the name of me, the present Clerk of said

Courts and places as evidence of such entries, and of the proceedings (*v*) referred to thereby, without any further proof. C. S. U. C. c. 19, s. 42.

Clerks to issue executions, tax costs and keep

38. The Clerk shall also issue all warrants, (*w*) precepts and writs of execution filled up and without blanks; he shall tax costs (*x*) subject to the revision of the Judge, (*y*)

Court (*or E. F., the Clerk of said Court when such entries were made*), written in my own proper handwriting (*or in the proper handwriting of the said E. F.*)

Given under my hand and the seal of the said Court at this day of A. D. 18 .

[SEAL.] *Clerk of the Division Court for the County of*

(*v*) This section is a pretty close transcript of section 111 of the English statute of 9 & 10 Vic. cap. 95. It has been decided under that Act that a minute of the proceedings made by the Clerk pursuant to this provision is conclusive evidence of them, even though the Judge gives evidence to the contrary: *Dews* v. *Riley*, 11 C. B. 434. The Clerk's book, or a certified copy of entries from such book, is the best, and therefore the only evidence of proceedings: *Reg.* v. *Rowland*, 1 F. & F. 72, *per* Bramwell, B.; Roscoe's Crim. Ev., 8th Ed. pp. 2 and 170. An entry in the Procedure Book, "struck out for want of jurisdiction on the ground of a disputed title having been sworn to," is not evidence of a judgment in replevin: *Tubby* v. *Stanhope*, 5 C. B. 790. The entries made by a Clerk in pursuance of this section are evidence against the sureties of such Clerk: *Middlefield* v. *Gould et al*, 10 C. P., at page 14; see *Carmarthen and Cardigan Railway Company* v. *The Manchester and Milford Railway Company*, L. R. 8 C. P., at page 691, *per* Bovill, C. J.

(*w*) In Common Law matters, usually applied to a proceeding against the person: Wharton, 775.

(*x*) "As soon after the Court as possible, the Clerk should receive from the successful party an affidavit of his disbursements to witnesses. The affidavit can be made before the Clerk of any Division Court, and forwarded by mail or otherwise to the Clerk in whose Court the judgment was rendered, and may be by the party or his agent. At latest, the Clerk should be put in possession of it the day before the execution is due, according to the order of the Court; as he has commonly general directions at the time of entering the suit, to proceed and collect the amount claimed, which dispenses with a special direction to sue out execution, when the time given by the Judge has expired:" 1 U. C. L. J. 81. For form of affidavit of disbursements, see Form 112. Where execution is "forthwith," the Clerk should afford the successful party a reasonable time in which to put in this affidavit; and in case of a nonsuit or judgment for defendant, the defendant is not, it is submitted, restricted to time. A mandamus will lie, to compel a Clerk to issue execution: *Reg.* v. *Fletcher*, 2 E. & B. 279.

(*y*) It is submitted that the proper practice for revision of taxation is for the party dissatisfied to give notice to the opposite party and the Clerk of the Court of his intention to have the Judge revise the taxation of costs on a certain day and hour. A reasonable time should be allowed. The papers in the case should be laid before the Judge, and in the event of the parties not appearing, an affidavit of service of notice of revision. (In analogy, see section 353 of the Common Law Procedure Act.) Payment of costs *without* protest does not prevent a revision: *Kormann* v. *Tookey*, 6 P. R. 112.

register all orders and judgments of the Court, and keep an account of all fines payable or paid into Court, and of all suitors' moneys paid into and out of Court, and shall enter an account of all such fines and moneys in a book (*z*) to be kept by him for that purpose, which book shall be open to all persons desirous of searching the same, and shall at all times be accessible to the Judge, who shall examine the same quarterly or oftener and compare the accounts hereinafter mentioned with such book, and shall certify on each such account that he has examined the same, and believes it to be correct, or if he does not believe it to be correct, he shall state his objections thereto, and the Clerk shall thereupon forward the account with such certificate to the County Crown Attorney. C. S. U. C. c. 19, s. 36. account of fines, &c.

39. The Clerk, at the periods from time to time appointed by the Lieutenant-Governor, shall submit his said accounts to be audited or settled by the County Crown Attorney. C. S. U. C. c. 19, s. 37. Clerks to submit accounts to County Crown Attorneys.

40. The Clerk of every Division Court shall, from time to time, as often as required so to do by the County Crown Attorney of his County, and at least once in every three months, deliver to him, verified by the affidavit of such Clerk, sworn before the Judge or a Justice of the Peace of the County, a full account in writing of all fines levied by the Court, accounting for and deducting the reasonable expenses of levying the same, and any allowance which the Judge may make out of any such fines, in pursuance of the power hereinafter given. C. S. U. C. c. 19, s. 38. Clerks of County and Division Courts to deliver to County Crown Attorney a verified account of fines.

41. The Clerk of each Division Court, when required by the Judge, shall from time to time, furnish him with a full account in writing, verified by the oath of the Clerk sworn before the Judge or a Justice of the Peace, of the moneys received into and paid out of the Court by any suitors or other parties (*a*) under any orders, judgments or process of the Clerk of Division Court to furnish Judge with a verified account of moneys paid in and out of Court.

(*z*) See Form 5.

(*a*) This refers to moneys received from all sources, as well as fines or forfeitures.

Court, and of the balance in Court belonging to any such suitors or parties. C. S. U. C. c. 19. s. 40.

Division Court Clerks to furnish the Judge with semi-annual accounts of fees and emoluments.

42. The Clerk of every Division Court shall, half-yearly at least, furnish to the Judge of his Court a detailed statement (*b*) of all fees and emoluments of his Court; which statement shall be sworn to before such Judge, and it shall be the duty of such Judge to require such statement and to file the same with the County Crown Attorney. C. S. U. C. c. 19, s. 41.

Clerk annually to make list of suitors' money in Court.

43. The Clerk shall, annually in the month of January, (*c*) make out a correct list (*d*) of all sums of money belonging to suitors in the Court, which have been paid into Court and have remained unclaimed for six years before the last day of the month of December then last past, specifying the names of the parties for whom or on whose account the same were so paid. C. S. U. C. c. 19, s. 43.

Copy of list to be put up in Court House and in Clerk's office.

2. A copy of such list shall be put up and remain at all times (*e*) in the Clerk's Office and during Court hours, in some conspicuous part of the Court House, or place (*f*) where the Court is held. C. S. U. C. c. 19, s. 44.

Disposal of Books and Papers when Clerk Changed.

Upon resignation, removal or death of Clerk, County Crown Attorney to become

44. All accounts, moneys, books, papers, and other matters in the possession of the Clerk, by virtue of or appertaining to his office, shall, upon his resignation, (*g*) removal or death, immediately (*h*) become the property of the County Crown Attorney (*i*) of the County in which the Division is

(*b*) See Rule 83; and as to the form of this statement, see Form No. 115. As to the statements which have to be made by Clerks in Cities, on or before the 15th day of January in each year: see 41 Vic. cap. 2, s. 34.

(*c*) That is *during* that month, and properly not before it commences nor after it expires: *Beaty* v. *Fowler*, 10 U. C. R. 382.

(*d*) See Form 116.

(*e*) For the purpose of ascertaining the person entitled to it.

(*f*) See the notes to section 9.

(*g*) See section 26 and notes.

(*h*) It is submitted that from the object and context of this clause "immediately," must here be read *instantly*. There can be no intervening ownership: see the remarks of Byles, J., in *Forsdike* v. *Stone*, L. R. 3 C. P. p. 611.

(*i*) Rev. Stat. cap. 78.

situate, who shall hold the same for the benefit of the public until the appointment (*k*) of another Clerk, to whom he shall deliver over the same, but not until such Clerk and his sureties have executed and filed (*l*) the covenant hereinbefore mentioned. C. S. U. C. c. 19, s. 47. possessed of papers.

[*Section* 48 *of C. S. U. C. c.* 19, *is as follows:*—

48. Any person wrongfully (*m*) holding or getting possession of such accounts, moneys, books, papers and matters aforesaid, or any of them shall be guilty of a misdemeanor (*n*); and upon the declaration in writing of the Judge presiding over the Division Court for the time being, that a person has obtained or holds such wrongful possession thereof, and upon the order of a Judge (*o*) of either of Her Majesty's Superior Courts of Law, founded thereon, such person shall be arrested by the Sheriff of any County in which he is found, and shall by such Sheriff be committed to the Common Jail of his County, (*p*) there to remain without bail until one of such Superior Courts or a Judge thereof be satisfied that such person has not and never had nor held any such matters or moneys, or that he has fully accounted for or delivered up the same to such County Crown Attorney, or until he be otherwise discharged by due course of law. 13, 14 V. c. 53, s. 13.] Punishment of person wrongfully holding moneys, books or papers.

Duties of Bailiffs. (*q*)

45. The Bailiffs shall serve (*r*) and execute all summonses, orders, warrants, precepts and writs delivered to them by Bailiffs to serve writs.

(*k*) See section 26.

(*l*) See sections 27 and 28 and notes.

(*m*) The gist of the offence consists in the word "wrongfully:" *Reg.* v. *Davis*, 4 L. T. N. S. 559; *Reg.* v. *Brent*, 1 Den. C. C. 157.

(*n*) Punishable by fine or imprisonment or both: *Pomeroy*, app., and *Wilson*, resp., 26 U. C. R., at p. 48; Russell on Crimes, Vol. 1, p. 45, 3rd Ed.

(*o*) It must not be conditional: *Chichester* v. *Gordon et al.*, 25 U. C. R. 527.

(*p*) Cannot be to any other than the gaol of the County of the Sheriff arresting him: *Switzer* v. *Brown*, 20 C. P. 193; *In re Weatherly*, 4 P. R. 28; *Schneider* v. *Agnew et al.*, 6 P. R. 338. The person charged must either disprove the charge in the way pointed out by this section or stand his trial or be discharged on *Habeas Corpus*.

(*q*) The remarks made in the notes to section 35, and the pages of the Upper Canada Law Journal there referred to, have special application to the duties of the Bailiff; we also refer to 9 U. C. L. J. 206 & 234. An important duty of the Bailiff is his conduct at Court: see 1 U. C. L. J. 101. He should open the Court in these words: "*Hear ye! Hear ye! All manner of persons who have anything to do at this Division Court for the County of , let them draw near and give their attendance and they shall be heard. God save the Queen:*" 1 U. C. L. J. 101.

(*r*) "Bailiffs should so regulate their proceedings that at proper intervals they may attend at the Clerk's office to receive summonses intended for service.

Clerks should assist Bailiffs of their Courts in seeing that the originals and the copies of summonses and claims correspond. * * * * *
Every care should be given to ascertain where the several defendants live, and, if there be more than one person of the same name in the locality, which person the summons is intended for. This information is usually given by plaintiffs to the Clerk, or is noted in the claim handed in for suit, and before the papers are taken from office, should be obtained. In Courts where the business is large, it will be absolutely necessary for the Bailiffs to make out a list of the summonses received, with columns for date and mode of service; it would otherwise be impossible to work to advantage, or to make proper returns to the Clerk:' 2 U. C. L. J. 85. 'There is no provision in the Statute authorizing Bailiffs to appoint deputies. If the right to appoint was a question to be determined on Common Law grounds merely, the Bailiff would probably be held to have the power; for, as already observed, the general rule with regard to all ministerial officers is, that they may appoint deputies. But the express provision enabling Clerks to do so, plainly implies that Bailiffs are not authorized to exercise any such power. Both Clerk and Bailiff are ministerial officers; but to a certain extent the Legislature may be supposed to have trusted the principals—Clerk and Bailiff—in the execution of both offices, making special provision, however, in the case of the Clerk, that the duties of his office might, on special contingencies, be executed by deputy. A Bailiff, doubtless, may call in assistance, when necessary, in the execution of his duty; and every such assistant, acting under the directions of his principal, will be within the protection of the statute, and be held in law to be the principal's deputy (though not Deputy-Bailiff) while doing any particular act—as in securing, keeping possession of property seized, or the like, under the Bailiff's direction; indeed such assistants are recognized in several sections of the statute. Section 195 (now 226) provides that no action is to be brought against a Bailiff 'or against any person acting by his orders and in his aid,' &c.; and in sections 184 (now between ss. 217 and 218), 196 (now 227) and 197 (now 228) assistants are referred to. It does not appear essential to due service of the ordinary summons, that it should be made by the Bailiff of the Court; if duly served by any literate person it is apprehended it would be sufficient, though no charge could be taxed for the service or mileage, unless effected by an authorized person. In practice it is not unusual to appoint a person a bailiff (*pro hac vice*) to effect a particular service, where the circumstances warrant such a course; and in that case the regular expense of service would be chargeable in the usual way. But all process of execution and warrants must be executed by the Bailiff personally:' 9 U. C. L. J. 68 & 69.

"As before observed, a deputy is one who acts by the right and in the name of another, having the power to do any act that his principal might do; and although the general rule is, that ministerial officers can make a deputy, the Division Court Bailiff does not appear to have any such power. While the statute expressly authorizes the appointment of a Deputy Clerk under certain circumstances and upon certain conditions, it is silent on this head as to Bailiffs; and the presumption is, that the intention of the law is to disable them from passing their power to a deputy. And it is to be observed that the office is one of considerable trust, is held during pleasure; and it must be presumed that the Judge in appointing trusted the Bailiff, and him alone, so that in the case of process directed to him by name or name of office, he alone can execute it. But the ordinary summons is addressed to the party, and it may be said that the reasons against appointing a deputy do not apply, at least with the same force. On the other hand, the whole tenor of the statute goes to show that the Legislature contemplated service by the Bailiff himself; and looking at the rules it would appear that the Board of Judges so construed the law. Then due service lies at the foundation of the Judge's jurisdiction; and although the question, what is due proof of service, rests absolutely and entirely on the discretion of the Judge (*Davis* v. *Walton*, 16 Jur. 954), the rule would be not to admit service

the Clerk for service, whether Bailiffs of the Court out of which the same issued or not, and shall so soon as served return (*s*) the same to the Clerk of the Court of which they are respectively Bailiffs; but, subject to the provisions of the sixty-third section, they shall not be required to travel beyond the limits of their Division, or be allowed to charge mileage for any distance travelled beyond the limits of the County in which the Courts of which they are respectively Bailiffs are situated. (*t*) C. S. U. C. c. 19, s. 79.

Bailiff to exercise duty of constable during

46. Every Bailiff shall exercise (*u*) the authority of a Constable (*v*) during the actual holding (*w*) of the Court of which he is a Bailiff, with full power to prevent breaches of

unless by a Bailiff. The Judge *in his discretion* may hold service by a person other than the Bailiff to be a good service, the object being to bring the summons to the notice of the defendants; but the Bailiff has no *right* to appoint a deputy to effect service. It is not unusual in practice for the Judge to appoint or sanction the appointment of some proper person to serve summonses in cases of emergency, but then the person so appointed is for the occasion and purposes named a Bailiff of the Court. But a Bailiff may have assistants when necessary in doing the work of his office, under his directions and in driving away or securing cattle or property seized there seems to be no objection to their employment. And in this sense such assistants are Deputy Bailiffs, that is, they would be held in law to be the principal's deputy when doing any particular act under his direction; and it would appear that the word 'Deputy,' used in the 184th section (now between 217 and 218), if applied to Bailiffs, is employed in this sense. The language, however, of that section is, 'If any officer *or* Bailiff (or his deputy *or* assistant) be assaulted,' &c.; and 'Deputy' would appear to apply to officers other than Bailiffs—'assistants' to Bailiffs. Assistant Bailiffs are also recognized in secs. 195 (now 226), 196 (now 227) and 197 (now 228), as persons acting by Bailiff's order and in their aid:" 9 U. C. L. J. 234.

(*s*) If not returned within six days after service, the Bailiff forfeits his fees (Rule 90), and they belong to the Fee Fund: 2 U. C. L. J. 124. This is *exclusive* of the day of service: *Young* v. *Higgon*, 6 M. & W. 49. The Clerk and his sureties are liable to the Bailiff on their covenant for his fees received by the Clerk on suits: *Cool* v. *Switzer*, 19 U. C. R. 199.

(*t*) A Bailiff is not *bound* to travel beyond the limits of his own division. If he does so, he is entitled to mileage for necessarily travelling anywhere in the County, but should he go out of the County, he is not entitled to the extra mileage: see 9 U. C. L. J. 207; *In re Ladouceur* v. *Salter*, 12 L. J. N. S. 182, and 6 P. R. 305.

(*u*) It is imperative on the Bailiff to exercise the authority here conferred on him.

(*v*) He is an officer charged with the preservation of the peace and the execution of warrants in furtherance of that object: Worcester, 300.

(*w*) "If the Court be sitting at the time of the offence committed, or its sittings are immediately about to take place, it will be better that the offender should be taken before the Court, that the law may be promptly and publicly vindicated and a final decision obtained; but in any case in which the offender is arrested without warrant, unless the hour be unreasonable, as at night, in which case he may be secured in a lock-up, or other convenient place till the

holding of Court.

the peace, (*x*) riots (*y*) or disturbances (*z*) within the Court-room or building in which the Court is held, or in the public streets, squares, (*a*) or other places within the hearing of the Court, and may, with or without warrant, (*b*) arrest all parties offending against the meaning of this clause, and forthwith (*c*) bring such offenders before the nearest Justice of the Peace, (*d*) or any other judicial officer (*e*) having power to investigate the matter or to adjudicate thereupon. C. S. U. C. c. 19, s. 183.

Fees of Clerks and Bailiffs, &c.

Clerks and Bailiffs to be paid by fees.

47. The Clerks and Bailiffs shall be paid by fees, (*f*) as provided and allowed by the General Rules or Orders

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next day, the party should be brought promptly before the Court, or before a Magistrate, and a complaint be formally lodged, as any unreasonable detention would not be justifiable:" 4 U. C. L. J. 110.

(*x*) These are offences against the public, which are either actual violations of the law, or constructively so, by tending to make others break it: Wharton, 108.

(*y*) A riot is defined to be a tumultuous disturbance of the peace by three persons or more assembling of their own authority with an intent mutually to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature, and afterwards executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful: Wharton, 669.

(*z*) Anything which would annoy or interfere with the Judge, or any of the officers of the Court, or others engaged in any business before the Court, would be a "disturbance" within the meaning of this part of the section: Wharton, 240.

(*a*) It was held, under the Statute 27 Geo. III. cap. 28, section 5, in respect to the word "square," that such word meant all rectangular figures only: *Attorney-General* v. *Cast Plate Glass Company*, 1 Anst. 39. But it is submitted that any open area in a City, Town or Village dedicated to the uses of the public would be a "square" within the meaning of this clause.

(*b*) The fullest powers of a Constable are hereby conferred on the Bailiff. See Roscoe's N. P., 13 Ed., 1168, title, "Actions against Constables," for a digest of the law in reference to the duties, rights and liabilities of Constables.

(*c*) Within a reasonable time: *Toms* v. *Wilson*, 4 B. & S. 455; Maxwell on Statutes, 311.

(*d*) This, being a penal statute, must be construed with reasonable strictness. In *Rex* v. *Harvey*, 1 Wils. "near" was so construed in a penal statute, yet not equivalent to "next," the Court remarking that "there must be a reasonable vicinity of which the Court will judge."

(*e*) In Cities and Towns where there is a Police Magistrate, he would be the proper person: Rev. Stat. cap. 72, ss. 4 & 6. Where the offence is one not triable summarily, then of course he is to "investigate the matter" only, but if the subject of summary conviction, then he should "adjudicate" upon it.

(*f*) See the notes to the tariff of fees of Clerks and Bailiffs. The table of fees contains all the services for which Clerks and Bailiffs are entitled to charge. No

applicable to Division Courts, heretofore in force or hereafter to be made by the Board of County Judges, and approved under the provisions of the two hundred and thirty-eighth section of this Act.

Fees of jurors and appraisers.

2. Until otherwise provided by such General Rules or Orders, the fees to be taken and received by Jurors and Appraisers shall be as follows:—

Each Juror sworn (*g*) in any cause, (*out of the money deposited with the Clerk for Juror's Fees*)..... *Ten Cents.*

To each Appraiser, during the time actually employed (*h*) in appraising goods, (*to be paid in first instance by the plaintiff and allowed in costs of the cause*)..... *Fifty Cents per day.*

See C. S. U. C. c. 19, ss. 32 & 49; 32 V. c. 23, s. 22.

Table of Fees to be hung up in Clerk's office.

48. A table of all such fees shall be hung up in some conspicuous place (*i*) in the offices of the several Clerks. C. S. U. C. c. 19, s. 49

Fees to be paid by plaintiff or

49. The fees upon every proceeding shall, on or before such proceeding, (*k*) be paid in the first instance by the

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local tariff or user in any particular County can give any additional right: *In re Dartnell and the Court of General Quarter Sessions of Prescott and Russell*, 26 U. C. R. 430. As to the punishment of Clerks and Bailiffs for extortion, see notes to section 218.

(*g*) A Juror must be *actually* sworn in a cause before he is entitled to the small fee here allowed.

(*h*) It is seldom that an appraisement will take more than part of a day to make; if the whole or only part of a day, in either case the appraiser would be entitled to the fee, and the same for the whole or part of any subsequent day in which he might be "actually" and, we will say, *necessarily* employed: see notes to section 192.

(*i*) This provision is made for the purpose of giving information to the public.

(*k*) It is submitted that the word "proceeding" here should receive a liberal interpretation, and must be held to apply to every act done by a Clerk *to which a fee is by the tariff attached*. For instance, taxing costs has been held to be a "proceeding" under a statute not more extensive in its meaning than this: *Reg.* v. *The London, Chatham and Dover Railway Company*, L. R. 3 Q. B. 170. Unless the fee is first paid, the Clerk need not perform the work. Where the Clerk is entitled to a fee which has not been paid him, and which he may not have given credit for, the Judge would probably refuse to hear the matter: 4 U. C. L. J. 81 & 82. If the Clerk gives credit for fees, he trusts to the promise of the party and waives the benefit of this section. It is submitted, however, that moneys coming into his hands for a particular person would, as against *that person*, be deductable from or chargeable with the fees so due by him to such a Clerk: 10 U. C. L. J. 291. It is better, however, for Clerks to adopt the cash system, and save any difficulty that might arise in this way, or have the right to retain moneys under special agreement. A person entering a suit

defendant in first instance.

plaintiff, or other party (*l*) at whose instance the proceeding takes place. C. S. U. C. c. 19, s. 50.

How enforced if not paid.

50. If the fees are not paid in the first instance by the plaintiff or party on whose behalf such proceeding is to be had, the payment thereof may, by order of the Judge, (*m*) be enforced by execution in like manner as a judgment of the Court, by such ways and means as any debt or damages ordered to be paid by the Court can be recovered. C. S. U. C. c. 19, s. 51.

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for another and becoming responsible for costs, should receive the money when made independently of any claim the Clerk might have against the suitor. The Clerk is not bound to pay a defendant, who has succeeded, his witness fees out of money deposited by plaintiff towards costs: 4 U. C. L. J. 178.

(*l*) This is intended to cover such a case as the assignee of a judgment seeking to enforce it.

(*m*) This is a summary proceeding and must be strictly exercised: *Fletcher* v. *Calthrop*, 6 Q. B. 880-891. The defaulting party must have an opportunity of being heard: see notes to section 36. There should be a summons to shew cause: *Bullen* v. *Moodie*, 13 C. P. 126; In Appeal, 2 E. & A. 379; Maxwell on Statutes, 325. It may be in this form and entitled in the original suit: *Elliott* v. *Sparrow*, 1 H. & W. 370; *Leir* v. *Coyle*, 1 Dowl. N. S. 932; *Salter* v. *McLeod*, 10 U. C. L. J. 299.

No. In the Division Court for the County of A. D. 1879.

Between { *A. B.* Plaintiff, and *C. D.* Defendant.

To the above named Plantiff:

You are hereby summoned to be and appear at the next sittings of this Court, to be holden at the Town Hall (*or as the case may be*) in the of in the County of on day, the day of A. D. 18 at the hour of of the clock in the noon, then and there to shew cause why an order should not be made against you to pay the fees now remaining unpaid of the above mentioned suit, amounting to the sum of dollars and cents, according to the provisions of the fiftieth section of the Division Courts Act, and in the event of your not so appearing an order to pay the same in to the Clerk of the said Court may nevertheless be made against you.

Dated this day of A. D. 18 .

Judge.

There is nothing in the section to prevent the summons being made returnable at the Judge's Chambers, in the County Town; but it is more consistent with the spirit of Division Court law to make it returnable at some sittings of the Court in which the suit was entered or proceeding taken, or in the party's own division. The summons is usually applied for on behalf of the Clerk, and should be founded on an affidavit of facts. If an order be made, then execution may, after the entry of such order in the procedure book, issue upon it, in the same way as on an ordinary judgment: see notes to section 156. The summons should be served a reasonable time before its return. It is submitted that the law regulating the time of service of other summonses does not apply to a case under this section. What is a reasonable time must be determined with reference to the circumstances of each particular case. There should be an

Bailiff's fees to be paid to Clerk before execution issues.

51. (*n*) At the time of the issue of the execution, the Bailiff's fees thereon shall be paid to the Clerk, and shall by him be paid over to the Bailiff, upon the return of the execution, and not before, but if the Bailiff does not become entitled to any part, or becomes entitled to a part only, of such fees, the whole or surplus shall on demand be by the Clerk repaid to the plaintiff or party from whom the fees were received. C. S. U. C. c. 19, s. 52.

Bailiff to forfeit fees if he neglects to return writ.

52. If the Bailiff neglects to return any process or execution within the time required by law, (*o*) he shall for each such neglect forfeit his fees thereon, and all fees so forfeited

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affidavit of personal service of the summons, or that it came to the knowledge of the Plaintiff or "party on whose behalf" the proceeding was taken: *Ward* v. *Vance*, 3 P. R. 130. The order may be in this form:

(Title of Court and Cause).

Upon reading the summons herein granted on the day of last (*or instant*) the affidavit filed, the affidavit of service thereof, and upon hearing the Clerk of the said Division Court, and the said (*Plaintiff, or as the case may be*) or ("*and no cause being shewn*") I do order that the said do pay to the Clerk of this Court the sum of dollars within days from this date, as the fees which should have been paid by him to the Clerk of this Court on the proceedings herein, and which now remain unpaid.

Dated this day of 18 .

Judge.

As the order can be enforced in the same way as an order under the 156th section, there is no need of its being served. No provision is made for the costs of this proceeding; therefore the order cannot include costs. As Clerks are frequently wronged of their fees, this section was evidently intended to give them a summary remedy therefor. Otherwise they would have to sue for them in an adjoining division.

(*n*) This section is intended to protect the Bailiff. What "the Bailiff's fees" on an execution may be is a matter of uncertainty. If he can find nothing to seize, his fees must be trifling; mileage in such cases not being allowable. Should he seize any property, it is usually sufficient to meet his fees. The clause, however, has more especial reference to a case where, after seizure and before sale, the case is settled between the parties to the prejudice of the Bailiff. In some cases, Clerks have abused the power conferred by this section, and have extorted large sums in cases where there was every reasonable probability of the debt being paid the Bailiff instantly on demand, or the execution returned *nulla bona*. It is the duty of the Clerk in this, as in other cases, to tax the Bailiff's fees, and prevent any charges being made not sanctioned by the tariff. In many cases, too little regard is paid to this part of their duty by Clerks. On the execution being returned by the Bailiff, the Clerk should forthwith make a return of the money, if returned "money made," to the party entitled; and if on foreign transcript, to the proper Clerk. If returned *nulla bona*, then also, should he duly notify the parties entitled: see Rules 95 and 96.

(*o*) See notes to section 163, as to whom an execution should be returned. The penalty of forfeiture of fees is intended to compel Bailiffs to duly make their returns. As to the return of summonses, see Rule 90. As this section

shall be held to have been received by the Clerk, who shall keep a special account thereof, and account for and pay over the same to the County Crown Attorney, to be by him paid over to the Provincial Treasurer, to form part of the Consolidated Revenue Fund. C. S. U. C. c. 19, s. 53.

And such fees to go to Con. Rev. Fund.

JURISDICTION OF DIVISION COURTS.

Cases in which Court has no jurisdiction.

53. The Division Courts shall not have jurisdiction (*p*) in any of the following cases:

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has for its object the compelling of Bailiffs to make their returns with proper dispatch, it is the duty of Clerks to exact the penalties, keep a proper account of same, and return the moneys to the County Crown Attorney.

(*p*) The Division Courts are from their nature Courts of limited jurisdiction. They are the creatures of the statute; and to the Act of Parliament to which they owe their existence, and from which they derive their powers, must we look for their jurisdiction over persons and matters. They possess no common law authority as the Courts of the Sovereign, but on the contrary, their authority is defined and restricted in their creation. Judges of these Courts, and the officers executing their process, cannot exceed the statutory jurisdiction with impunity. A Judge may be entirely erroneous in his opinion of law on a question *within* his jurisdiction, and there is an entire immunity from consequences at the suit of the injured party; but the very moment he transgresses that boundary which the Legislature has thought proper to place on his power, then he is liable for any wrong committed, in the same way as any other individual, if he knew or had the means of knowing the want of jurisdiction. "The jurisdiction which he exercises is a jurisdiction conferred and limited by statute, and if the conditions precedent to its exercise do not exist, the whole proceeding in the Court is *coram non judice*: *per* Lush, J., in *Serjeant* v. *Dale*, 2 Q. B. D., at page 566; *Calder* v. *Halket*, 3 Moore P. C. 28; *Carratt* v. *Morley*, 1 Q. B. 18; *Houlden* v. *Smith*, 14 Q. B. 841; and *Graham* v. *Smart et al.*, 18 U. C. R. 482. The *omission* of a duty cast upon the Judge renders him liable at the suit of a person injured: *Parks* v. *Davis*, 10 C. P. 229. The law makes no presumption in favour of inferior jurisdictions, but it will intend nothing against them: *Christie* v. *Unwin*, 11 A. & E. 379, *per* Coleridge, J.; and *In re Clarke*, 2 Q. B. 630, *per* Lord Denman; *Bullen* v. *Moodie*, 13 C. P., at page 138, *per* Draper, C. J. And as a general rule every circumstance required by the statute to give jurisdiction *must* appear on the face of the proceedings or by reasonable intendment: *Rex* v. *All Saints, Southampton*, 7 B. & C. 790, *per* Holroyd, J.; *Gosset* v. *Howard*, 10 Q. B. 411; *Reg.* v. *Helling*, 1 Strange, 8; and *Reg* v. *Totness*, 11 Q. B. 80. Should a Division Court assume jurisdiction where it has none, the remedy is Prohibition. Should the Judge refuse to consider or adjudicate on a matter within his jurisdiction, the remedy is *mandamus*. These have been considered prerogative writs. In a late case of *In re Stratford and Huron Railway Company, and the Corporation of the County of Perth*, 38 U. C. R. 112, in appeal, the present Chief Justice of that Court appears to think that the writ of *mandamus* is not invested with its prerogative character in this Province.

Prohibition.—In the first place, as to the writ. The origin of this writ will be found fully and lucidly discussed by Brett, J., in *Worthington* v. *Jeffries*, at page 381 of L. R. 10 C. P. It is a writ of right: *Jackson* v. *Beaumont*, 11 Ex. 300. This writ will not lie to an Inferior Court where the subject of a suit there is within its jurisdiction, though in the proceedings matter is stated

which is out of its jurisdiction, unless the Court is going on to try such matter: *Dutens* v. *Robson*, 1 H. Black, 100. The writ ought not to be granted, unless it be made clearly to appear that under no view of the facts has the Inferior Court jurisdiction. It was *held* that the writ did not lie where the Inferior Court had only jurisdiction over part of the matter: *Carslake* v. *Mapledoram*, 2 T. R. 473; but see *Fitzsimmons* v. *McIntyre*, 5 P. R. 119; and *In re Walsh* v. *Ionides*, 1 E. & B. 383; *Kerkin* v. *Kerkin*, 3. E. & B. 399. Nor where the matter is immaterial: *Butterworth* v. *Walker*, 3 Burr. 1689. Nor for mistake in law if within the jurisdiction of the Court: *Toft* v. *Rayner*, 5 C. B. 162, *Lexden and Munster Union* v. *Southgate*, 10 Ex. 201; *Ellis* v. *Watt*, 8 C. B. 614; *In re Grass* v. *Allan et al.*, 26 U. C. R. 123; *Zohrab* v. *Smith*, 5 D. & L. 635; *Norris* v. *Carrington*, 16 C. B. N. S. 396; *Reg.* v. *Twiss*, L. R. 4 Q. B. 407. Where the want of jurisdiction appears on the face of the proceedings, the Court will not grant a Prohibition after sentence or judgment: *Roberts* v. *Humby*, 3 M. & W. 120. The reason for it is given by Lord Abinger, C. B., at page 122. He says, "The principle of the rule seems to be this, that if you wait and take the chance of a sentence in your favour you cannot afterwards object to the jurisdiction, unless it appears on the face of the proceedings that the Court had no jurisdiction." It is said to be doubtful if it will be granted after execution levied: *Robinson* v. *Lenaghan*, 2 Ex. 333. But it was *held* not too late in the later case of *Kimpton* v. *Wilkey*, 9 C. B. 719; see also *Graham* v. *Smart et al.*, 18 U. C. R. 482. In cases where there is an appeal, it has been *held* that this writ can even be moved for then: *Harrington* v. *Ramsay*, 8 Ex. 879. It will not be granted after judgment unless it is perfectly clear that there has been an excess of jurisdiction: *Ricardo* v. *Maidenhead Board of Health*, 2 H. & N. 257. Nor will it be granted where the jurisdiction is doubtful: *In re Birch*, 15 C. B. 743. The Court is bound to interfere and grant this writ at the instance of a stranger as freely as to a party to the suit: *De Haber* v. *The Queen of Portugal*, 17 Q. B. 171; *Baker* v. *Clark*, L. R. 8 C. P. 121, note 1: *Bridge* v. *Branch*, 1 C. P. D. 636, *per* Brett, J. Where an Inferior Court proceeds in a cause properly within its jurisdiction, no prohibition can be awarded until some question is raised which the Court is incompetent to try, but where the foundation for the jurisdiction is defective, a prohibition may be applied for at once: *London* (*Mayor, &c.*) v. *Cox*, L. R. 2 H. L. 239. If defect of jurisdiction is distinctly brought to the notice of the Judge, it is equivalent to its appearing on the face of the proceedings, *per* Pollock, C. B., in the case of *Denton* v. *Marshall*, 1 H. & C. 659. Where a defendant appears at the trial, and whilst the case is proceeding makes no objection to the jurisdiction, but suffers the Court to act without protest or objection, as if it had jurisdiction down to actual payment of damages and costs, it is too late to apply for a prohibition, even though the party had no opportunity of applying sooner, unless the want of jurisdiction appears on the face of the proceedings: *Yates* v. *Palmer*, 6 D. & L. 283; *Reg.* v. *Widdop*, L. R. 2 C. C. 3; *Blake* v. *Beech*, 1 Ex. D. 326, *per* Cleasby, B. Material delay will be a bar to the writ: *In re Denton* v. *Marshall*, 1 H. & C. 654. In a case of *Smart* v. *O'Reilly et al.*, from the first Division Court of the County of Wentworth, *per* Armour, J., it was *held* that where a person submits to the jurisdiction assumed by the Judge without objection or protest, he is not entitled to prohibition two months after judgment even though debt and costs remain unpaid: see also *In re Cleghorn and Munn*, 2 L. J. N. S. 133. A defendant is not bound to wait for trial in a Division Court, he may at any time during the action move for a prohibition: *Sewell* v. *Jones*, 15 Jur. 153; 1 L. M. & P. 525, s. c. Formerly a Judge in Chambers had not power to order writ of prohibition: *In re Kemp* v. *Owen*, 10 U. C. L. J. 269. But he has now, Rev. Stat. Cap. 52, section 3. The right to prohibition is only taken away by express statutory enactment: *Oram* v. *Brearey*, 2 Ex. D. 346. It is no ground for granting the writ, that the Judge decided against law and good conscience: *Siddall* v. *Gibson et al.*, 17 U. C. R. 98. Where facts disputed in application for prohibition, the certificate of the Judge

was held to govern: *In re Clarke*, 2 L. J. N. S. 266. A party applying for prohibition must lay before the Court all the materials on which order in Inferior Court was granted: *In re Grass* v. *Allan et al.*, 26 U. C. R. 123. Where applicant had cross-examined witnesses, argued the case, and had taken no exception, he was held precluded from objecting to jurisdiction: *In re Burrowes*, 18 C. P. 493. Where Judge has jurisdiction, prohibition will not go for mere matters of practice: *Ellis* v. *Watt*, 8 C. B. 614; *Re McLean* v. *McLeod*, 5 P. R. 467. When question of jurisdiction not raised in Court below, see *Nerlich* v. *Clifford*, 6 P. R. 212. Where a Judge makes an order which, though possibly erroneous in itself, is made at the request of one of the parties and is acted on, such party cannot obtain prohibition: *Richardson* v. *Shaw*, 6 P. R. 296. Coverture is no ground for prohibition; it should be set up in the Court below: *Read* v. *Wedge*, 20 U. C. R. 456. Where the title to land comes in question, it is the duty of the Judge to enquire into the fact, and it is only where such question *actually arises* that the jurisdiction of the Court is ousted: *Latham* v. *Spedding*, 17 Q. B. 440; but see *Coulson* v. *O'Connell*, 29 C. P. 341. Illustrative of the same principle, see *In re Dixon* v. *Smarr*, 6 P. R. 336, and cases cited. If a question of title to land arises, the Judge must of necessity determine that point first, yet the question is still open to a party on prohibition: *Thompson* v. *Ingham*, 14 Q. B. 710; and if determined wrongly prohibition lies: *Re Bowen*, 15 Jur. 1196; *Sewell* v. *Jones*, 1 L. M. & P. 525; *Kimpton* v. *Willey*, 9 C. B. 719; 5 D. & L. 648, s. c. A Court cannot give itself jurisdiction by a false recital or finding of facts; see the American Notes to *Chew* v. *Holroyd*, 8 Ex. 249 (American Ed.). Prohibition will not go where the plaint stated a matter within the Judge's jurisdiction, and the objection to the jurisdiction arose on contested facts which the Judge had power to enquire into, and the decision on the merits turned on the very point on which the question of jurisdiction arose, and the affidavits were conflicting: *Joseph* v. *Henry*, 1 L. M. & P. 388. Until the Judge has had an opportunity of inquiring into the disputed facts relative to jurisdiction, prohibition will not lie: *Dixon* v. *Smarr*, 6 P. R. 336. Trespass for false imprisonment is within the jurisdiction of a Division Court: *Chivers* v. *Savage*, 5 E. & B. 697; and where in that case the Judge, in his judgment, used expressions from which it appeared that he had dealt with the facts upon the question of damages, as if it were a case for malicious prosecution, it was held there was no ground for prohibition. But a Superior Court is not confined to the particulars, but may look at actual facts to ascertain if jurisdiction in Inferior Court exists, and if not, prohibition will go: *Hunt* v. *North Staffordshire Railway Company*, 2 H. & N. 451. A prohibition will not be granted because the Judge has received improper evidence: *Winsor* v. *Dunford*, 12 Q. B. 603. An application for plaint was correctly made, and correctly entered against defendant as executor of F. W. Taylor, but the summons described him as executor of W. Thompson. At the hearing, the Judge, upon it being represented to him that the Statute of Limitations would intervene to bar the claim, directed a fresh summons to issue, bearing the same date and number as the first. *Held*, that the Court would not interfere with the course taken by the Judge: *Foster* v. *Temple*, 5 D. & L. 655. A defendant committed on a judgment summons after discharge under Insolvent Act is entitled to be discharged, but prohibition will not lie: *Still* v. *Booth*, 1 L. M. & P. 440. *A total want* of jurisdiction cannot be cured by the assent of parties: *Jones* v. *Owen*, 5 D. & L. 669. A statute giving appeal, or taking away *certiorari*, does not prevent prohibition: *Pears* v. *Wilson*, 2 L. M. & P. 515. The same case decides that where an objection is taken to the jurisdiction, the Judge ought to enter it on the proceedings, in order that a Superior Court may see if there is ground for prohibition. Where a cause is referred by consent without any objections to jurisdiction, but during progress of the reference, title to land came in question and one of the parties objected, but the arbitrators proceeded, prohibition was held to lie: *Knowles* v. *Holden*, 24 L. J. Ex. 223. A party who objects to jurisdiction does not in England

waive right to prohibition by obtaining from the Judge a statement of case for opinion of Superior Court: *Jackson* v. *Beaumont*, 11 Ex. 300. Prohibition may issue after judgment for an excess of jurisdiction, not appearing on the face of the proceedings: *Marsden* v. *Wardle*, 3 E. & B. 695. It is no ground for prohibition that under process to levy a sum within its jurisdiction the officer has seized property to a greater amount: *Summers, ex parte*, 18 Jurist, 522. A Judge took time to consider as to nonsuiting on the ground of want of jurisdiction, and a prohibition issued before he decided, and he then nonsuited the plaintiff, and awarded costs against him. A rule for prohibition was made absolute: *Lawford* v. *Partridge*, 1 H. & N. 621; and when the jurisdiction is ousted, the Judge can do nothing: *Powley* v. *Whitehead*, 16 U. C. R. 589; *Lawford* v. *Partridge*, 1 H. & N. 621; *Campbell* v. *Davidson*, 19 U. C. R. 222; *Nicholls* v. *Lundy*, 16 C. P. 160; *Hodgson* v. *Graham*, 26 U. C. R. 127; *In re* Kingston election, *Stewart* v. *Macdonald*, 41 U. C. R., at page 313; but see *Great Northern and London and North-Western Joint Committee* v. *Inett*, 2 Q. B. D. 284. Where it *prima facie* appears, and is not denied, that title to land will come in question prohibition will go: *Macara* v. *Morrish*, 11 C. P. 74. Even though title to land may come in question in an interpleader suit, prohibition does not lie: *Munsie* v. *McKinley et al.*, 15 C. P. 50. As to an action of trespass for removal of rails of a fence raising title to land, see *In re Bradshaw* v. *Duffy*, 4 P. R. 50. Railway companies "live and carry on business" only at their head office, and garnishee proceedings commenced elsewhere will be prohibited: *Ahrens* v. *McGilligat*, Grand Trunk Railway Company, Garnishees, 23 C. P. 171. In *Westover* v. *Turner*, Grand Trunk Railway Company, Garnishees, 26 C. P. 510, it was held that the garnishees having a factory for the making and repair of rolling stock used on the road, and employing a number of workmen therein, did not render the garnishee proceedings at any place but the head office valid, and prohibition was granted. An irregularity in a matter of practice merely is not a ground for interfering by prohibition: *Jolly* v. *Baines*, 12 A. & E. 201; *In re Higginbotham* v. *Moore*, 21 U. C. R. 326. A plaintiff cannot, by giving defendant credit for a set-off, compel him to set it up, nor thus give jurisdiction to the Court: *Furnival* v. *Saunders*, 26 U. C. R. 119; see also *McMurtry* v. *Munro*, 14 U. C. R. 166. Plaintiff, who had been employed by defendants to purchase wool on commission, sued them in Division Court for commission, and $10 paid to an assistant. It appeared that defendant had furnished plaintiff with $1,100, and plaintiff had expended $36 beyond that sum in purchasing wool, but no question was made at the trial as to the due expenditure of $1,100; the only question being whether plaintiff was entitled to any commission at all, and no claim was made for the $36 or any part of it, the plaintiff's demand being confined to the commission claimed on the quantity of wool purchased, and not on the price paid; it was *held* not to be an action for the balance of an unsettled account exceeding $200, the balance of unsettled account being the $36, which was not in question, and prohibition was refused. *Held* also, that this was not a splitting of a demand, but two separate causes of action: *McRae* v. *Robins et al.*, 20 C. P. 135. Where suit is brought in wrong division, prohibition is the remedy: *Watt* v. *VanEvery et al.*, 23 U. C. R. 196; *Kemp* v. *Owen*, 14 C. P. 432; *Carsley* v. *Fisken et al.*, 4 P. R. 255; *Gold* v. *Turner*, L. R. 10 C. P. 149; or for an amount beyond jurisdiction of the Court: *In re The Judge of the County Court of the U. C. of Northumberland & Durham*, 19 C. P. 299. The holder of a promissory note payable to "*A. B.* or bearer," endorsed it over to a third party. It was held that an action could be brought against both maker and endorser in the Division Court for the division in which the endorser resided, and that the question of whether or not the endorsement was made in order to give jurisdiction could not be enquired into: *Bridges* v. *Douglas*, 13 L. J. N. S. 358. Should a Judge of his own accord, and against the will of the defendant, amend the particulars by reducing the claim to an amount within the jurisdiction of the Court, prohibition would lie: *Hill, In re*, 10 Ex. 726; *Hopper* v. *Warburton*, 32 L. J. Q. B.

104; 7 L. T. N. S. 722. Where a party takes a benefit under a Judge's order, he cannot afterwards object that it was made without jurisdiction: *Tinkler* v. *Hilder*, 4 Ex. 187; *Buffalo and Lake Huron Railway Company* v. *Hemmingway*, 22 U. C. R. 562; *Harrison* v. *Wright*, 13 M. & W. 816. If a Judge, in disregard of a statute or rule of Court, proceeds in a cause, he will be prohibited: *Ex parte M'Fee*, 9 Ex. 261. Objections on the ground of defect of jurisdiction may be founded on the character and constitution of the Inferior Court, the nature of the subject matter of the inquiry, or the absence of some preliminary proceeding which was necessary to give jurisdiction; but the objection of defect of jurisdiction cannot be entertained if it rests solely on the ground, that the Judge has erroneously found a fact which was essential to the validity of his order, but which he was competent to try: *The Colonial Bank of Australasia* v. *Willan*, L. R. 5 P. C. 417. For instance, if a defendant was served the day before any sittings with an ordinary summons, should the Judge insist on proceeding with the hearing at such sittings, prohibition would lie: *Ex parte M'Fee*, 9 Ex. 261; *Ex parte Story*, 12 C. B. 767; *James* v. *The South-Western Railway Company*, L. R. 7 Ex. 287; *Serjeant* v. *Dale*, 2 Q. B. D., page 566, *per* Lush, J. Where a Judge assumes jurisdiction, not by deciding on conflicting facts, but on a wrong assumption of a point of law, his decision will be reviewed by prohibition: *Elston* v. *Rose*, L. R. 4 Q. B. 4. Where a Superior Court is clearly of opinion, both with reference to the facts and law, that an Inferior Court is exceeding its jurisdiction, it is *bound* to grant a writ of prohibition, whether applied for by defendant or a stranger; or even after a new trial, where no question of jurisdiction previously raised, 6 P. R. 177. In such a case, neither the smallness of the claim in the suit below nor delay on the part of the applicant is a reason for refusing the writ. The plaintiff in the Inferior Court has in no case an absolute right to have the plaintiff in prohibition put to declare in prohibition: *Worthington* v. *Jeffries*, L. R. 10 C. P. 379. But see *Chambers* v. *Green*, L. R. 20 Eq. 552. As to the costs in prohibition, see Rev. Stat. cap. 52, s. 2, and *Rex* v. *Kealing*, 1 Dowl. 440; *Tessimond* v. *Yardley*, 5 B. & Ad. 458; *Pewtress* v. *Harvey*, 1 B. & Ad. 154; *Craven* v. *Sanderson*, 7 A. & E. 897 n.; *Ex parte Tucker*, 4 M. & G. 1079; *White* v. *Steel*, 13 C. B. N. S. 231; *Ex parte Overseers of Everton*, L. R. 6 C. P. 245; *Wallace* v. *Allen*, L. R. 10 C. P. 607. Affidavits in support of an application for prohibition should be entitled simply in the Court, and not in any cause (*Evans, ex parte*, 2 Dowl. N. S. 410; *Siddall* v. *Gibson*, 17 U. C. R. 98; *In re Miron* v. *McCabe*, 4 P. R. 171); but affidavits entitled "In the Queen's Bench, between *M. A. B.*, plaintiff, and *W. P.*, defendant, in prohibition," were allowed to be read: *Breedon* v. *Capp*, 9 Jur. 781. So also were affidavits entitled "In the matter of a certain cause in the First Division Court of the Counties of L. & A., in which *E. A. M.* is plaintiff and *B. D.* is defendant," held unobjectionable: *In re Burrowes*, 18 C. P. 493. There is no authority in this country for staying proceedings in the Court below pending prohibition, *per* Wilson, J., in *Miron* v. *McCabe*, 4 P. R. 171. This case was overruled (*In re Hall* v. *Curtain*, 28 U. C. R. 533); but not on any of the formal points decided on the question of prohibition. Restitution will not be ordered in prohibition when the subject matter of the suit is no longer within the control of the Inferior Court: *Denton* v. *Marshall, In re*, 1 H. & C. 654. When a rule *nisi* for a prohibition has been discharged, the Court will not allow the motion to be renewed upon affidavits stating matter not before presented to the Court, but existing at the time of the original application: *Bodenham* v. *Ricketts*, 6 N. & M. 537. It is not necessary that the grounds for issuing a prohibition should appear in the rule or order: *Eversfield* v. *Newman*, 4 C. B. N. S. 418. Where a rule for prohibition was directed to be served on the plaintiff and the Judge, service of the Judge and plaintiff's Attorney was held insufficient: *Massey* v. *Burton*, 3 Jur. N. S. 1108; 2 H. & N. 597, s. c. The defendant should consider that the obtaining a writ of prohibition, in many cases will force the plaintiff to sue in a Superior or County Court, where he will,

if he succeeds, be entitled to the costs of that Court: *Coulson* v. *O'Connell*, 29 C. P. 341. Where a question of title to land arises, the better course is not to apply before the hearing, for in that case the defendant must establish by affidavit, not merely that the claim *may* involve a question beyond or out of the jurisdiction of the Court, but that it *must necessarily* do so; otherwise the Superior Courts will not interfere: Davis' C. C. Acts, 83. The application is usually made to a Judge in Chambers (Rev. Stat. cap. 52, secs. 2 & 3), and is founded on an affidavit disclosing all the material facts. The following form of affidavit is submitted as somewhat of a guide, but in every case the affidavit will necessarily be different according to the different circumstances:

In the Queen's Bench (or Common Pleas).

I, *A. B.*, of the of in the County of and Province of Ontario make oath and say:

1. That on the day of A.D. 18 , I was served with annexed copy of summons and particulars of demand thereto attached, marked "A."

2. That I am the defendant (*or one of the defendants*) in the suit mentioned in the said summons of against myself (*if others, naming them also*), in the Division Court for the (*said*) County of

3. That I attended at the sittings of the said Division Court held on the day of A.D. 18 , and did there and then (*through C. D., my Counsel or Agent, as the case may be*) object to the jurisdiction of the said Division Court to entertain the said suit, inasmuch as I claimed to justify the said alleged trespass by right and title to the said close at the time when the said trespass was alleged to have been committed (*or here set out any other ground of objection which the deponent made, according to the circumstances of the case*).

4. That I did there and then offer to prove before the Judge of the said Court that I did *bona fide* claim the right and title to the said close, and that the same was my close, soil and freehold (*or whatever other fact or facts were relied on before the Judge as showing a want of jurisdiction, or what the defendant otherwise offered to prove*).

5. That the said close in which the said supposed trespass was committed is part of Lot number in the concession of the Township of in the County of

6. That I did, at the time when the said supposed trespass was committed, *bona fide* claim, and from thence continually hitherto, have *bona fide* claimed, the soil or freehold of the said land, by virtue of a conveyance (*or as the case may be*) thereof, heretofore made to me by one *G. H.*, bearing date the day of A.D. 18 (*or in such other way as the defendant claims title to the land*).

7. That the said close is part and parcel of the said land so conveyed (*or as the case may be*) as aforesaid, and that the said , the plaintiff in said Division Court suit, claims the said close adversely to me, and contends, as I believe, that the said close belongs to him, but which I say is not the case.

8. That the said Judge, notwithstanding my first objection, and notwithstanding my said offer to prove my said title as aforesaid, did proceed to hear and determine the said cause and gave judgment against me for $ damages, together with costs (*or as the case may be*) on the said day of A.D. 18 , payable in days (*or forthwith or otherwise, or as the case may be*).

9. That I have not paid the said damages or costs.

10. That execution has (*or has not*) issued against me therefor.

Sworn, &c.

If prohibition is applied for on any of the other grounds of want of jurisdiction, mentioned in sub-sections 1 to 7, inclusive, of this section, or where the suit is for an amount beyond the jurisdiction of the Court, or where cause of action is being divided, or where action is brought in the wrong division, &c., the above affidavit can be altered so as to make it conform to the circumstances. The affidavit should fully set out all facts and circumstances of the case; and if it

1. Actions for any gambling debt; (*q*) or

can be corroborated this should be done in every essential particular, and by as many affidavits as can reasonably be procured, for it lies on the applicant to make out a case *clearly* of want of jurisdiction if he wishes prohibition on affidavit: 2 L. J. N. S. 266; 26 U. C. R. 123; 2 H. & N. 263.

Mandamus.—This is a high prerogative writ of a most extensive remedial character, issuable out of either of the Superior Courts of Common Law, directed to any Corporation or Company, Inferior Court of judicature, or person, requiring them to do some particular thing specified therein, which appertains to their office and which it is their duty to perform: Impey on *Mandamus*, 1; Tapping on *Mandamus*, pages 4 & 5. As to the principles on which this writ is granted, see Harr. Com. Law Pro. Act, 466 & 467; *In re The Stratford and Huron Railway Company and The Corporation of the County of Perth*, 38 U. C. R. 112; and *Re The Hamilton and North Western Railway Company*, 39 U. C. R. 93. In England, by virtue of the Statute 19 & 20 Vic. cap. 108, s. 43, a summary mode by summons and order is provided for compelling a County Court Judge to do any act belonging to the duties of his office, but here the only remedy is by *mandamus*. This writ will not be directed to the Judge of an inferior tribunal, unless he has refused to exercise the duty which the *mandamus* seeks to compel him to perform: *Re McCulloch and The Judge of Leeds and Grenville*, 35 U. C. R. 449. Where the Judge, having heard the evidence as to jurisdiction, thinks that the cause of action did not arise within the jurisdiction, it was *held* that he having heard the cause, no *mandamus* would issue to compel him to rehear it. Having exercised his jurisdiction his decision was final: *Kernot* v. *Bailey, et al.*, 2 U. C. L. J. 178. Where upon an interpleader summons a Judge erroneously decides against a claimant on the ground that the notice of claim was insufficient (see our Rule of Court, No. 38), a *mandamus* will issue to compel him to adjudicate upon the claim: *Reg.* v. *Richards*, 2 L. M. & P. 263. But when a Judge enters upon the hearing of a case, and from the evidence decides he has no jurisdiction to adjudicate upon it, a *mandamus* will not lie to compel him to do so: *Milner, ex parte* 5 Jur. 1037; *Reg.* v. *West Riding Justices*, 1 New. Sess. Cases, 247, Q. B. The writ will only go to a County Court Judge where his jurisdiction is clear: *Trainor* v. *Holcombe*, 7 U. C. R. 548. *Mandamus* was refused, to compel a County Court Judge to approve of the security tendered for appeal after the time for giving it had expired (*Ford* v. *Crabb*, 8 U. C. R. 274); but it will go to compel him to hear and determine a matter before him (*In re Burns* v. *Butterfield*, 12 U. C. R. 140); but not to correct his judgment when given (*Ib.*), nor to reverse his judgment on a point of practice: *In re Woods* v. *Bennett*, 12 U. C. R. 167. Where a Judge is interested in a suit, *mandamus* will be refused to compel him to try it: *In re Judge of Elgin*, 20 U. C. R. 588. It will issue to a Division Court Clerk to compel him to issue an execution (*Reg.* v. *Fletcher*, 2 E. & B. 279; *In re Linden et ux.* v. *Buchanan*, 29 U. C. R. 1); but his fee should first be tendered him: *In re Township Clerk of Euphrasia*, 12 U. C. R. 622. A demand and refusal, or what is equivalent to the latter, is required: *Re Peck and The Corporation of the County of Peterborough*, 34 U. C. R. 129. Affidavits for *mandamus* should properly be entitled only in the Court in which they are to be used: *In re Municipality of Augusta* v. *The Municipal Council of Leeds and Grenville*, 1 P. R. 121: Rev. Stat. cap. 52, s. 21. The application can be made to a Judge in Chambers: Rev. Stat. cap. 52, s. 17, *et seq.* As to the application to the Court and what must be shewn by affidavit, see Tapping on *Mandamus*, 282, chapter IV.

(*q*) This may be said to be any debt arising from the playing of any game for money or other valuables: Worcester, 603. A distinction must be kept in view between wagers that are legal and those that are not. At Common Law most wagers were legal, but statute law has very much circumscribed them: see

2. Actions for spirituous or malt liquors drunk in a tavern or alehouse; (*r*) or

3. Actions on notes of hand given wholly or partly in consideration of a gambling debt or for such liquors; (*s*)

Hampden v. *Walsh*, 1 Q. B. D. page 192, *per* Cockburn, C. J. It is to be observed too, that we are governed by the statutes in force in England before 1792, and not by the strict provisions of the English Act of 8 & 9 Vic. cap. 109, which applies to all wagers whether legal or otherwise: *per* Cairns, L. C., in *Diggle* v. *Higgs*, 2 Ex. D. 427. The game of dominoes is not an unlawful game; but if played for money and a debt incurred, that would be within this subsection: *Reg.* v. *Ashton*, 1 E. & B. 286. So also would money lost in playing at billiards: *Parsons* v. *Alexander*, 5 E. & B. 263. Money deposited with a stakeholder to await the result of a horse race, and sued for by one of the parties before the running of the race, would not be within this section: *Kelly* v. *Gafney* 8 U. C. L. J. 50. Money lost as a bet on a horse race would (*Blaxton* v. *Pye*, 1 Wils. 369; *Applegarth* v. *Colley*, 10 M. & W. 723); unless for £50 a side, which probably means £50 sterling: *Wilson* v. *Cutten*, 7 C. P., at page 479; and the horses owned by parties: *Fulton* v. *James*, 5 C. P. 182; *Watson* v. *Cutten*, 7 C. P. 476. Where the defendant sold for the plaintiff a pair of horses won by plaintiff at a raffle, and received the purchase money, it was *held* that he could not refuse to pay it over on the ground that the plaintiff had obtained the horses by gambling: *Jamieson* v. *Sherwood*, 14 U. C. R. 282. A debt under a lottery and a gambling debt are very different: *Wallbridge* v. *Becket*, 13 U. C. R. 395. It is doubtful if gambling is fraud under the Insolvent Act: *In re Jones*, an insolvent, 4 P. R. 317. Money lent to enable a person to gamble is not recoverable back (*Foot* v. *Baker*, 5 M. & G. 535); but money lent for the purposes of a lawful game is: *M'Kinnell* v. *Robinson*, 3 M. & W. 434. Money lent to a friend to pay a gambling debt is recoverable back (*Alcinbrook* v. *Hall*, 2 Wils. 309; *Knight* v. *Cambers*, 15 C. B. 562; *Jessopp* v. *Lutwyche*, 10 Ex. 615, *per* Parke, B.; *Rosewarne* v. *Billing*, 15 C. B. N. S. 316; *Ex parte Pyke*, *In re Lister*, 8 Ch. D. 754; *Hill* v. *Fox*, 4 H. & N. 359); and is provable against the estate of the borrower: *Babb* v. *Yelverton*, L. R. 9 Eq. 471. As to legal and illegal wagers and the recovery of money back, see *Bank of Toronto* v. *McDougall*, 28 C. P. 345; *Coombes* v. *Dibble*, L. R. 1 Ex. 248; *Hampden* v. *Walsh*, 1 Q. B. D. 189; *Diggle* v. *Higgs*, 2 Ex. D. 422; *Higginson* v. *Simpson*, 2 C. P. D. 76.

(*r*) It is submitted that these words mean *licensed* places. No *debt* could be created for the sale of liquors drunk anywhere, without there being a license to sell: Rev. Stat. cap. 181, s. 39; *Ritchie* v. *Smith*, 6 C. B. 462. Whether liquors are "spirituous" or "malt," is a question of fact, which is better to have established by the evidence of a practical chemist: *Harris* v. *Jenns*, 9 C. B. N. S. 152. *Quære*. Would not such a claim be recoverable in a higher Court? *Leith* v. *Willis*, E. T. 6 Will. IV.; *Hartley* v. *Hearns*, T. T. 5 & 6 Vic. As to what is drinking "on the premises," see *Cross* v. *Watts*, 13 C. B. N. S. 239.

(*s*) It is submitted that the jurisdiction of the Court is ousted, no matter whether or not the note is sued by the original payee or a *bona fide* holder. It is questionable if in any Court the latter would have the right to recover in this Province: *Goldsmid* v. *Hampton*, 5 C. B. N. S. 94; Byles on Bills, 9th Ed. 135, 136, and cases there cited. Of course the English Statute of 5 & 6 Will. IV. cap. 41, is not in force in this Country. That statute enlarges the Common Law right of *bona fide* holders of promissory notes for value without notice, but our statute does not go so far. Further, it is submitted that the Legislature intended to prevent as much as possible the taking of notes for such considerations, and with that view entirely prohibited the Division Court entertaining suits for them. If a note should in form be given for a loan of money, but in reality for

4. Actions of ejectment or actions in which the right or title to any corporeal or incorporeal hereditaments, (*t*)

one of the prohibited considerations, it would be within this section: *Hill* v. *Fox*, 4 H. & N. 359; see notes to sub-section 1 of this section. A writing in these words would not be a promissory note: "Good to Mr. Palmer for $850 on demand:" *Palmer* v. *McLennan*, 22 C. P. 258.

(*t*) "Hereditament" is defined in the text-books of authority to signify "all such things, whether corporeal or incorporeal, which a man may have to him and his heirs, by way of inheritance, and which, if they be not otherwise bequeathed, come to him which is next of blood, and not to the executors or administrators, as chattels do:" see *Doe d. Lord* v. *Crago*, 6 C. B. p. 90. In order to oust the jurisdiction on this ground there must be *bona fide* a question of title in dispute. A mere assertion of title is not sufficient: *Lilley* v. *Harvey*, 5 D. & L. 648; *Emery* v. *Barnett*, *In re*, 4 C. B. N. S. 423. Nor a suggestion that title comes in question: *Ball* v. *Grand Trunk Railway Company*, 16 C. P. 252. The Judge has jurisdiction to enquire and decide whether title really is in dispute, but his decision is not final; and if he erroneously decides that title to land does not come in question, he can be prohibited (*Thompson* v. *Ingham*, 14 Q. B. 710); but a Superior Court won't interfere until the Judge has inquired into it: *Dixon* v. *Smarr*, 6 P. R. 336. The claim set up of title to land must be a *bona fide* one, and the right one that can exist in point of law: *Lloyd* v. *Jones*, 6 C. B. 81; *Blackmore* v. *Higgs*, 15 C. B. N. S. 790. A person sued for rent and double value cannot oust the jurisdiction of the Court by alleging title in himself, if it is proved that he has admitted himself to have been tenant to the plaintiff at the time the rent accrued and from which the holding over commenced: *Wickham* v. *Lee*, 12 Q. B. 521. In England a plea of not possessed to an action of trespass *quare clausum fregit* takes a case out of the jurisdiction of the County Courts (*Timothy* v. *Farmer*, 7 C. B. 814); but only in case a question of title *actually* comes in question: *Latham* v. *Spedding*, 17 Q. B. 440; but see *Coulson* v. *O'Connell*, 29 C. P. 341. After execution issued and defendant's goods seized, prohibition would be granted to restrain the Division Court from proceeding further, if it appeared by affidavit, though not on the face of the proceedings, that title to corporeal hereditaments came in question so that the Judge had no jurisdiction (*Marsden* v. *Wardle*, 3 E. & B. 695); but not if by his acts or conduct he had waived it: *In re Denton* v. *Marshall*, 1 H. & C. 654. Where an action was commenced for an injury to plaintiff's reversionary interest in land, by the removal of a boundary fence between the lands of plaintiff and defendant, and the defendant cutting down trees, &c., and the erection of a new fence in such a manner as to make it appear that a portion of the plaintiff's land belonged to the defendant; it was *held* that the jurisdiction was ousted on the defendants shewing that the title to land was *bona fide* in dispute, and that he was not bound to wait until the Court had proceeded to hear the case: *Sewell* v. *Jones*, 1 L. M. & P. 525. A tenant sued for use and occupation is at liberty to shew that the title of the plaintiff (the person of whom he took the premises) expired during the tenancy, even though the tenant continued to enjoy or occupy the premises for the whole term without being subjected to eviction by the owner; and if the tenant sets up such a defence, the Court has no longer jurisdiction, as the title to land comes in question: *Mountnoy* v. *Collier*, 1 E. & B. 630. Where a party is charged with a liability arising from his being owner of land, which ownership he disclaims, this raises a question of title: *Reg.* v. *Harden*, 2 E. & B. 189. On the trial of a case for trespass committed by breaking the doors of certain rooms in a cottage, the plaintiff's case was, that he had let to the defendant a portion only of the cottage, and had reserved to himself the rooms in which the trespass was committed. The defendant contended that plaintiff had let him the whole cottage. It was *held* that title to an incorporeal hereditament came in question: *Chew* v. *Holroyd*, 8

Ex. 249. The jurisdiction is ousted no matter how fraudulent or *mala fide* the claim of either party may be: *Marsh* v. *Deures*, 17 Jur. 558. Where a statute gives a special statutory jurisdiction to a Division Court, a question of title to land would not oust it: *Hertford Union Guardians* v. *Kimpton*, 11 Ex. 295. *A.* was found taking sand from premises in the occupation of *B.* (under a lease), and was given into custody by *B.* on a charge of stealing it. On appearing before a Magistrate, *A.* denying that *B.* had any right, the charge was dismissed as involving a question of title. *A.* afterwards sued in English County Court for false imprisonment; it was *held* that no question of title arose: *Eversfield* v. *Newman*, 4 C. B. N. S. 418. It is to be observed that an action for false imprisonment in Division Court is *not* prohibited by this section. It was *held* that, when on the hearing it appears that title to land comes in question, the Judge had no power to nonsuit or award costs against the plaintiff: *In re Lawford* v. *Partridge*, 1 H. & N. 621. Much to the same effect in our own Courts: see *Powley* v. *Whitehead*, 16 U. C. R. 589; *Nicholls* v. *Lundy*, 16 C. P. 160; *Campbell* v. *Davidson*, 19 U. C. R. 222; *Hodgson* v. *Graham*, 26 U. C. R. 127; *Re* Kingston Election, *Stewart* v. *Macdonald*, 41 U. C. R., at page 313, *per* Harrison, C. J. But see *The Great Northern Committee* v. *Inett*, 2 Q. B. D. 284. The Kingston case was decided on the power to award costs where there was no jurisdiction upon the authority of *Brown* v. *Shaw*, 1 Ex. D. 425. This case, as well as *Peacock* v. *The Queen*, 4 C. B. N. S. 264, was cited in the case at page 284 of 2 Q. B. D., and disregarded. Cockburn, C. J., says: The respondent is entitled to avail himself of this objection, and he is obliged to come here to inform us of the absence of jurisdiction, for if he did not the objection would not appear, and judgment would be given against him. As he is obliged to come here by the act of the appellants, he is entitled to his costs. It is clear that to some extent there is jurisdiction over the subject matter, for the Court has power to hear and determine whether the appeal will lie or not. I am of opinion that under these circumstances there is jurisdiction to give costs. That being so, it seems to me to make no difference in the practical result, whether the respondent comes to inform the Court of the objection, by means of a separate application, as in the present case *or at the hearing*." It is submitted that the opinion expressed in this last case is the correct one, and will be ultimately adopted, but up to the present time the general opinion among County Judges is that where there is no jurisdiction there is no power to award costs, following *In re Lawford* v. *Partridge*, 1 H. & N. 621, and that class of cases. Should the title to land arise in an action of replevin in Division Court, the Court would still have jurisdiction: *Fordham* v. *Akers*, 4 B. & S. 578. So also would there be jurisdiction in an interpleader issue: *Munsie* v. *McKinley*, 15 C. P. 50. In an action by a tenant against his landlord for breach of covenant for quiet enjoyment, when *non demisit* is pleaded, the jurisdiction of County and Division Courts is ousted (*Parser* v. *Bradburn*, 13 L. J. N. S. 40), and plaintiff entitled to Superior Court costs: *Ib.*; *Davis* v. *Vandecker*, 13 L. J. N. S. 299; In *Stephenson* v. *Raine*, 2 E. & B. 744, it was *held* that the office of a parish clerk in England was an "hereditament" within the meaning of that word as used in the County Court Act of 9 & 10 Vic. cap. 95, s. 58, from which this part of the section in question was taken. Title to land may come in question and oust the jurisdiction of the Court in an action of tort to personal chattels: *Trainor* v. *Holcombe*, 7 U. C. R. 548. One *H.*, sold to defendant timber standing on his land, and afterwards conveyed and gave possession of the land to the plaintiff; *held* that title to land did not come in question, and action was maintainable in County Court: *Bailey* v. *Bleecker*, 5 L. J. N. S. 99. The principle of such cases as this would apply to Division Courts, *per* Alderson, B., in *Davis* v. *Walton*, 8 Ex. 156. In an action for converting the plaintiff's dwelling house with doors, windows, &c., the defence was that the goods were not the plaintiff's. At the trial it appeared that the plaintiff claimed as assignee of a mortgage of the land on which the house stood, and the dispu-

or any toll, (*u*) custom or franchise (*v*) comes in question; or

5. Actions in which the validity of any devise, bequest or limitation (*w*) under any will or settlement may be disputed; or

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was, whether the house was part of the freehold or not. *Held*, that a question of title to land arose: *Portman* v. *Patterson*, 21 U. C. R. 237; see also *Fair et al.* v. *McCrow*, 31 U. C. R. 599. *Prima facie* proof, of title to land arising in the case being given, and no cause being shewn to the contrary, would oust the jurisdiction: *Macaca* v. *Morrish*, 11 C. P. 74. The title of a "corporeal hereditament" is in question whether its existence or the right of the claimant to it is denied; *per* Lord Campbell, C. J., in *Addey* v. *The Deputy Master of the Trinity House*, 22 L. J. Q. B. 3, s. c. nom.; *Reg.* v. *Everett*, 1 E. & B. 273. Paving rates, assessed under authority of an Act of Parliament, are not incorporeal hereditaments, and may be sued for in Division Court: *In re Baddeley*, 4 Ex. 508. Where the jurisdiction would be ousted under this section, a plaintiff would be entitled to full costs in a Superior Court: *Coulson* v. *O'Connell*, 15 L. J. N. S. 31.

(*u*) A toll is defined to be a tax paid for any liberty or privilege. It is the *title* to the toll that must come in question to oust jurisdiction: *Hunt* v. *The Great Northern Railway Company*, 10 C. B. 904, *per* Jervis, C. J. and Williams, J. The charges of a railway company for conveyance of goods is not within this part of the section: *Ib.* In a suit against a collector of the trustees of a harbour company to recover back a sum paid as a duty imposed by Statute on vessels passing within certain limits, the question was raised as to the right of the trustees to take a second rate on vessels re-passing as well as passing, it was *held* that the title to a toll came in question: *Reg.* v. *Everitt*, 1 E. & B. 273. The right to take toll under an Act of Parliament must clearly appear, and any doubt is given in favour of the public: *Stourbridge Canal Company* v. *Wheeley*, 2 B. & Ad. 792. A mere claim of right to tolls without shewing that it is a *bona fide* claim would not oust jurisdiction of the Court: *Rex* v. *Hampshire Justices*, 3 Dowl. 47. There can be no toll for the mere use of a public way: *Lawrence* v. *Hitch*, L. R. 3 Q. B. 521. A toll may vary from time to time, according to the value of money, and be good: *Ib.* Where toll is authorised to be taken by Act of Parliament, the rates need not be uniform unless there is an enactment to that effect: *Hungerford Market Company* v. *City Steamboat Company*, 3 E. & B. 365.

(*v*) It is submitted that of the various meanings attached to the word "custom," it here means a right established by immemorial usage as a custom: *Lloyd* v. *Jones*, 6 C. B. 81.

A claim of custom is triable under the English County Court Act (*Davis* v. *Walton*, 8 Ex. 153); but the words of our Statute exclude the right to try such in the Division Court.

"Franchise" is a right reserved to the people by the constitution, or a certain privilege or exemption bestowed by the Government: Worcester.

(*w*) It is difficult to give a meaning to these words. It is submitted, however, that jurisdiction is excluded where there is any *disputed claim* under a "devise, bequest or limitation," under any will or settlement. A claim to a residuary bequest would be within this part of the section: *Pears* v. *Wilson*, 6 Ex. 833. Under this part of the clause generally, see *Hewston* v. *Phillips*, 11 Ex. 699; *Beard* v. *Hine*, 10 W. R. 45; *Longbottom* v. *Longbottom*, 8 Ex. 203; *Ratcliffe* v. *Winch*, 22 L. J. Chan. 915; *Neighbour* v. *Brown*, 26 L. J. Ch. 670; Addison on Torts, 2nd Ed. cap. 23.

6. Actions for malicious prosecution, (*x*) libel, slander, criminal conversation, seduction or breach of promise of marriage; or

7. Actions against a Justice of the Peace for anything done by him in the execution of his office, if he objects thereto. (*y*) C. S. U. C. c. 19, s. 54.

Cases in which the Court has jurisdiction.

54. The Judge of every Division Court may hold plea of, and may hear and determine in a summary way, for or against persons, bodies corporate or otherwise: (*z*)

(*x*) "To put the Criminal Law in force maliciously, and without any reasonable or probable cause, is wrongful; and if thereby another is prejudiced in property or person there is that conjunction of injury and loss which is the foundation of an action:" Addison on Torts. If the particulars of a claim should shew good cause of action for false imprisonment, the proceedings in Division Court would not be restrained, because the Judge, in giving judgment, used expressions indicating that he gave damages for malicious prosecution: *Chivers* v. *Savage*, 5 E. & B. 697. Should the particulars be framed so as substantially to shew a case of malicious prosecution the Court cannot entertain it: *Jones* v. *Currey*, 2 L. M. & P. 474. In *Hunt* v. *North Staffordshire Railway Company*, 2 H. & N. 451, the particulars were as follows: "£17 12*s.* 6*d.*, being for moneys paid for loss of time and attendance before the magistrates, upon a complaint and information of *W.* on behalf of the defendants." The plaintiff had been summoned before the magistrates for riding in a railway carriage without having paid his fare, and the summons was dismissed with costs, and the action was brought to recover the expenses occasioned by such summons. It was *held* that the action was, in substance, for malicious prosecution, and was beyond the jurisdiction. A count that the defendant caused plaintiff to be arrested and imprisoned without reasonable or probable cause, on a false and malicious charge of felony, is a count in trespass for assault and false imprisonment, and not a count for malicious prosecution: *Brandt* v. *Craddock*, 27 L. J. Ex. 314 (Amer. reprint 3 H. & N. 958.) The defendant's wife gave the plaintiff into the charge of a constable on an unfounded charge of felony. The defendant attended at the police station, and, after having been cautioned by the inspector on duty that he would not incur the responsibility of detaining the plaintiff unless the defendant distinctly charged him with felony and signed the charge sheet; the defendant signed the charge sheet, and the plaintiff was detained, and taken next morning before the magistrates, who discharged him. The plaintiff took out a plaint in a County Court for false imprisonment, accompanying it with a notice, whereby he expressly disclaimed any cause of action, in respect of the malicious prosecution. The Judge, erroneously treating the signing of the charge sheet as the commencement of a malicious prosecution, ruled that the whole was one continuous transaction, and that the false imprisonment could not be separated from the rest, and consequently, that he had no jurisdiction and non-suited the plaintiff. The Court of Common Pleas, on appeal, directed a new trial: *Austin* v. *Dowling*, L. R. 5 C. P. 534.

(*y*) If a magistrate should be sued in the Division Court for an act done in the execution of his office, and has given notice of his objection thereto, he cannot remove the suit by *certiorari* into a Superior Court: *Weston* v. *Smegd*, 1 H. & N. 703. At page 705 Pollock C. B. is reported to have said: "The notice given put an end to the proceedings in the County Court, and the plaintiff was in the same position as if the action had never been brought."

(*z*) "The general principle of law is, that as the law grants redress for all injuries and gives a remedy for every kind of right, so it is open to all kinds of

persons, and none are excluded from bringing an action:" Bac. Abr. Action, B. To this rule there are exceptions. As a general rule a person convicted of felony cannot sue until he obtains a pardon or suffer his punishment: Dicey on Parties to Action, 2; *Whitaker* v. *Wisbey*, 12 C. B. 44. An outlaw cannot sue so long as his outlawry lasts, nor can an alien enemy sue: Dicey, 3. There are only "two kinds of Common Law actions: one for injury to person or property, and the other for breach of contract. Now the ordinary case of a breach of contract is where both parties have agreed to do a certain thing, and one breaks the promise which he has made. But for a long time *implied contracts* have been admitted into the law where a transaction having taken place between the parties, *a state* of things has arisen in reference to it which was not contemplated by them, but is such that one party ought, in justice and fair dealing, to pay a certain sum of money to the other:" *per* Martin, B., in *Freeman* v. *Jeffries*, L. R. 4 Ex. 199. "An action on contract is an action brought for the nonperformance or breach of any contract or promise, whether expressed or implied, whether made by deed, simply in writing, or word of mouth:" Dicey, 8. "An action for tort is an action for a wrong independent of contract. * * * In other words, a wrong or a tort is a violation by one person of any of the rights possessed by another person, independently of any agreement with the wrongdoer; and an action for a wrong or a tort, is an action on account of the violation of or interference with such rights:" Dicey, 9. "Two things must concur for the maintenance of an action for tort, a right independently of any agreement with the defendant, and a violation or interference with such right: *Ib.* The chief differences between the two forms of action are these:

"No one can sue or be sued for the breach of a contract who is a stranger to the contract, or, as it is sometimes expressed, is not privy to the contract. * * * Any person, on the other hand, who is injured by a wrongful act, may bring an action for tort against the wrongdoer, even though the injury be an indirect one; as where a master is injured in consequence of an injury done to his servant:" Dicey, 10. In an action on contract, all the persons with whom the contract is (in the eye of the law) made, should join as plaintiffs, since *A.* cannot recover damages for the breach of a contract made with *A.* and *B.* In an action of tort a plaintiff may sue any or all of the wrongdoers. All persons jointly liable on contracts must be sued together (except as is provided for by section 77): Dicey, 11. In an action of tort no objection can be made to the non-joinder of a joint wrongdoer as defendant, but in actions of contract the non-joinder of a co-contractor is fatal (Dicey, 12) unless amended, if this is amendable, see Rule No. 105, *et seq.*

At Common Law a woman could not be sued on contracts made by her during coverture; but a married woman and infants were in general responsible for their torts: Dicey, 12 and 13. In this Province a married woman can render herself liable so as to affect her separate property by a contract made with reference to her separate estate, and when she does assume to contract, it is *presumed* that she does so with reference to her separate property; and at the trial it must be shewn that at the time of the transaction she had separate property, or that she traded separately from her husband: *Brown et al.* v. *Winning*, 43 U. C. R. 327; *Wagner* v. *Jefferson*, 37 U. C. R. 551; *Kerr et al.* v. *Stripp et al.* 40 U. C. R. 125; *Kerr* v. *Stripp*, 24 Grant 198; *Harrison* v. *Douglass*, 40 U. C. R. 410; *Meakin* v. *Samson, et al.* 28 C. P. 355; *Frazee et al.* v. *McFarland, et al.* 43 U. C. R. 281; *Darling* v. *Rice*, 1 App. Rep. 43; *Standard Bank* v. *Boulton*, 3 App. Rep. 93; *Lawson* v. *Laidlaw*, 3 App. Rep. 77; *Denham* v. *Brewster*, 28 C. P. 607. If the husband had an interest in the land as tenant by courtesy, at the time of the alleged contract, the wife cannot be rendered liable: *Brown et al.* v. *Winning*, 43 U. C. R. at page 332, and cases there cited. The married woman must have an interest in the property *at the time* the contract was made: *Lawson* v. *Laidlaw*, 3 App. Rep. 91. An infant is liable for his torts: *Burnard* v. *Haggis*, 14 C. B. N. S, 45. As the jurisdic-

tion of the Division Courts varies in contract and tort as to amount, it is necessary to keep clearly in view the distinguishing characteristics of the two actions. It is laid down, "that if a contract imposes a legal duty upon a person the neglect of that duty is a tort founded on contract, so that an action *ex-contractu* for the breach of contract, or an action *ex delicto* for the breach of duty, may be brought at the option of the plaintiff:" Addison on Torts, 3rd Ed. 13. An action against a common carrier on the custom of the realm has ever since (*Pozzi* v. *Shipton*, 8 A. & E. 963), until lately been considered strictly in tort; see also *Boorman* v. *Brown*, 3 Q. B. 516. The case of *Baylis* v. *Lintott*, L. R. 8, C. P. 345, was founded on a cause of action against a hackney carriage proprietor for not securely carrying certain luggage belonging to a person who had hired his carriage. The declaration alleged that in consideration that the plaintiff would, with her luggage, become a passenger in such carriage, and of certain reward to be paid by the plaintiff to the defendant in that behalf, the defendant promised to carry the plaintiff and her luggage safely; and that the defendant, not regarding his duty as hackney carriage proprietor, nor his said promise, did not safely carry the plaintiff's luggage, but so carelessly and negligently conducted himself that part of the luggage was lost. *Held*, that the action was founded on contract. The tendency of the Courts is to hold that damages resulting from a breach of duty, under contract, are the subject of an action *ex contractu: per* Bovill, C. J., at p. 348 of L. R. 8 C. P.; see also *Legge* v. *Tucker*, 1 H. & N. 500; *Tuttan* v. *Great Western Ry.* Co., 2 E. & E. 844; *Morgan* v. *Ravey*, 6 H. & N. 265; Bullen & Leake, 3rd Ed., 121; but see *Pontifex* v. *Midland Ry. Co.*, 3 Q. B. D. 23. Mr. Dicey in his valuable book, at page 20, says: "In spite of conflicting decisions the doctrine laid down by Sir J. Mansfield, C. J., is, it is submitted, in theory correct. Actions for tort founded on contract, though in form actions for tort are *in reality* actions for breach of contract; they owe their existence to the fact that for technical reasons (some of which still exist) declarations are often framed in tort where the real cause of action was the breach of a contract." By suing in tort, the plaintiff avoids the defence of set-off (Leake on Contracts, 48); but he cannot by so doing affect the substantial rights of the parties: *Alton* v. *Midland Railway Co.*, 19 C. B. N. S. 213; *Marshall* v. *York, Newcastle and Berwick R'y Co.*, 11 C. B. 655; *Martin* v. *Great Indian R'y Co*, L. R. 3 Ex. 9. Although there are no *forms* of action in Division Courts, yet, with a view to understand the rules as to parties, it is well to bear in mind the distinction between different forms. The nature of the different forms of actions are these:

Covenant lies where a party claims damages for a breach of covenant, *i. e.*, of a promise under seal.

Assumpsit lies where a party claims damages for a breach of simple contract, *i. e.*, a promise not under seal.

Trespass lies where a party claims damages for a trespass committed upon him, *i. e.*, for an injury of a *direct and immediate kind* committed on the person, or tangible and corporeal property of the plaintiff.

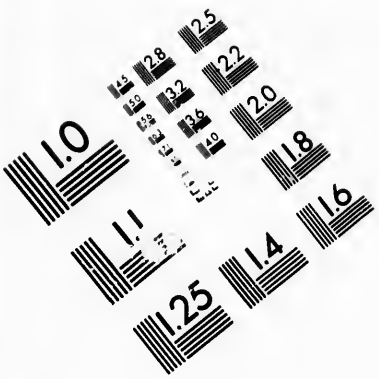
Case, or Trespass on the case, lies where a party claims damages for any wrong not included under the head of trespass.

Case includes under it the greater number of torts, *e. g.*, torts arising from negligence, fraud, &c.

As distinguished from trespass, it lies for an indirect as contrasted with a direct and immediate injury; but the distinction between the one form and the other is in many cases very fine, and there are instances wherein both or either trespass or case will lie.

Trover lies where the plaintiff sues for damages for the interference with his right to the possession of specific goods and chattels. Such interference is technically called "Conversion."

Detinue lies where the plaintiff claims to recover specific goods or chattels wrongfully detained by the defendant. This action differs in practice little from



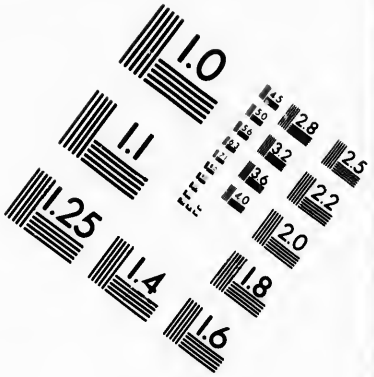


IMAGE EVALUATION
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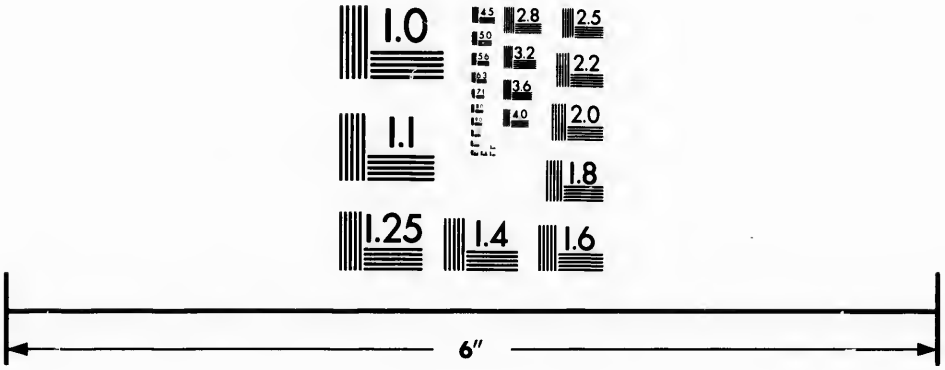

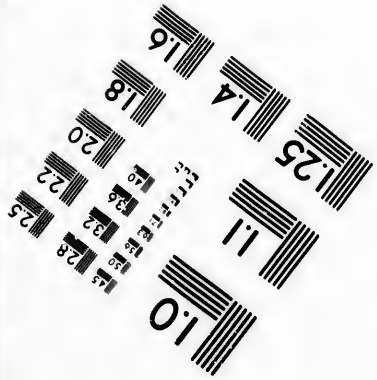

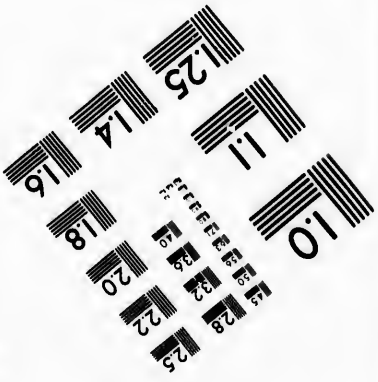

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Trover. The chief differences are, that a plaintiff can in an action for detinue obtain the return of the goods, and that the gist of detinue is the wrongful detainer of the goods and of trover, the wrongful dealing with them: Dicey, pages 24 and 25.

Replevin lies under our statute where, under the law of England, on the 5th December, 1859, it could be maintained for a wrongful distress, and also in cases where trespass to goods or trover could be maintained for a wrongful taking or detention: Rev. Stat. cap. 53, s. 2.

The following general rules are applicable to all actions:

1. That no action can be sustained where there is no infringement of a right.

2. That mere damage will not support an action: Dicey, 28. The rule applies to actions of contract; *Ib.* 39.

"Where one person has a legal and another an equitable interest in the same property, any action in respect of such property must be brought by the person who has the legal interest:" Dicey, 43. As the Administration of Justice Act has been *held* not to apply to Division Courts in certain cases: (*Willing* v. *Elliott*, R. & J.'s Digest, 1106); it is submitted that this rule must, when such rights exist, apply to such Courts: *Castelli* v. *Boddington*, 1 E. & B. 66, 879. As a rule in all actions for breaches of contract, if maintainable, some damages are presumed (Dicey, 52; Mayne on Damages, 3 Ed. p. 4); but not when damage is the essence of the action: Pages 5, 35, 409, 413, 416, and 478. Aliens have the right to sue in our Courts on contracts made or torts committed beyond the limits of the Province (Dicey, 55); but the law regulating such contracts must be that of the country where contract made, but the *procedure* must be according to our law: *Ib.* 56. In cases of tort there exists one cause of action according to the law of both countries: *The Halley* L. R. 2 P. C. 193. "A person who is wronged by another cannot, if the wrong amounts to a felony, bring an action against the wrongdoer until he has prosecuted him for felony:" Dicey, 64; *Ashby* v. *White*, 1 Smith's L. C. 6th Ed. 267; *Wellock* v. *Constantine*, 2 H. & C. 146. The rule does not prevent actions against others than the felon himself. Thus, if X. steals goods from *A.* and sells them to *Y.* who buys them without knowing they were stolen, *A.* may bring an action of trover against *Y.* although he has not prosecuted *X.*: *White* v. *Spettigue*, 13 M. & W. 603; *Wells* v. *Abrahams*, L. R. 7 Q. B. 554; *Osborn* v. *Gillett*, L. R. 8 Ex. 88. In an action against the thief, it appears he must plead the felony in order to raise such a defence; if not pleaded, the Judge is bound to try the case on the issues raised: *Wells* v. *Abrahams*, L. R. 7 Q. B. 554.

Another rule is, "that the same person cannot be both plaintiff and defendant:" Dicey, 65. This rule has the further application that where two or more persons must join as plaintiffs in an action, they cannot bring any action in which it would be necessary to make one of them defendant: *Ib.* At Common Law the right to bring an action could not be transferred or assigned: Dicey, 66. Choses in action are assignable in this Province by virtue of Rev. Stat. cap. 116, s. 6, *et seq.* A chose in action has been described as "a right to be asserted or property reducible into possession either by action at law or suit in equity," and this definition has been approved of in *Fleet* v. *Perrins*, L. R. 4 Q. B. 500, 505; see also L. R. 3 Q. B. 536. Under our statute the action *must* be brought in the name of the assignee (*Wellington* v. *Chard*, 22 C. P. 518), and the defendant can plead the plaintiff's assignment to another: *Ib.* It is sufficient to allege that the chose in action "was duly assigned in the manner required by the Act:" *Cousins* v. *Bullen*, 6 P. R. 71. The assignment must be absolute: *Hostrawser et al.* v. *Robinson*, 23 C. P. 350. A person can, under our statute, assign to his partner and himself a debt due to him individually: *Blair et al.* v. *Ellis*, 34 U. C. R. 466. The Act applies to assignments made before as well as since its passing: *Wallace* v. *Gilchrist*, 24 C. P. 40. An assignment cannot be made for the mere purpose of enabling the assignee to sue in his own name: *Wood* v. *McAlpine*, 1 App. Rep. 234. As to pleading assignment, see *O'Connor* v.

McNamee, 28 C. P. 141; see notes to sec. 68. The purchaser of a debt from an assignee in insolvency can sue for it in his own name: Insolvent Act of 1875, s. 69. So also, it is submitted, *must* the action be brought by the assignee after attachment or assignment in insolvency for the recovery of debts due the estate: *Sayer* v. *Dufaur*, 11 Q. B. 325; *Morgan* v. *Knight*, 15 C. B. N. S. 669; *Kitson* v. *Hardwick*, L. R. 7 C. P. 473, 477; *O'Connor* v. *McNamee*, 28 C. P. 141. Under either the Insolvent Act or the Rev. Stat., it is submitted that the assignee would take, subject to all equities between the original parties: *Gould* v. *Close*, 21 Grant, 273. Another rule is that "no person can be sued who has not infringed upon the right in respect of which the action is brought:" Dicey 73. Of course the right of action for damages in tort cannot be assigned: Dicey, 76. "No one can sue for breach of a contract who is not a party to the contract, or who does not derive rights from an original party to the contract:" Dicey, 78. For instance, *X* enters into a contract with *A*, and his non-performance of it indirectly injures *M*. *M* cannot, but *A* can, sue *X*: Dicey, 79; *Alton* v. *Midland Railway Company*, 19 C. B. N. S. 219. "The person to sue for the breach of a simple contract must be the person from whom the consideration for the promise moves:" Dicey, 81; *Smart* v. *Chell*, 7 Dowling, 785. In suing a public carrier for loss of goods, he at whose risk the goods are carried should bring the action. This is ordinarily the consignee, but may be the consignor: see Dicey, page 87, *et seq*.

"The person to sue for the breach of a contract by deed, is the person with whom the contract is expressed by the deed to be made, *i.e.*, the covenantee or his representative" (Dicey, 101); even though he did not execute it: *Pitman* v. *Woodbury*, 3 Ex. 4; *How* v. *Greek*, 3 H. & C. 391; *Toler* v. *Slater*, L. R. 3 Q. B. 42. "No one can sue on a covenant in an indenture, who is not mentioned among the parties to the indenture:" Dicey, 103. It is enough, however, if the class to which he belongs is sufficiently designated among the parties: *Isaacs* v. *Green*, L. R. 2 Ex. 352; *McLaren* v. *Baxter*, L. R. 2 C. P. 559; *Sunderland Insurance Company* v. *Kearney*, 16 Q. B. 925. "All the persons with whom a contract is made must join in an action for the breach of it:" Dicey, 104. One of two co-plaintiffs has the right to bring an action in the name of both; nor has the Court any power to interfere, unless the co-plaintiff's name be used not only against his will but fraudulently: *Emery* v. *Mucklow*, 10 Bing. 23. He may apply to the Court to have the proceedings stayed until he gets security for costs: *Laws* v. *Bott*, 16 M. & W. 300. He is not always entitled to such security: *Emery* v. *Mucklow*, 10 Bing 23. He may release or settle the action: *Crook* v. *Stephens*, 5 Bing. N. C. 688; *Johnson* v. *Holdsworth*, 4 Dowl. 63; *Herbert* v. *Piggott*, 2 C. & M. 384. Any one of several plaintiffs can give a release which is good and can be pleaded, unless it is fraudulent: *Rawstorne* v. *Gandell*, 15 M. & W. 304. If release fraudulent it will be set aside (*Jones* v. *Herbert*, 7 Taunt. 421); but a strong case must be made out: *Ib*; see further, *DePothonier* v. *DeMattos*, E. B. & E. 461.

"One and the same contract, whether it be a simple contract or a contract by deed, cannot be so framed as to give the promisees or covenantees the right to sue upon it both jointly and separately:" Dicey, 111, and cases there cited. Covenantors may make themselves by the same covenant *jointly as well as severally liable*, but they cannot by the same covenant give the covenantees *joint* as well as several rights of action: *Bradburne* v. *Botfield*, 14 M. & W. at page 573. As to the rule for interpreting whether covenant joint or joint and several: see Dicey, 113, *et seq*. As covenants which run with the land may be the subject of Division Court jurisdiction, we refer to Dicey on Parties to Action, page 127, note (*f*), which contains very full mention of them.

"The right of action on a contract made with several persons jointly passes on the death of each to the survivors; and on the death of the last to his representatives:" Dicey, 128.

"A contract entered into with a principal, through an agent, is in law made with the principal; and the principal, not the agent, is the proper person to sue for the breach of it:" Dicey, 130. Or he may sue on a contract made *in his name* without authority, if afterwards ratified, even after action: *Bird* v. *Brown*, 4 Ex. 786; *Ancona* v. *Marks*, 7 H. &. N. 686; *Coates* v. *Kelty, et al.* 27 U. C. R. 284; *Blake* v. *Walsh, et al.* 29 U. C. R., p. 545; *Ross* v. *Tyson*, 19 C. P. 294; *Westlok* v. *Brown*, 43 U. C. R. 402; *Watson* v. *Swann*, 11 C. B. N. S., 769; and the contract must be made on behalf of a person capable of being ascertained at the time it was made, and cannot, therefore, be ratified by a person not then in existence: *Watson* v. *Swann*, 11 C. B. N. S. at page 771, *per* Willes, J.; and *Kelner* v. *Baxter*, L. R. 2 C. P. 174; *Scott* v. *Ebury*, L. R. 2 C. P. 255; and especially *Spiller* v. *Paris Skating Rink Company*, 7 Ch. D. 368, and cases cited. It cannot be ratified in part: Dicey 133. Nor can an agent sue on a contract made by him as such, except in the following cases, in the first three of which he *must* sue in his own name: (1), where an agent is contracted with by deed in his own name; (2), where the agent is named as a party to a bill of exchange, &c.; and (3), where the right to sue upon a contract is by the terms or circumstances of it expressly restricted to the agent: Dicey, 134, 135. In the following cases either principal or agent may sue: (1), where the contract is made with the agent himself, *e. g.*, where the agent is treated as the actual party with whom the contract is made; (2), where the agent is the only known or ostensible principal, or where the agent has made a contract, not under seal, in his own name, for an undisclosed principal; (3), where an agent has made a contract in the subject-matter of which he has a special interest or property; and (4), where the agent has paid away money of the principals under circumstances which give a right to recover it back: Dicey, 134 to 140. A person who enters into contract in *reality* for himself, but apparently as agent of another, whom he does not name, can sue on the contract as principal: *Schmaltz* v. *Avery*, 16 Q. B., 655; but a person who contracts in reality for himself, but apparently as agent for another, whose name he gives, cannot sue on the contract as principal: Dicey, 144. A firm or unincorporated company cannot sue in its name as a firm or as a company, but must sue in the names of the individual members of the firm or company: Dicey, 148. Clerks should not in such cases issue the summons without having the names of all the members of the partnership first inserted. All who were partners or members of a company at the time when contract made must join in the action for breach of it: Dicey, 181. A dormant partner may, but need not be joined: Dicey, 151. A partner should not be joined in suing on contract made before he joined the firm: Dicey, 152. A partner would have to sue alone on contracts made with him on behalf of the firm, in the same cases in which an agent would have to sue in his name on contracts made by him on behalf of his principal: Dicey, 154. A corporation must sue in its corporate name (Dicey, 163); but cannot sue on contracts *ultra vires: Taylor* v. *Chichester Railway Company*, L. R. 2 Ex., page 379; judgment of Blackburn, J. same case, L. R. 4 H. L. 628. Co-executors or co-administrators must all join as plaintiffs: Dicey, 219. An executor renouncing should not be joined: page 220, Rev. Stat. cap. 46, s. 59 *Allen* v. *Parke*, 17 C. P. 105. On the death of a co-executor or co-administrator, his rights of action pass to the survivors, and ultimately to the last survivor: Dicey, 221. The executor of a sole or of a sole surviving executor represents the original testator; but the administrator of an executor, or the administrator of an administrator does not: Dicey, 221. No person can be sued for a breach of contract who is not a party to the contract: Dicey, 223. The person to be sued is the person who promises or allows credit to be given to him: Dicey, 225. The exceptions to the rules that joint contractors must all be sued are: where a co-contractor has become bankrupt, or where a claim is barred against one or more joint debtors and not against others; where co-contractor is resident out of the jurisdiction, (or in cases mentioned in section 77); where an action is brought against a firm,

some of which are nominal or dormant partners; or where a co-contractor is an infant or married woman: Dicey, 230, 233. An agent who, without having authority, enters into a contract on behalf of a principal, cannot himself be sued *on the contract*, but is liable otherwise (see *Godwin* v. *Francis*, L. R. 5 C. P. 295, and cases cited) except where his authority has expired, as for instance by death, without his knowledge: Dicey, 264. An infant cannot be sued on any contract made by him, except for "necessaries." This word is one of relative meaning: everything must depend on the infant's position and station in life. For cases on this point, see Dicey, 286; Roscoe's N. P. 13th Ed. 635; Rob. & Jos. Digest, 1722. It is doubtful if those can be necessaries with which an infant is already supplied: *Ryder* v. *Wombwell*, L. R. 4 Ex. 42; see *Archibald* v. *Flynn*, 32 U. C. R. 523; *Eastland* v. *Burchell*, 3 Q. B. D. 432. A father is as such under no legal liability to pay for necessaries supplied to his child. "In point of law, a father who gives no authority and enters into no contract, is no more liable for goods supplied to his son than a brother or an uncle, or a mere stranger would be. From the moral obligation a parent is under to provide for his children a jury are, not unnaturally, disposed to infer against him a liability in respect of claims upon his son on grounds which warrant no such inference in law:" *per* Abinger, C. B., in *Mortimore* v. *Wright*, 6 M. & W. 486. To render the father liable he must have contracted to be bound just the same as a stranger: Leake on Contracts, 27, 28; *Bazeley* v. *Forder*, L. R. 3 Q. B., 559. An adult cannot be sued on contracts made by him during infancy [not necessaries] unless ratified in writing after he attains 21 years of age; and no fresh consideration is required: *Williams* v. *Moor*, 11 M. & W. 256; *Rowe* v. *Hopwood*, L. R. 4 Q. B. 1. If one of several co-contractors is an infant and the others are adults, the latter alone must be sued: Dicey, 294. An executor or administrator must be sued in his representative character on all contracts made by deceased; but in his personal character on contracts made by himself: Dicey, 317, 318. All co-executors or co-administrators, who have administered, should be joined as defendants in an action: Dicey, 322. An executor *de son tort* may be sued jointly with a lawful executor, or they may each be sued separately; but an administrator cannot be sued jointly with an executor *de son tort*: Dicey, 323. Trover cannot be maintained unless the plaintiff has the right to *immediate* possession (*Bradley* v. *Copley*, 1 C. B. 685); but he may bring an action for damage done to a reversionary interest: Dicey, 367. Persons who have a separate interest, and sustain a joint damage, may sue either jointly or separately, and persons who have a joint interest must sue jointly for an injury to it: Dicey, 380. The right of action for a tort cannot be transferred or assigned: Dicey, 382.

A master cannot sue for mere injury to the servant, nor a servant for mere injury to the master: Dicey, 383. Partners must sue jointly for wrong to the firm, and all should join who were partners when wrong committed: Dicey, 384, 385. For *debts* due to an insolvent before insolvency, we have shewn that the right of action is vested in the assignee; but for injuries to his personal feelings, or reputation, the insolvent himself must sue: *Howard* v. *Crowther*, 8 M. & W. 604, *per* Abinger, C. B.; *White* v. *Elliott, et al.* 30 U. C. R. 253. An action for a personal wrong dies with the person: Broom's Legal Maxims, 4th Ed. 876; *Cameron* v. *Milloy*, 22 C. P. 331. The personal representatives of deceased can sue for injuries to his personal property, committed after his death: Dicey, 406. An owner is liable for damages done by an animal known to be dangerous: *Applebee* v. *Percy*, L. R. 9 C. P. 647, and cases there cited; also Roscoe's N. P. 739, 740. Knowledge is essential (*Cox* v. *Burbridge* 13, C. B. N. S. 430); and by the servant is knowledge of the master (*Baldwin* v. *Casella*, L. R. 7 Ex. 325); and slight evidence of knowlege is sufficient: *Applebee* v. *Percy*, *supra*. One, or any, or all of several joint wrongdoers may be sued, and there is no right of contribution between them: *Merryweather* v. *Nixan*, 2 Smith's L. C. 6th Ed. 481. If several are sued jointly in tort it is essential that the wrong complained of be joint: Dicey, 431; *Cornyton* v.

1. All personal actions (*a*) where the amount claimed does not exceed ~~forty~~ sixty dollars; and

Litheby, 2 Wms. Saund. 117, c. note *(g)*. Every person who interferes with the liberty of another is *prima facie* a trespasser, and must justify his act: *Brooks* v. *Hodgkinson*, 4 H. & N. 712, and cases cited. A master is liable for a wrongful act committed by a servant in the usual course of his employment, though there be no express command to do the act: Smith's Master and Servant, 2d Ed. 208: *Swire* v. *Francis*, 3 App. Cas. 106; *Erb* v. *Great Western Railway Company*, 3 App. Rep. A person ratifying a tort is liable as a wrongdoer from the beginning: *Bird* v. *Brown*, 4 Ex. 786; *Hilbery* v. *Hatton*, 2 H. & C. 822, and cases cited. See also on the same point, *Cronshaw* v. *Chapman*, 7 H. & N. 911; *Kennedy* v. *Patterson, et al.* 22 U. C. R. 556: *Slaght* v. *West et al.*, 25 U. C. R. 391. An employer of a contractor is not liable for contractor's servants: *Reedie* v. *L. & N. W. Railway Company*, 4 Ex. 244; but see *Johnston* v. *Hastie*, 30 U. C. R. 232: *Graham* v. *Toronto, Grey & Bruce Railway Company*, 23 C. P. 541. The contractee is liable when he personally interferes with the contractor's workmen (*Burgess* v. *Gray*, 1 C. B. 578); or when the act contracted to be done is in itself unlawful: *Peachey* v. *Rowland*, 13 C. B. 182; and *Ellis* v. *Sheffield Gas Company*, 2 E. & B. 767. A master is not liable for a mistake, in law, of a servant in doing that which by law he had no right to do: *Poulton* v. *London and South Western Railway Company*, L. R. 2 Q. B. 534. A servant or other agent is liable to the person wronged for acts of misfeasance or positive wrong in the course of his employment (*Swire* v. *Francis*, 3 App. Cas. 106); but not for acts of nonfeasance or mere omission: Story on Agency, ss. 308, 312. One or any, or all of the partners in a firm may be sued jointly for a wrong committed by the firm: Dicey, 468. A corporation can be sued for torts; *Limpus* v. *London General Omnibus Company*, 1 H. & C. 526; and for fraud: *Western Bank of Scotland* v. *Addie*, L. R. 1 Scotch App. 167. An infant may be sued for torts committed by him, but not for torts founded on contract: Dicey, 474 and 475. An action will not lie against an infant for representing himself of full age, and thereby getting credit: *Price* v. *Hewett*, 8 Ex. 146; *Liverpool Adelphi Loan Association* v. *Fairhurst*, 9 Ex. 422; *Bartlett* v. *Wells*, 1 B. & S. 836. A discharge in insolvency would be no bar to an action of tort: *Parker* v. *Crole*, 5 Bing. 63. See also Rob. & Jos. Digest, 38 *et seq.* Further, as to parties to actions *ex delicto*; see Addison on Torts, cap. 20; Rob. & Jos. Digest, 38, 1102.

(*a*) This means actions for tort as contradistinguished to the class of actions enumerated in the next sub-section. In the cases under sub-section 1, the jurisdiction is limited to $40; under this, to $100. We will give an epitome of the different kinds of action usually brought in Division Courts under this sub-section with one or two leading references under each head. A penalty under statute of not more than $40 is recoverable in Division Court, unless the statute declares, or it can be inferred that it shall only be recoverable in some other Court: *In re Apothecaries Co.* v. *Burt*, 5 Ex. 363. The *onus* is on the plaintiff of shewing all necessary facts to bring such a case within the statute: *Mason qui tam* v. *Mossop*, 29 U. C. R. 500. And generally the action must be brought within a year: *Ib.*, and *Dyer* v. *Best*, L. R. 1 Ex. 152. A person who keeps a dog or other animal accustomed to bite mankind, with knowledge of its dangerous propensities, is liable for damage done by such animal; and very slight evidence is necessary now to establish such knowledge on the part of the owner: *Applebee* v. *Percy*, L. R. 9 C. P. 647. As soon as the owner knows of the animal's propensity he should destroy it or send it away (*McKone* v. *Wood*, 5 C. & P. 2); and notice of the propensity of the animal will not be a protection unless the person injured saw it: *Sarch* v. *Blackburn*, 4 C. & P. 300. Our statute has made the owner of a dog liable for killing or injuring sheep whether he knew of the dog's propensity or not: Rev. Stat. cap. 194, s. 16. The

remedy, if sought under that statute, must be before a Justice of the Peace (s. 12), it being the prescribed *forum: Hollis* v. *Marshall*, 2 H. & N. 755; *Reg.* v. *Brodhurst*, 32 L. J. M. C. 168. A person who *harbours* a dangerous animal is liable: Addison on Torts, 2nd Ed. 158, 177; *May* v. *Burdett*, 9 Q. B. 110. A promise afterwards to make compensation is only slight evidence against a defendant: Addison, 178, 179; *Thomas* v. *Morgan*, 2 C. M. & R. 502. A tenant's trade or domestic fixtures are removable without giving a cause of action: Addison, 202, *et seq.* A person who puts out fire on his own premises, that may spread and injure the property of his neighbour, is bound to exercise due, but not extraordinary caution: *Buchanan* v. *Young et al.*, 23 C. P. 101; see also *Coghlan* v. *City of Ottawa*, 1 App. Rep. at page 60; *Clark* v. *Chambers*, 3 Q B. D. 327. One who collects water or anything else of a dangerous nature on his land, in a manner inconsistent with its natural course or state, is liable for damages should it escape: *Fletcher* v. *Rylands*, L. R. 3 H. L. 330; *Humphries* v. *Cousins*, 2 C. P. D. 239, and cases there cited. Every entry upon land in the possession or occupation of another constitutes a trespass, and is actionable unless the act can be justified: Addison on Torts, 220, cap. 6, sec. 1. An entry under landlord's distress warrant by breaking through a window, or in any other such way, is a trespass *ab initio: Attack* v. *Bramwell*, 3 B. & S. 520. As to trespasses by cattle and domestic animals, see Addison on Torts, 222, *et seq.*, cap. 6, sec. 1. Trespass to personalty consists in one person meddling "with the goods and chattels of another, either by laying hold of, removing, or carrying away inanimate things, or by striking, chasing or driving cattle, sheep, and domestic animals in which the owner has a valuable property:" Addison 267, cap. 7, sec. 1. A person who lawfully obtains possession of goods, but unlawfully withholds them against the will of the owner, without lawful cause, is guilty of conversion and is liable in Trover. As to this form of action generally, see Roscoe's N. P. 13th Ed. 928, *et seq.*; Addison on Torts, 2nd Ed. 269, *et seq.*; and *Lovekin* v. *Podger*, 26 U. C. R. 156; Rob. & Jos. Digest, "Trover." Lien is the right of one man to retain that which is in his possession belonging to another, until certain demands of him, the person in possession, are satisfied; it gives no right of action in the chattel; and is either *particular*, that is for some charge growing out of or connected with the identical thing; or *general*, that is a right to retain for a general demand: Wharton, 443. If a person having a lien claim goods as his own, his lien is at an end, and he is liable for a conversion: *Weeks* v. *Goode*, 6 C. B. N. S. 367. The omission to mention a lien when goods demanded is not a waiver of it, and if the person who has possession claims a right to detain them in respect of two separate sums claimed to be due to him, and he has a lien only in respect of one of these sums, his refusal is no evidence of a conversion, unless the sum in respect to which lien exists is tendered: Addison on Torts, 279. Where a party claims to detain goods upon two causes of lien in such way as to dispense with tender of either, he is guilty of conversion unless he can sustain both: *Kerford* v. *Mondel*, 28 L. J. Ex. 303; same case, 5 H. & N. 931, Amer. Ed. Sale of goods puts an end to lien: *White* v. *Spettigue*, 13 M. & W. 608; *Gurr* v. *Cuthbert*, 12 L. J. Ex. 309; *Mulliner* v. *Florence*, 3 Q. B. D. 484. A sale for unpaid purchase money is not a conversion: *Milgate* v. *Kibble*, 3 M. & G. 100. The finder of a chattel can maintain trover against any one but the true owner: *Bridges* v. *Hawkesworth*, 21 L. J. Q. B. 75. The title to game, as well as birds or other animals, is generally in the owner of the land where killed: *Rigg* v. *Lonsdale*, 1 H. & N. 923; but see *Blades* v. *Higgs*, 12 L. T. N. S. 615 (H. L). In England a title to a chattel is often acquired by purchase in market overt. Such is not the law in this Province. A purchaser of a chattel at Sheriff's or Bailiff's sale only gets such title to it as the execution debtor had, and without any warranty of title, unless expressly made: *Chapman* v. *Speller*, 14 Q. B. 621; *Morley* v. *Attenborough*, 3 Ex. 500. When a bill or note has been proved to have been stolen or lost, or to have

been obtained by fraud, this affords a presumption that the thief or the finder, or the fraudulent possessor of the security, would dispose of it, and would place it in the hands of another to sue on it. Such proof on the part of the defendant casts upon the plaintiff the burthen of shewing that he gave value for the note: *Bailey* v. *Bidwell*, 13 M. & W. 73. So also, if note given by a man in fraud of his partners, and transferred: *Hogg* v. *Skeen*, 18 C. B. N. S. 426. The right of action for trespass or trover to goods after insolvency is in the Assignee: Insolvent Act, 1875, s. 16; *Sayer* v. *Dufaur*, 11 Q. B. 325. A judgment in trover or detinue only *when satisfied* vests the property in the defendant (*Brinsmead* v. *Harrison*, L. R. 6 C. P. 584, in Ex. Chamb. L. R. 7 C. P. 547, and *ex parte Drake*, 5 Chan. D. 866; though a judgment against *one* of several joint tort feasors is a bar to an action against the others for the same cause, notwithstanding such judgment remains unsatisfied: *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547. And a judgment in a Division Court would be an estoppel in any other Court: *Flitters* v. *Allfrey*, L. R. 10 C. P. 29: *Austin* v. *Mills*, 9 Ex. 288. If goods are sold by a trespasser the owner can either sue in trespass or waive it, and sue for the purchase money: *Neate* v. *Harding*, 6 Ex. 349. An owner of a chattel taken by one who has no right to it, and who refuses to give it up on demand, can use force sufficient to enable him to retake his property: *Blades* v. *Higgs*, 10 C. B. N. S. 713. As to the action for conversion, see further: Addison on Torts, 2nd Ed. 304. Where chattels have lawfully come into the hands of a person, a demand of the property and a refusal to deliver it up are necessary to prove: *Burroughes* v. *Bayne*, 5 H. & N. 296; Roscoe's N. P. Evidence, 13th Ed. 947. A temporary interference with chattels is not sufficient; it must appear that the owner has been entirely deprived of the use of them: *England* v. *Cowley*, L. R. 8 Ex. 126, 130; *Hiort* v. *Bott*, L. R. 9 Ex. 86. Though goods purchased, yet, if vendee not entitled to *immediate* possession, trover will not lie: *Lord* v. *Price*, L. R. 9 Ex. 54. Where goods are stolen, trover lies against any one but the thief, without the latter being first convicted: *Wells* v. *Abrahams*, L. R. 7 Q. B. 554; *Osborn* v. *Gillett*, L. R. 8 Ex. 88. A Bailiff, after seizure under execution, would have a right to maintain trover: Watson on Sheriff, 2nd Ed. 302; *Ex parte Williams*, L. R. 7 Chy. 138. Evidence of possession is sufficient against a wrong doer: *Jefferies* v. *Great Western Railway Company*, 5 E. & B. 802; *Bourne* v. *Fosbrooke*, 18 C. B. N. S. 515; *Page* v. *Cowasjee Eduljee*, L. R. 1 P. C. 127, 145. In conversion of goods, the general rule is that the damages should be the value of the thing converted at the time of conversion and interest (*Leslie et al.* v. *Canada Central Railway Company*, 44 U. C. R. 21); and proof of a *bona fide* sale to a solvent customer is evidence on which a Judge or Jury should act: *France* v. *Gaudet*, L. R. 6 Q. B. 199, 204; Mayne on Damages, 339, *et seq.*; Addison on Torts, cap. 21. Where a defendant will not produce the article, it will be presumed against him to be of the greatest value that an article of that species can be: Mayne on Damages, 3rd Ed. 346. As to special damage, see Mayne 349, 350; Roscoe's N. P. 13th Ed. 954. Where a person, even with a limited interest in goods sues a stranger, he has a right to recover their full value (*Swire* v. *Leach*, 18 C. B. N. S. 479); but if the defendant has an interest in the goods, the plaintiff can only recover to the extent of his interest: *Johnson* v. *Stear*, 15 C. B. N. S. 330; *Halliday* v. *Holgate*, L. R. 3 Ex. 299, 301; *Long* v. *Monck et al.*, 22 C. P. 387. Damages may be given in the nature of interest in trover or trespass to goods: Rev. Stat. cap. 50, sec. 268. As to actions of trespass, and for injuries from negligence, and the negligent management of chattels, see Addison on Torts, cap. 8; Saunders on Negligence, cap. 1. As to negligence on the part of bailors and bailees, see Addison on Torts, cap. 9; Saunders, 165. As to negligence on the part of common carriers, and the form of action, see *Pontifex* v. *The Midland Railway Company*, 3 Q. B. D. 23. common ferrymen and innkeepers, see Addison, cap. 10. Of wrongful distress, distress for rent, and distress damage feasant, see Addison cap. 11. As to

2. All claims and demands of debt, account or breach of contract, or covenant or money demand, (*b*) whether payable in money or otherwise, where the amount or balance claimed does not exceed one hundred dollars (41 Vic. c. 8, s. 6, s.s. 2); and except in cases in which a jury is legally demanded by a party as hereinafter provided, the Judge shall be sole Judge in all actions brought in such Division Courts, and shall determine all questions of law and fact in relation thereto, and he may make such orders, judgments or decrees thereupon, as appear to him just and agreeable to equity and good conscience, and every such order, judgment and decree, shall be final and conclusive between the parties. C. S. U. C. c. 19, s. 55.

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actions for assault and battery and wrongful imprisonment, see Addison, cap. 12. As to actions for malicious arrest, see Addison, cap. 13. Of trespass in execution of void or irregular process, and the responsibility of Judges and ministerial officers of justice, and parties setting them in motion, see Addison, cap. 14. As to trespasses and injuries committed in execution of warrants and order of Justices, and the responsibility of Magistrates, Constables and their assistants, and parties setting them in motion, see Addison, cap. 15. As to injuries from the exercise of statutory powers, see Addison, cap. 16. As to fraudulent misrepresentation and deceit, see Addison, cap. 18. An action of detinue is a personal action within this sub-section (*Taylor* v. *Addyman*, 13 C. B. 309; *Bryant* v. *Herbert*, 3 C. P. D. 389), and so is replevin: *Lucas* v. *Elliott*, 9 U. C. L. J. 147. As to limitations of actions *ex delicto*, see Addison, cap. 21, sec. 1.

(*b*) It is submitted that this means all actions *ex contractu*, whether founded upon specialty or simple contract debts, and whether the damages are liquidated or not: *Morris* v. *Cameron*, 12 C. P. 422.

In all contracts there must be a *concurrence of intention:* Benjamin on Sales, 2d Ed. 33; *McIntosh* v. *Brill*, 20 C. P. 426; *Bickford* v. *G. W. R. Co.*, 28 C. P. 516, and cases there cited; Roscoe's N. P. 13th Ed. 494.

Parol, or simple contracts, are those "which are either made by word of mouth, or are inferred from the silent language of men's conduct and actions, or are put into writing and signed by the parties to them; but are not sealed and delivered, and cannot be enforced, unless they are founded upon some good or valuable consideration:" Addison on Contracts, 7th Ed. p. 2. Specialty contracts, or contracts made by deed, are those put "in writing, sealed and delivered, by the parties to them:" Addison, 17.

It is proposed to refer to the different forms of action which arise under these two heads, and which most frequently become the subject of litigation in Division Courts.

Goods sold and delivered.—The plaintiff must prove three things: the contract of sale, the delivery of the goods according to the contract, and the value of the price of the goods delivered: see Roscoe's N. P. 13th Ed. 494, 521; Bullen & Leake, title, "Goods sold and delivered;" Rob. & Jos. Digest, 2698; Addison on Contracts, title, "Sale of goods and chattels;" Fisher's Digest, 7570.

Goods bargained and sold.—On a contract of sale of goods the obligations of the seller are: 1, to deliver, or preserve for delivery, to the buyer; 2, to per-

form warranties, express or implied; 3, neither wilfully to misrepresent nor fraudulently to conceal anything relating to the thing sold; and the obligations of the buyer are: 1, to accept the article sold; and 2, to pay the price: Roscoe, 13th Ed. 493, *et seq.* The property passes if the intention of the parties is that it should pass: *Stevenson et al.* v. *Rice*, 24 C. P. 245; *Gleason* v. *Knapp*, 26 C. P. 553. At Common Law a sale of chattels was good, though the bargain was by parol; but by the 17th sec. of the Statute of Frauds, it is enacted that "No contract for the sale of any goods, wares and merchandises, for the price of £10 sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." In this Province this section applies to sales of goods, of the value of $40 and upwards: Rev. Stat. cap. 117, s. 11. For the cases on this form of action see Roscoe's N. P. 13th Ed. 493, *et seq.*; Rob. & Jos. Digest, title, "Sale of goods," at page 573: Addison on Contracts, 7th Ed., title, "Sale of goods and chattels;" Bullen & Leake, title, "Goods bargained and sold:" Benjamin on Sales, 2nd Ed. 72 to 142 inclusive; Fisher's Digest, 7570; L. R. Digest, 2369.

Money lent.—The plaintiff will have to prove the loan of the money. It is not sufficient, merely, to prove the payment of money to the defendant, for in such case the presumption is that the money is paid in liquidation of an antecedent debt; but if the plaintiff can shew any money transactions between him and the defendant, from which a loan may be inferred, or any application by the defendant to borrow money at the time, this, coupled with the payment, will be evidence of a loan: *Welch* v. *Seaborn*, 1 Stark, 474; *Cary* v. *Gerrish*, 4 Esp. 9; Roscoe's N. P. 13th Ed. 565; Addison on Contracts, title, "Borrowing and lending;" Rob. and Jos. Digest, title, "Money counts;" Bullen & Leake, title, "Money lent;" Fisher's Digest, 5890; L. R. Digest, 1783.

Money paid.—In order to maintain this action the plaintiff must, if denied, prove: 1, the payment of the money by the plaintiff; 2, that it was paid at the request of the defendant, and to his use: see Roscoe's N. P. 13th Ed. 559; Bullen & Leake, and Addison on Contracts, title, "Money paid;" Fisher's Digest, 5894; L. R. Digest, 1783; Rob. & Jos. Digest, title, "Money counts."

Money had and received.—This is the most comprehensive form of action of all the money counts: see Roscoe's N. P. 566, 13th Ed.; Addison on Contracts, and Bullen & Leake, title, "Money had and received;" Fisher's Digest, 5903. Money is not recoverable back simply because paid under protest: *Street* v. *The Corporation of Simcoe*, 12 C. P. 292; *Benjamin* v. *The Corporation of Elgin*, 26 U. C. R. page 664, and cases there cited. It must be paid under circumstances amounting to oppression, imposition, extortion, deceit or fraud: Addison on Contracts, 7th Ed. 1063; Rob. & Jos Digest, title, "Money counts;" L. R. Digest, 1783.

Interest.—See Roscoe's N. P. 13th Ed. 584; Rob. & Jos. Digest, 1884; Fisher's Digest, 4956, and notes to section 106 of this Act; Addison on Contracts, and Bullen & Leake, title, "Interest;" L. R. Digest, 1495; Rob. & Jos. Digest, 1883.

Account stated.—In order to recover in this form of action, the plaintiff must prove an *absolute* acknowledgment by the defendant of his claim. A qualified acknowledgment is not sufficient: Roscoe's N. P. 13th Ed. 588; Bullen & Leake and Addison on Contracts, title, "Account stated;" Rob. & Jos. Digest, "Money counts;" Fisher's Digest, 5938. To support the claim there must be an antecedent and subsisting debt between the parties: *Toms et al.* v. *Sills*, 29 U. C. R. 497; see *Buck* v. *Hurst*, L. R. 1 C. P. 297; L. R. Digest, 28

Work and materials.—In an action for work done, the plaintiff must prove: 1, The contract, express or implied; 2, the performance of the work and supply of materials, if any; and 3 the value, if the remuneration is not ascertained by

the contract: Roscoe's N. P. 13th Ed. 551; Bullen & Leake and Addison on Contracts, titles, "Work done," and "Work and services;" Rob. & Jos. Digest, title, "Work and labour;" L. R. Digest, 3021.

On an award.—In an action on an award the plaintiff must prove the submission and award, and the performance by himself of any conditions precedent: Roscoe's N. P. 13th Ed. 470. If the submission should be by mutual bonds, then in action *on the award* the execution of both bonds must be proved: *Ferrer* v. *Owen*, 7 B. & C. 427; *Brazier* v. *Jones*, 8 B. & C. 124, Rob. & Jos. Digest, 114, *et seq.*; Addison on Contracts, and Bullen & Leake, title, "Arbitration;" Russell on Awards, 4th Ed. 498, and title, "Action;" L. R. Digest, 200.

On an Attorney's bill of costs.—The plaintiff must prove: 1, His retainer as attorney by the defendant, which may be done by shewing either an express retainer, or that the defendant attended at his office and gave directions, or in other ways recognized his employment; 2, That the business was done, which may be proved by a clerk or other agent, who can speak to the existence of the cause or the business in respect of which the charges are made, and can prove the principal items: Roscoe's N. P. 13th Ed. 473. If the work charged for was *entirely* useless to the defendant through the negligence of the Attorney, the latter cannot recover anything: *Templer* v. *McLachlan*, 2 N. R. 136; *Robinson* v. *Emanuel*, L. R. 9 C. P. 415; Rob. & Jos. Digest, 322; Arch. Pract., title, "Attorneys, their remedies for their bills;" L. R. Digest, 2530. The bill does not carry interest during the pendency of the suit or proceeding: *Lyddon* v. *Moss*, 5 U. C. L. J. 239.

The defence of non-delivery of a signed bill for one month before action is a statutory defence, and notice of it must be given: 7 U. C. L. J. 135, 136; see also notes to section 92.

Bailments.—For action under this head, see Bullen & Leake, titles, "Bailment," "Carrier" and "Livery Stable Keeper;" Rob. & Jos. Digest, 368; Addison on Contracts, titles, "Bailment for Hire," and "Bailment without Reward." The increase generally belongs to the bailor: *Dillaree* v. *Doyle*, 43 U. C. R. 442; Fisher's Digest, 566; Roscoe's N. P. 13th Ed. 615.

Agistment of cattle.—See Bullen & Leake, title, "Agistment;" Addison on Contracts, "Agisters."

Bills of exchange and promissory notes.—For actions on these, see Bullen & Leake, under this title; Roscoe's N. P. 13th Ed. 350, *et seq.*; Rob. & Jos. Digest, 475; Addison on Contracts, under title, "Bill of Exchange;" Byles on Bills; Story on Promissory Notes.

Cheques.—In respect to actions on cheques, see last paragraph.

Bonds.—For action on bond, see Bullen & Leake and Chitty's Precedents in Pleading, title, "Bond;" Roscoe's N. P. 13th Ed., same title; Addison on Contracts, title "Bonds;" Rob. & Jos. Digest, 598; L. R. Digest, 340; notes to section 56.

Board and lodging.—A contract for board and lodging does not require to be in writing: *Wright* v. *Stavert*, 2 E. & E. 721. Under title of "Board and Lodging," see Bullen & Leake; Chitty's Prec.; Addison on Contracts; Roscoe's N. P.

Carriers.—See Bullen & Leake; Chitty's Prec.; Addison on Contracts; Addison on Torts; Roscoe's N. P.; Taylor on Evidence; Saunders on Negligence; Campbell on Negligence, under the title "Carriers;" Rob. & Jos. Digest, 634; Fisher's Digest, 1409; L. R. Digest, 438.

Calls for stock.—In this action, see Bullen & Leake, titles, "Calls" and "Company;" Roscoe's N. P., "Joint Stock Company;" Addison on Contracts, "Calls;" Rob. & Jos. Digest, "Corporations;" Fisher's Digest, 7151 and 9686.

Forbearance to sue.—The forbearance of an action commenced for a *bona fide* claim is a sufficient consideration for a promise, as the forbearing a suit instituted to try a doubtful question of law; but forbearing a suit in which the

plaintiff had no cause of action, and *knew* it, will not support a promise: *Wade* v. *Simeon*, 2 C. B. 548; *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449; *Macklin* v. *Kerr et al.*, 27 C. P. 47; Addison on Contracts, title, "Forbearance."

Guarantees.—A guarantee is a contract to answer for the payment "of a debt or performance of a duty by another person:" Roscoe's N. P. 13th Ed. 455; see also Addison on Contracts, title, "Guarantee;" Rob. & Jos. Digest, 1628 De Colyar on Guarantees; L. R. Digest, 1389; Fisher's Digest, 4205. The liability of the principal debtor must continue: *Poucher* v. *Treuhey*, 37 U. C. R. 367, and cases cited. A guarantee that a promissory note made by another will be paid at maturity is within the 4th section of the Statute of Frauds, and must be in writing: *Wamboldt* v. *Foote et al.*, 2 App. Rep. 579. As to the construction of guarantee for future and past debts, see *Morrell* v. *Cowan*, 7 Ch. D. 151, and cases cited.

Hire of goods.—One who hires goods and chattels, and negligently uses them, is liable for damage: Bullen & Leake, 2nd Ed. 146; see Bailment, *supra*, and notes thereto.

Indemnities.—For actions brought on indemnities, see "guarantee," *supra*, and authorities there noted.

Landlord and tenant.—In actions between landlord and tenant for rent, use and occupation, &c., see Roscoe's N. P., title, "Rent," "Landlord," "Use and Occupation:" Rob. & Jos. Digest, 2008; Fisher's Digest, 5164; Woodfall's Landlord and Tenant: Addison on Contracts, title, "Landlord and Tenant."

Liquidated damages.—See Bullen & Leake and Chitty's Prec., and Addison on Contracts, under above title; *McPhee* v. *Wilson*, 25 U. C. R. 169; also cases at 23 C. P. 195, 32 U. C. R. 590, 33 U. C. R. 520, 38 U. C. R. 35 and 333, 17 C. P. 139, L. R. 3 C. P. 161, 4 H. & N. 506, L. R. 8 C. P. 70, L. R. 2 Eq. 221, L. R. 9 C. P. 114 and 115; Roscoe's N. P. 13th Ed. 327.

Medical attendance.—See Bullen & Leake under this head; also Rev. Stat. cap. 142. See notes to section 92.

Replevin bond.—For actions on, see Bullen & Leake, Chitty's Prec., under above title; Roscoe's N. P. 711, and section 56 and cases noted.

Reward.—In action for reward offered, see Bullen & Leake and Chitty's Prec., title, "Reward;" Addison on Contracts, 7th Ed. pp. 8, 657; *Turner* v. *Walker*, L. R. 1 Q. B. 641; L. R. 2 Q. B. 301 (Ex. Chamb).

Witness.—An action can be maintained by a witness against the party that subpœnaed him for his expenses (*Hale* v. *Bates*, E. B. & E. 575); and if paid his fees and does not attend, or the cause is settled and subpœna not acted upon, the money is recoverable back as money had and received: *Martin* v. *Andrews*, 7 E. & B. 1.

Warranty.—"A warranty in a sale of goods is not one of the essential elements of the contract, for a sale is none the less complete and perfect in the absence of a warranty; but it is a collateral undertaking, *forming part of the contract* by the agreement of the parties, express or implied. It follows, therefore, that antecedent representations made by the vendor as an *inducement* to the buyer, but not forming part of the contract when concluded, are not warranties. It is not indeed necessary that the representation, in order to constitute a warranty, should be simultaneous with the conclusion of the bargain; but only that it should be made during the course of the dealing which leads to the bargain, and should then enter into the bargain as part of it:" Benjamin on Sales, 2nd Ed. 497. A warranty given *after* the sale requires a new consideration: *Roscorla* v. *Thomas*, 3 Q. B. 234. No warranty of quality is implied by the mere fact of sale: *Hopkins* v. *Tanqueray*, 15 C. B. 130; but this is subject to some very important exceptions. There is, however, no exception where an existing specific chattel, inspected by the buyer, has been sold: *Parkinson* v. *Lee*, 2 East. 314; *Chanter* v. *Hopkins*, 4 M. & W. 369. Where a chattel is to be made or supplied to the order of a purchaser, there is an im-

plied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or for the particular purpose intended by the buyer, if that purpose be communicated to the vendor when the order is given: *Barr* v. *Gibson*, 3 M. & W. 390; *Josling* v. *Kingsford*, 13 C. B. N. S. 447; *Randall* v. *Newson*, 2 Q. B. D. 102. In a sale of goods by sample, the vendor warrants the quality of the bulk to be equal to the sample (*Heilbutt* v. *Hickson*, L. R. 7 C. P. 438; *Couston* v. *Chapman*, L. R. 2 Scotch App. 250); and if the goods are not up to the sample, the purchaser may refuse to accept them: *Ib.* He cannot accept part and refuse the rest; he must accept or refuse all or none of an entire lot: *Ib.* As to a sale of part of specific crop, see *Howell* v. *Coupland*, 1 Q. B. D. 258, and cases cited. Sometimes a warranty is implied from the usage of a particular trade: *Jones* v. *Bowden*, 4 Taunt. 847. In a sale of goods by description, and not inspected by the buyer, there is an implied warranty that they are saleable (*Jones* v. *Just*, L. R. 3 Q. B. 197; *Bigelow et al.* v. *Boxall*, 38 U. C. R. 452; but see *Ward* v. *Hobbs*, 3 Q. B. D. 150; *Francis* v. *Maas*, 3 Q. B. D. 341; *Saudys* v. *Small*, 3 Q. B. D. 449); but the warranty does not extend to necessary depreciation resulting from transit (*Bull* v. *Robison*, 10 Ex. 342); nor to the packages in which the merchandise is contained: *Gower* v. *Von Dedalzen*, 3 Bing. N. C. 717. Where an article is bought for a particular purpose known to the seller, and the buyer relies on the seller's skill, there is an implied warranty (*Bigge* v. *Parkinson*, 7 H. & N. 955; *Macfarlane* v. *Taylor*, L. R. 1 Scotch App. 245; but see *Snelgrove* v. *Bruce*, 16 C. P. 561); but where there is an express warranty, an implied warranty is excluded: *Dickson* v. *Zizinia*, 10 C. B. 602. Although goods sold by sample are not in general to be deemed as sold with an implied warranty, yet the facts and circumstances may justify the inference that an implied warranty is superadded to the contract: *Mody* v. *Gregson*, L. R. 4 Ex. 49. The existence of the thing sold is not properly an implied warranty but a condition: Benjamin on Sales, 2nd Ed. 62. The seller of provisions impliedly warrants them to be wholesome, or rather he incurs that responsibility by the old statutes: see Benjamin on Sales, 2nd Ed. 550; *Webb* v. *Knight*, 2 Q. B. D. 530.

It appears to be now established, that in every sale of goods not by a public officer there is an implied warranty of title: *Brown* v. *Cockburn, et al.*, 37 U. C. R. 592; *Wilson, et al.* v. *Mason*, 38 U. C. R., at p. 24. No particular form of words is necessary to create a warranty: Benjamin on Sales, 2nd Ed. 496, *et seq.* The test appears to be whether the vendor assumes to assert a *fact* of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case there is a warranty, in the latter not: Benjamin, 499; Addison on Contracts, 7th Ed. 500, *et seq.*; Oliphant on Horses, 113. The warranty of an agent entrusted to sell is that of the principal: Addison, 503; see *McDermott, et al.* v *Ireson*, 38 U. C. R. 1; *Howard* v. *Sheward*, L. R. 2 C. P. 148. "A general warranty does not usually extend to defects apparent on simple inspection requiring no skill to discover them, nor to defects known to the buyer. But the warranty may be so expressed as to protect the buyer against the consequences growing out of a patent defect:" Benjamin, 502.

Warranty of horses.—As horses are subject to secret maladies, it is best to take a warranty to provide against hidden defects, and a purchaser is not protected otherwise unless he can make out fraud: *Ormrod* v. *Huth*, 14 M. & W. 661; Oliphant on Horses, 113. The general rule is, that whatever the vendor represents, and which can reasonably be intended to form part of the bargain, is a warranty: Benjamin on Sales, 497; Oliphant, 113, 134. A sound price is not tantamount to a warranty: Oliphant, 114. A warranty of a horse is either general or qualified: *Ib.*; *Chapman* v. *Gwyther*, L. R. 1 Q. B. 463. The buyer of a horse should always take care to distinguish between a warranty and a representation: Oliphant, 115. If the vendor give a written warranty, that

must govern (*Ib.*); and it cannot be extended by implication: Oliphant, 116. When several horses are sold at an entire price and a warranty is given as to all, the contract of sale is entire, but the warranty is several: *Ib.* A warranty only extends to the state of the horse at the time of the sale, unless the warrantor *expressly* fixes some future period to which he undertakes to extend it: *Ib.* If a horse were sold as fit for a carriage, and he was not fit for that purpose, there would be a breach of warranty (*Chanter* v. *Hopkins*, 4 M. & W. 406); but unfitness must be clearly proved: Oliphant, 118. Though a horse is sold with a warranty, yet any *fraud* at the time of the sale will avoid the sale, though it is not any point included in the warranty (Oliphant, 119, 142 to 158 inclusive; *Steward* v. *Coesvelt*, 1 C. & P. 23; *Kennedy* v. *Panama, &c., Mail Company*, L. R. 2 Q. B., at page 587); but any immaterial representation proving untrue will not avoid the sale: *Ib.* As to the sale and warranty of a horse by an agent, see Oliphant, 120 to 127 inclusive; *Howard* v. *Sheward*, L. R. 2 C. P. 148. A general warranty of a horse does not cover *patent defects* obvious to the buyer (Oliphant, 127), or such as he knows of: page 129. In the case of breach of warranty of a horse, the buyer is neither bound to tender the horse nor give notice to the vendor of the defect (Oliphant, 159); nor is the seller bound to take back the horse unless it was so agreed (page 160), or unless the contract was executory only: *Street* v. *Blay*, 2 B. & Ad. 456; Oliphant, 160 to 162; Addison on Contracts, 7th Ed. 464, 504. A breach of warranty may be given in mitigation of damages in an action for the price: page 162. Where there is *fraud* the purchaser has a right to return the horse: Oliphant, 164. If there is an agreement that a horse is to be returned if unsound or unsuitable, the buyer must return him as soon as he discovers either: page 165. So also if he is unfit for a particular purpose: page 166. A mere verbal offer *after* the sale to take back the horse amounts to nothing: Oliphant, 166. If a horse should be sold subject to return, and not returned within the stipulated or a reasonable time, the sale would be complete: page 166. "Where a breach of warranty has taken place, it is prudent for the buyer in an ordinary case to tender the horse back to the seller *immediately* on discovering such breach, and so entitle himself to to be repaid the expenses he has been put to in keeping him; and if the seller receives him back there will be a mutual recission of the original contract": Oliphant, 167. Should the vendor not take back the horse he can be sold, but it should be to the best advantage: *Ib.* If the purchaser does not wish to tender the horse he should at once give notice of the defect: *Ib.* The seller, on receiving notice of a breach of warranty, should have the horse examined (page 168); and so should the purchaser. A breach of warranty is no answer to an action on a note for the price; but if an action be brought by the seller on the note, and *fraud* can be proved, that is an answer *in toto* to the action on the note, provided the purchaser repudiated the contract in time: Oliphant, 168; Byles on Bills, 9th Ed. 127; *Warwick* v. *Nairn*, 10 Ex. 762; *Sheffield Nickel Company* v. *Unwin*, 2 Q. B. D. 223; *Waddell et al.* v. *Jaynes*, 22 C. P. 212. What is "*unsoundness*" in a horse is difficult to define. Mr. Oliphant says, at page 66, "The rule as to unsoundness is, that if at the time of the sale the horse has any disease, which either actually does diminish the natural usefulness of the animal so as to make him less capable of work of any description, or which, in its ordinary progress, will diminish the natural usefulness of the animal; or if the horse has, either from disease (whether such disease be congenital or arises subsequently to its birth), or from accident undergone any alteration of structure, that either actually does at the time, or in its ordinary effects will, diminish the natural usefulness of the horse, such a horse is *unsound*." Temporary disease or accident is unsoundness: Oliphant, 69. "A vice is a bad habit, and a bad habit, to constitute a vice, must either be shewn in the temper of the horse, so as to make him dangerous or diminish his natural usefulness, or it must be a habit decidedly injurious to his health:" Oliphant, 69. For what are cases of *unsoundness* and *vice* coming within the usual warranty of horses, we particularly

55. Upon any contract for the payment of a sum certain in labour or in any kind of goods or commodities or in any other manner (*c*) than in money, the Judge, after the day has passed on which the goods or commodities ought to have been delivered or the labour or other thing performed, may give judgment for the amount in money as if the contract had been originally so expressed. C. S. U. C. c. 19, s. 56. Judge may order payment in money, although contract not for payment in money.

56. The said Division Courts shall also have jurisdiction in all actions of replevin, (*d*) where the value of the goods or other property or effects distrained, taken or detained, does not exceed the sum of ~~forty~~ sixty dollars, as provided in "*The Replevin Act.*" 53 V. c. 45, ss. 6 & 7. Jurisdiction in replevin. Rev. Stat. c. 53, s. 5

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refer to Oliphant on Horses, 64 to 108 inclusive; Addison on Contracts, title, "Warranty;" Fisher's Digest, 8557; L. R. Digest, 2928; Rob. & Jos. Digest, "Warranty;" Roscoe's N. P., title, "Horse."

Payment.—"In general the party who pays money has a right to direct the application of it; but where money is paid to a creditor, generally, without any specific appropriation by the party paying, and the creditor has several demands against the party paying, he may apply the money paid to whichever of those demands he pleases. The appropriation by the debtor need not be express; it may be inferred from conduct or circumstances indicating his intention:" Roscoe's N. P. 13th Ed. 659, *et seq.*, and cases cited; Rob. & Jos. Digest, 2715; Addison on Contracts, "Payment;" *County of Frontenac* v. *Breden*, 17 Grant, 645.

Stoppage in transitu.—See *Wiley* v. *Smith*, 2 Sup. Court R. 1; Addison on Con., 7th Ed., pp. 476, 485; Benjamin on Sales, p. 689, *et seq.*

(*c*) The object of this section is to provide for a class of cases which frequently arise in the country. Agreements are frequently entered into by which, in the form of a promissory note, a person undertakes to pay a certain sum in some designated commodity. According to the well known principles of law, this would in the higher Courts have to be declared for and recovered upon as an ordinary simple contract debt, the consideration necessarily being alleged and proved. The section in question appears to place such a transaction, after the day for performance has expired, much in the same light as a liability upon a promissory note, and the Judge may view the transaction and give judgment as if the contract had originally been expressed as payable in money.

A demand would not be necessary by the plaintiff before the suit, it being incumbent on the defendant to offer to perform the work or otherwise fulfil his promise: *Teal* v. *Clarkson*, 4 O. S. 372; *Jones* v. *Gibbons*. 8 Ex. 920; *Crabtree* v. *Messersmith*, 19 Iowa R. 179; 1 Amer. Law Review, 538. Should the contract be to deliver wheat "F. O. B." it would be the duty of the buyer to provide cars for the shipment, and if not done there would be no breach: *Marshall* v. *Jamieson*, 42 U. C. R. 115.

(*d*) In what cases goods are repleviable, see Rev. Stat. cap. 53 (which we quote as follows), and cases cited in Rob. & Jos. Digest, 3296 to 3299.

REPLEVIN ACT.

"Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. This Act may be cited as "*The Replevin Act.*"

WHEN GOODS REPLEVIABLE.

2. Wherever any goods, chattels, deeds, bonds, debentures, promissory notes, bills of exchange, books of account, papers, writings, valuable securities or other personal property or effects have been wrongfully distrained under circumstances in which by the law of England, on the fifth day of December, one thousand eight hundred and fifty-nine, replevin might have been made, the person complaining of such distress as unlawful may obtain a writ of replevin in the manner prescribed by this Act; or in case any such goods, chattels, property or effects have been otherwise wrongfully taken or detained, the owner or other person, or corporation capable of maintaining an action of trespass or trover for personal property, may bring an action of replevin for the recovery thereof, and for the recovery of the damages sustained by reason of such unlawful caption and detention, or of such unlawful detention, in like manner as actions are brought and maintained by persons complaining of unlawful distresses. C. S. U. C. c. 29, s. 1.

3. No party to a suit or proceeding, in any Court, shall replevy or take out of the custody of the Sheriff, Bailiff, or other officer, any personal property seized by him under process against such party in such suit or proceeding. 40 V. c. 7, *Sched.* A (92).

REPLEVIN IN COUNTY COURTS.

4. In case the value of the goods or other property or effects distrained, taken or detained, does not exceed the sum of two hundred dollars, and in case the title to land is not brought in question, the writ may issue from the County Court of any County wherein such goods or other property or effects have been distrained, taken or detained. C. S. U. C. c. 29, s. 3.

REPLEVIN IN DIVISION COURTS.

5. In case the value of goods or other property or effects distrained, taken or detained, does not exceed the sum of forty dollars, the writ may issue from the Division Court for the Division within which the defendant or one of the defendants resides or carries on business, or where the goods or other property or effects have been distrained, taken or detained. 23 V. c. 45, s. 6.

2. The matter shall then be disposed of without formal pleadings, and the powers of the Courts and officers, and the proceedings generally in the suit, shall be, as nearly as may be, the same as in other cases which are within the jurisdiction of Division Courts; and this Act shall, so far as any such suit is concerned, be read as if it formed part of "*The Division Courts Act.*" 23 V. c. 45, s. 7.

PROCEDURE.

6. No writ of replevin shall issue out of either of the Superior Courts of law or any County Court.

1. Unless an order is granted for the writ on an affidavit by the person claiming the property, or some other person shewing to the satisfaction of the Court, or Judge, the facts of the wrongful taking or detention which is complained of as well as the value and description of the property, and that the person claiming it is the owner thereof, or is lawfully entitled to the possession thereof (as the case may be); 23 V. c. 45, s. 1.

2. Or unless the person claiming the property, his servant or agent, makes an affidavit which shall be entitled and filed in the Court out of which the writ is to issue, stating:

(*a*) That the person claiming the property is the owner thereof, or that he is lawfully entitled to the possession thereof (describing the property in the affidavit);

(*b*) The value thereof to the best of his belief;

(*c*) That the property was wrongfully taken out of the possession of the claimant, or was fraudulently got out of his possession, within two calendar months next before the making of the affidavit;

(*d*) That the deponent is advised and believes that the claimant is entitled to an order for the writ;

(*e*) And that there is good reason to apprehend that unless the writ is issued without waiting for an order, the delay would materially prejudice the just rights of the claimant in respect to the property. C. S. U. C. c. 29, s. 4; 23 V. c. 45, s. 1 (2).

3. Or (in case the property was distrained for rent or damage feasant), unless the person claiming the property, his servant or agent, makes an affidavit (which shall be entitled and filed in the Court from which the writ is to issue) stating:

(*a*) That the person claiming the property is the owner thereof, or that he is lawfully entitled to the possession thereof (describing the property in the affidavit);

(*b*) The value thereof to the best of his belief;

(*c*) That the property was taken under colour of a distress for rent or damage feasant, and in such case the writ shall state that the defendant has taken and unjustly detains the property, under colour of a distress for rent or damage feasant (as the case may be). C. S. U. C. c. 29, s. 4; 23 V. c. 45, s. 1 (3).

7. Where an application for an order is made, the Court or Judge may proceed on the *ex parte* application of the plaintiff, or may grant a rule or order on the defendant to show cause why the writ should not issue; and may, on the *ex parte* application, or on the return of the rule or order to shew cause, grant or refuse the writ, or direct the Sheriff to take a bond in less or more than treble the value of the property, or may direct him to take and detain the property until the further order of the Court, instead of at once replevying the same to the plaintiff; or may impose any terms or conditions in granting the writ, or in refusing the same, on the return of a rule or order to show cause, as under the circumstances in evidence appear just. 23 V. c. 45, s. 3.

8. Except in the County of York, a Judge of the County Court of the County where the goods are which are sought to be replevied shall have the power of issuing the order in the same manner as by law the Judges of the Superior Courts of Law are empowered to issue the same. 34 V. c. 12, s. 6.

9. In case a writ of replevin is issued, whether with or without an order, or in case any rule or order is made under the seventh or eighth sections, the defendant may, at any time, or from time to time, apply to the Court or Judge, on affidavit or otherwise, for a rule or order on the plaintiff to shew cause why the writ, or why the rule or order respecting the same, should not be discharged, or why the same should not be varied or modified, in whole or in part, as therein specified, or why all further proceedings under the writ should not be stayed, or why any other relief, to be referred to in the rule or order so applied for, should not be granted to the defendant, with respect to the return, safety or sale of the property or any part thereof, or otherwise; and the Court or Judge may make such rule or order thereon as, under all the circumstances, best consists with justice between the parties. 23 V. c. 45, s. 4.

10. The writ shall state the description and value of the property, and shall be tested in the same manner as a writ of summons under "*The Common Law Procedure Act*," and shall be returnable on the eighth day after the service of a copy thereof, and may be in the words or to the effect of Form 1 in the Schedule to this Act, or otherwise adapted to the circumstances of the case. C. S. U. C. c. 29, ss. 5 & 4 (2).

11. Before the Sheriff acts on the writ he shall take a bond in treble the value of the property to be replevied, as stated in the writ; which bond shall be assignable to the defendant; and the bond and assignment thereof may be in the words or to the effect of Form 2 in the Schedule to this Act, the condition being varied to correspond with the writ. C. S. U. C. c. 29, s. 8; 23 V. c. 45 *s.* 5.

12. Such bond shall be subject to the provisions of the eighth section of the Act passed by the Imperial Parliament in the eighth and ninth years of the

reign of His Majesty King William the Third, and chaptered eleven. 39 V. c. 7, s. 8.

13. The Sheriff shall not serve a copy of the writ until he has replevied the property, or some part of the property therein mentioned, if he cannot replevy the whole in consequence of the defendant having eloigned the same out of his County, or because the same is not in the possession of the defendant, or of any person for him. C. S. U. C. c. 29, s. 7.

14. In case the writ issues without an order, the Sheriff shall take and detain the property, and shall not replevy the same to the plaintiff without the order of a Judge or a rule of the Court in that behalf; but may, within fourteen days from the time of his taking the same, re-deliver it to the defendant, unless in the meantime the plaintiff obtains and serves on the Sheriff a rule or order directing a different disposition of the property; but this section shall not apply in case of a distress for rent or damage feasant, under the third subsection of the sixth section of this Act. 23 V. c. 45, s. 2.

15. In case the property to be replevied or any part thereof is secured or concealed in any dwelling house or other building or enclosure of the defendant, or of any other person holding the same for him, and in case the Sheriff publicly demands from the owner and occupant of the premises deliverance of the property to be replevied, and in case the same is not delivered to him within twenty-four hours after such demand, he may, and if necessary shall, break open such house, building or enclosure for the purpose of replevying such property or any part thereof, and shall make replevin according to the writ aforesaid. C. S. U. C. c. 29, s. 9.

16. If the property to be replevied, or any part thereof, is concealed either about the person or on the premises of the defendant, or of any other person holding the same for him, and in case the Sheriff demands from the defendant or such other person as aforesaid deliverance thereof, and deliverance is neglected or refused, he may, and if necessary shall, search and examine the person and premises of the defendant or of such other person for the purpose of replevying such property or any part thereof, and shall make replevin according to the writ. C. S. U. C. c. 29, s. 10.

17. The Sheriff shall return the writ at or before the return day thereof, and shall transmit annexed thereto,

1. The names of the sureties in, and the date of the bond taken from the plaintiff, and the name or names of the witnesses thereto;

2. The place of residence and additions of the sureties;

3. The number, quantity and quality of the articles of property replevied; and in case he has replevied only a portion of the property mentioned in the writ, and cannot replevy the residue by reason of the same having been eloigned out of his County by the defendant, or not being in the possession of the defendant, or of any other person for him, he shall state in his return the articles which he cannot replevy and the reason why not. C. S. U. C. c. 29, s. 11.

18. If the Sheriff makes such a return of the property distrained, taken or detained, having been eloigned, as would warrant the issuing of a *capias in withernam* by the law of England, on the fifth day of December, one thousand eight hundred and fifty-nine, then upon the filing of such return, such a writ shall be issued by the officer who issued the writ of replevin, in the words or to the effect of Form 3 in the Schedule to this Act, and before executing such writ the Sheriff shall take pledges, according to the law of England on the said day in that behalf, in like manner as in cases of distress. C. S. U. C. c. 29, s. 20.

19. A copy of the writ shall be served on the defendant personally, or, if he cannot be found, by leaving the copy at his usual or last place of abode, with his wife or some other grown person, being a member of his household, or an inmate of the house wherein he resided as aforesaid. C. S. U. C. c. 29, s. 6.

20. In case it is shewn by affidavit to the satisfaction of the Court, or of a Judge having jurisdiction in the case, that the defendant cannot be served with a copy of the writ in any of the modes authorized by the preceding section, the Court or Judge, if the defendant has not appeared, may either require some further attempt to effect service, or appoint some act to be done or some notice of the proceedings to be published in such manner as the Court or Judge deems proper; and thereupon (or upon the first application if the Court or Judge thinks fit) the Court or Judge may authorize the plaintiff to proceed in the action in such manner and subject to such conditions as the Court or Judge directs or imposes. 37 V. c. 7, s. 37.

21. In case the defendant has been duly served with a copy of the writ, and does not enter his appearance in the suit at the return thereof, it shall not be necessary for the plaintiff to enter an appearance for the defendant; but the plaintiff on filing the writ and an affidavit of service thereof, or a rule of Court or a Judge's order for leave to proceed, may proceed in the action in the same manner as in an action commenced by an ordinary writ of summons. C. S. U. C. c. 29, s. 12; 37 V. c. 7, s. 38.

22. In any such case, or upon an appearance being duly entered by the defendant in the office of the Clerk or Deputy Clerk of the Crown, or of the Clerk of the County Court from whose office the writ of replevin issued, the plaintiff and defendant respectively shall (in the absence of any provision herein or in any rules of the Superior Courts of Common Law to the contrary) declare, avow, reply, rejoin and otherwise plead to issue and take all subsequent proceedings to trial and judgment according to the practice in replevin in England, on the said fifth day of December, 1859, so far as applicable to the Court having cognizance of the case, but all such proceedings shall be taken respectively within the same time as in other personal actions in the same Court; and in case of default so to do, the parties respectively shall be liable to the like judgment and proceedings as in such personal actions under the "*The Common Law Procedure Act.*" C. S. U. C. c. 29, s. 14.

23. Where the replevin is brought for goods, chattels, or other personal property distrained for any cause, the venue shall be laid in the County in which the distress has been made, but in other cases it may be laid in any County. C. S. U. C. c. 29, s. 13.

24. Where the action is founded on a wrongful detention, and not on the original taking of the property, the declaration shall conform to the writ, and may be the same as in an action of detinue. C. S. U. C. c. 29, s. 17.

25. Where the action is founded on a wrongful taking and detention of the property, it shall not be necessary for the plaintiff to state in his declaration a place certain within the City, Town, Township or Village, as the place at which the property was taken. C. S. U. C. c. 29, s. 18.

26. If the defendant justifies or avows the right to take or distrain the property, in or upon any place in respect of which the same might be liable to forfeiture, or to distress for rent, or for damage feasant, or for any custom, rate or duty, by reason of any law, usage or custom at the time existing and in force, he shall state in his plea of justification or avowry a place certain within the City, Town, Township or Village within the County, as the place at which such property was so distrained or taken. C. S. U. C. c. 29, s. 19.

27. The foregoing provisions as to pleading are in addition to the provisions of "*The Common Law Procedure Act.*"

28. In case the plaintiff becomes entitled to sign judgment by default, he shall be at liberty to sign final judgment for the sum of five dollars and costs according to the proper scale, but shall not be entitled to recover a larger sum except upon an assessment before a Judge or jury, or upon filing the written consent of defendant or his Attorney, and an affidavit verifying the signature to such consent. 37 V. c. 7, s. 39.

29. In case upon an assessment aforesaid, after interlocutory judgment by default, the plaintiff does not recover a larger amount than the said sum of five dollars, he shall tax such costs only as he would have obtained had he signed final judgment for the said sum under the preceding section, unless a Judge otherwise orders. 37 V. c. 7, s. 40."

If the value of the goods, or other property or effects, distrained, taken or detained, *does not exceed* $40, the writ may issue from Division Court for the division within which the defendant, or one of the defendants, *resides* (*Brown* v. *London and North Western Railway Company*, 4 B. & S. 326; *Alexander* v. *Jones*, L. R. 1 Ex. 133; *In re Ladouceur* v. *Salter*, 6 P. R. 305), or *carries on business* (*Buckley* v. *Hann*, 5 Ex. 43; *Brown* v. *London and North Western Railway Company*, 4 B. & S. 326; *Shea* v. *United Assurance Society*, L. R. 3 C. P. 21; *Shields* v. *Great Northern Railway Company*, 8 U. C. L. J. 195; *Ahrens* v. *McGilligat, Grand Trunk Railway Company, Garnishees*, 23 C. P. 171; followed in *Westover* v. *Turner, Grand Trunk Railway Company, Garnishees*, 26 C. P. 510; see also notes to ss. 62, 63), or where the goods or other property or effects have been distrained, taken or detained: Rev. Stat. cap. 53, s. 5. By subsection 2 of the same section, the matter shall be disposed of in the Division Court without formal pleadings, and the powers of the Courts and officers, and the proceedings generally in the suit, shall be as nearly as may be the same as in other cases which are within the jurisdiction of Division Courts; and that the Replevin Act shall, so far as any suit in the Division Court is concerned, be read as if it formed part of the Division Courts Act. Section 6, and subsequent sections of the Replevin Act, just mentioned, prescribe the procedure in such cases. Where by that statute any duty is prescribed to be performed by "the Sheriff," in Division Court proceedings, it may generally be read as "*the Bailiff.*" For affidavits on which to issue writs of replevin, with or without Judge's order in first instance, see Forms 13 and 14. No other cause of action can be joined with it: Rule 41; *Great Western Railway Company* v. *Chadwick*, 3 U. C. L. J. 29. But the question of title to land does not oust jurisdiction in replevin: *Fordham* v. *Akers*, 4 B. & S, 578. As to the findings of Judge and procedure generally, see Rules from 42 to 50 inclusive. As to the duties of the Bailiff, see Rules 46 to 50 inclusive. The plaintiff must make claim according to Form 15. Goods in the custody of any Sheriff, Bailiff or other officer, under process are not repleviable at the suit of the party against whom such process issued: Rev. Stat. c. 53, s. 3. As to the right to maintain this action to goods in the custody of the law, see the cases mentioned at pages 3299 to 3302 of Rob. & Jos. Digest. In replevin, a verdict or judgment is divisible, so that the plaintiff may recover for whatever part of the goods he proves himself entitled to, and defendant for the rest: *Hunt et al.*, 16 U. C. R. 521; *Haggart* v. *Kernahan*, 17 U. C. R. 341; *Henderson* v. *Sills*, 8 C. P. 68; *Canniff* v. *Bogart*, 6 U. C. L. J. 59. As to the service of summons in replevin, see Rules 47 and 48. Notice of action is not necessary, in replevin: *Lewis* v. *Teale et al.*, 32 U. C. R. 108. Whether there has been a taking or detention is a matter of defence at the trial: *Gilchrist* v. *Conger*, 11 U. C. R. 197. As a rule, the Court of Chancery will not interfere to restrain replevin proceedings, unless it can be shewn that complete security could not be got at law: *Bletcher* v. *Burns*, 9 Grant, 425. There may be more than two sureties in the bond, even where the statute says there should be two: *Meyers* v. *Maybee*, 10 U. C. R. 200. The 11th section of the Replevin Act does not prescribe the number of sureties; but it is submitted that as a matter of security there should not be less than two. By this section and Rule 46, the bond is assignable, and the assignee may sue on it in his own name: *Bacon* v. *Langton*, 9 C. P. 410. The bond need only be attested by one witness, but a subscribing witness is necessary to its validity: *Heley et al.* v. *Cousins et al.* 34 U. C. R. 63. Proof of the execution of a replevin bond is not within chapter 62, section 50, of the Rev. Stat.: see H. C. L. P. Act, note (*c*) to setion 212. The rule as to proof in such

cases will be found in Stephen on Ev., 2nd Ed., Articles 67, 69, 70, 71, 88. If Bailiff wrongfully refuse to assign bond, an action would lie against him: *Pacaud* v. *McEwan*, 31 U. C. R. 328. The bond cannot be assigned while suit pending: *Becker et al.* v. *Ball et al.*, 18 U. C. R. 192. The bond is forfeited and assignable when the Court in which replevin suit was brought refused to try the case for want of jurisdiction: *Welsh et al.* v. *O'Brien et al.*, 28 U. C. R. 405. Where the defendant succeeds on the pleas of *non detinet* and not guilty, he is entitled to an assignment of bond, and to maintain action for his costs of defence: *Mulvaney* v. *Hopkins et al.*, 18 U. C. R. 174. Where the writ of replevin and subsequent proceedings are set aside by Judge's order, the defendant has still a right to take the benefit of the bond: *Meloche* v *Reaume et al.* 34 U. C. R. 606. If a plaintiff in replevin prosecutes his suit without delay, there is no action on the bond (*Casswell et al.* v. *Catton et al.*, 9 U. C. R. 282); but the inability of the plaintiff's Attorney in the replevin suit to communicate with his client does not prevent a forfeiture of the bond: *Bletcher* v. *Burn*, 24 U. C. R. 124. It is no answer to an action on the bond, for not prosecuting the suit with effect and making return of the goods, to say that a return was made according to the condition, but that the plaintiff refused to accept the same. It only answers one breach: *Golding* v. *Bellnap et al.* 26 U. C. R. 163. Where a plaintiff succeeds only for part of the goods replevied, and a return is adjudged of the rest, he is liable upon the bond for not prosecuting the suit with effect as to the goods for which he failed, and for not returning them: *Patterson et al.* v. *Fuller et al.*, 31 U. C. R. 323. A set-off may be pleaded to an action by the assignee of a replevin bond: *McKelvey* v. *McLean et al.*, 34 U. C. R. 635. A so, payment into Court: *Thompson* v. *Kaye et al.*, 13 C. P. 251. As to the d nages recoverable, see Rule 44. The plaintiff may recover as damages the value of any of the property in defendant's hands at the time of issuing the writ to which the plaintiff proves his right, though not actually replevied: *Lewis* v. *Teale et al.*, 32 U. C. R. 108; see also *Burn* v. *Blecher*, 14 C. P. 415; *Bletcher* v. *Burn*, 24 U. C. R. 259; and *Patterson et al.* v. *Fuller et al.*, 32 U. C. R. 240. The actual damage is all plaintiff is entitled to recover on the bond: *Heley et al.* v. *Cousins et al.*, 34 U. C. R. 63. Courts are averse to staying proceedings on replevin bonds, and prefer leaving the question of damage to be tried in the ordinary way: *Hoover et al.* v. *Zavitz*, T. T. 1 & 2 Vic.; *Culham et ux.* v. *Love et al.*, and *Love* v. *Culham et al.*, 30 U. C. R. 410; *Meyers et al.* v. *Baker*, *Hargreaves* v. *Meyers et al.*, 26 U. C. R. 16; *Meloche* v. *Reaume et al.*, 34 U. C. R. 606; *Johnson et al.* v. *Parke et al.*, 12 C. P. 179. A release by plaintiff to one of several obligors in a replevin bond to a Bailiff, after an assignment by him to the plaintiff in replevin, would release all the sureties, and would also preclude him from suing the Bailiff for taking insufficient sureties: *Kirkendall* v. *Thomas*, 7 U. C. R. 30. So a reference to arbitration of the replevin suit, without the assent of the surety, will discharge him: Russell on Awards, 4th Ed., 83; *Archer* v. *Hale*, 4 Bing. 464; *Hutt* v. *Gilleland*. *Hutt* v. *Keith*, 1 U. C. R. 540. But it is otherwise if the surety consents to. Enlarging time for making award does not discharge the sureties. *Hopkins* v. *Harper*, 10 Bing. 118. A postponement of the trial of a replevin suit, without the direct assent or concurrence of the sureties, discharges them; the question being, not whether the sureties are injured by the delay, but whether they *might* have been: *Canniff* v. *Bogert*, 6 C. P. 474; *Polak* v. *Everett*, 1 Q. B. D. 669; Russell on Awards, 4th Ed., 136. Nor will the attendance of the sureties at an arbitration imply consent to the reference: *Burke v. Glover et al.*, 21 U. C. R. 294; see instructive article on Law of Replevin, commencing at page 169 of 10 U. C. L. J. Replevin can be maintained against a wrongdoer by one who has a bare possession: *Gilmour et al.* v. *Buck*, 24 C. P. 187; *Meyerstein* v. *Barber et al.*, L. R. 2 C. P. 38, 661, and L. R. 4 H. L. 317. The same evidence as in trover of demand is necessary in replevin for same cause: *Smalley* v. *Gallagher*, 26 C. P. 531. The proceeding of certio-

No privilege to exempt from jurisdiction of Court.

57. No privilege shall be allowed to any person to exempt him from suing and being sued in a Division Court; (*e*) and any executor or administrator may sue or be sued therein; and the judgment and execution shall be such as in like cases would be given or issued in the Superior Courts. C. S. U. C. c. 19, s. 57.

Minors may prosecute for wages.

58. A minor (*f*) may sue in a Division Court for any sum not exceeding one hundred dollars, due to him for wages, (*g*) in the same manner as if he were of full age. C. S. U. C. c. 19, s. 58.

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rari does not apply to replevin: *Mungean* v. *Wheatley*, 6 Ex. 88. An informal replevin bond would be enforceable by the Bailiff as a voluntary bond, and he would stand as a trustee for the defendant: *Stansfeld* v. *Hellawell*, 7 Ex. 373. As to an action against the Bailiff for taking an insufficient bond, see Fisher's Digest, 2166. The two sureties in a replevin bond are together liable only to the amount of the penalty in the bond and the costs of the suit on the bond: *Hefford* v. *Alger*, 1 Taunt. 218. In replevin for distress for rent, the sureties are only liable for the value of the goods seized; and if that value exceeds the amount of rent due, they will be only liable for the rent: *Hunt* v. *Round*, 2 Dowl. 558.

(*e*) At one time certain classes were privileged from service of summons or arrest, and under certain circumstances, and to a certain extent, this is so yet in proceedings in the higher Courts, but this section abolishes any privilege in Division Courts. As examples of the law formerly, see *Lyster* v. *Boulton*, 5 U. C. R. 632, and *Reg.* v. *Gamble and Boulton*, 9 U. C. R. 546. No privilege could be claimed on contempt of Court: *Henderson* v. *Dickson*, 19 U. C. R. 592; see also *Regan* v. *McGreevy*, 5 P. R. 94. As to the privilege of Attorneys in England under a somewhat similar provision, see *Jones* v. *Brown*, 2 Ex. 329, and cases cited. As to the right of a married woman to sue for her wages, see *McCandy* v. *Tuer et al.*, 24 C. P. 101.

(*f*) That is a person under twenty-one years of age.

(*g*) This does not restrict infants from suing in the Division Courts for anything but wages, but was intended only to enable them to recover for their own labour, contrary to the principles of the Common Law: *Ferris* v. *Fox*, 11 U. C. R. 612. An infant has six years to bring such action after attaining his majority: *Taylor* v. *Parnell*, 43 U. C. R. 239. In suing for anything but wages, an infant must procure the attendance of a next friend at the office of the Clerk of the Court, at the time of entering the suit, who must undertake to be responsible for costs: Rule 126. The form of such undertaking will be found at No. 7 of the Forms. It is doubtful, if an infant can hire himself for wages to his parent, and whether the contract is binding on the latter: *Perlet* v. *Perlet*, 15 U. C. R. 165. The wages which a minor earns under a contract of hiring belong to himself, and not to his parents: *Delesdernier* v. *Burton*, 12 Grant, 569. As to the right and liability of infants generally, see cases in Rob. & Jos. Digest, 1722, *et seq.*; Roscoe's N. P. Ev. 13th Ed. 634, *et seq.*; Addison on Contracts, 7th Ed. 115, *et seq.*; Law Reports Digest, 1452. The right of a servant to recover his wages, when recoverable on an entire contract of service and payable in an indivisible sum, depends on the *complete* performance of his term of service. If hired, for instance, for a year for a lump sum as wages, and he leaves before his time has expired without just cause, he forfeits his wages: *Huttman* v. *Boulnois*, 2

C. & P. 510; *Lilley* v. *Elwin*, 11 Q. B. 742; *Blake* v. *Shaw*, 10 U. C. R. 180. But if the servant has been paid any portion of such year's salary the employer is not entitled to recover it back, neither is he entitled to have it applied on account of moneys payable in respect of a previous year's service; and although the employer, on dismissing his servant, may have assigned one ground therefor, he is not precluded from afterwards shewing the entire ground for such dismissal: *Tibbs* v. *Wilkes*, 23 Grant, 439. The rule that an indefinite hiring is to be taken as a yearly one (*Rettinger* v. *Macdougall*, 9 C. P. 485), is not a rule of law, but the jury are to say what the terms of the hiring were, judging from the circumstances of the case; thus, on an indefinite hiring at certain weekly wages, the jury may infer the hiring was weekly: *Baxter* v. *Nurse*, 6 M. & G. 935. So a hiring at "two guineas a week for one year" is a weekly hiring (*Robertson* v. *Jenner*, 15 L. T. N. S. 514, *per* Bramwell, B.), or at "£2 a week and a house" (*Evans* v. *Roe*, L. R. 7 C. P. 138), is a hiring by the week and not by the year. There is no inflexible rule that an indefinite hiring of a clerk must be construed as a hiring by the year: *Fairman* v. *Oakford*, 5 H. & N. 635. In this case the plaintiff entered the defendant's employment at a salary of £250 a year, which was paid weekly. The jury found it a weekly hiring and the Court refused to interfere: see also *Rettinger* v. *Macdougall*, 9 C. P. 485. Should a person be hired for a year, his wages payable *at the rate of so much per month*, it is submitted, on the authority of *Taylor* v. *Laird*, 1 H. & N. 266; *Fairman* v. *Oakford*, 5 H. & N. 635 and *Button* v. *Thompson*, L. R. 4 C. P. 330, to be clearly established that each month's wages would become vested at the end of each month and could not be divested by any misconduct of the servant, and that the rule about forfeiture of wages does not apply to such a case. The case of *Walsh* v. *Walley*, L. R. 9 Q. B. 367, is clearly distinguishable from the others. Where a master, having a right to discharge his servant for misconduct, condones the act and retains the servant, he cannot afterwards discharge him for the same act: *Phillips* v. *Foxall*, L. R. 7 Q. B. 680, *per* Blackburn, J. With regard to menial or domestic servants there is a common understanding, though the contract is for a year, that it may be dissolved by either party on giving a month's warning or a month's wages: *Beeston* v. *Collyer*, 4 Bing. 313, *per* Gaselee, J.; *Fawcett* v. *Cash*, 5 B. & Ad. 908; *Nowlan* v. *Ablett*, 2 C. M. & R. 54. If the master should, without just cause, turn the servant away without notice, the latter would be entitled to recover a month's wages beyond the arrears: *Robinson* v. *Hindman*, 3 Esp. 235. If a servant misconduct himself, the master may turn him away without any warning: *Spain* v. *Arnott*, 2 Stark, 256. A refusal to obey a lawful order (as to remain at home at a certain time, or to do a proper day's harvest work, &c.), is a good ground of dismissal: s. c., and *Lilley* v. *Elwin*, 11 Q. B. 742. And it matters not how reasonable or urgent the excuse for the servant's wilful absence may be: *Turner* v. *Mason*, 14 M. & W. 112. If a clerk claims to be a partner he can be forthwith dismissed: *Amor* v. *Fearon*, 9 A. & E. 548. So where a clerk disobeys a direction to apply remittances in a particular way (*Smith* v. *Thompson*, 8 C. B. 44); or a traveller neglects immediately to remit sums collected in accordance with the terms of his engagement (*Blencarn* v. *Hodges' Distillery Company*, 16 L. T. N. S. 608); or sells his employer's goods to a brothel keeper (*Ib.*); or where a servant embezzles, though his wages due exceed what he has embezzled: *Brown* v. *Croft*, 1 Chitty's Practice of the Law, 82. Where a person is engaged by a firm, the death of one of the partners puts an end to the contract, and no action can be brought against survivors for not employing the plaintiff (*Tasker* v. *Shepherd*, 6 H. & N. 575); but a voluntary parting with the business is a breach of the contract to employ: *Stirling* v. *Maitland*, 5 B. & S. 840. It is different with a person paid by commission: *Ex parte Maclure*, L. R. 5 Chan. 737. It is an implied condition on contracts for personal service, that the death of either party shall dissolve the contract: *Farrow* v. *Wilson*, L. R. 4 C. P. 744. Incapacity in a servant from illness arising after a contract for personal service,

absolute in its terms, has been entered into, is an answer to an action for its breach: *Boast* v. *Firth*, L. R. 4 C. P. 1; *Robinson* v. *Davison*, L. R. 6 Ex. 269. Incapacity of the servant from sickness does not determine the contract, nor will it justify dismissal without regular notice: *Rex* v. *Wintersett*, Cald. 298. A person entered into service as a brewer for a term certain at weekly wages, and became disabled by illness for several months, but afterwards returned to work and was employed by the defendant as before; it was *held* that the inability did not suspend the right to wages: *Cuckson* v. *Stones*, 1 E. & E. 248. But permanent disability, such as paralysis, &c., would have justified putting an end to the contract: s. c. Total inability to perform his duty will not prevent a servant from recovering wages for the time he actually served, where the agreement is not for any specific term: *Bayley* v. *Rimmell*, 1 M. & W. 506. A sailor, disabled in the course of his duty, is entitled to wages for the whole voyage: *Chandler* v. *Grieves*, 2 H. Black. 606 (note). Inability to perform his duty by an artificer, by reason of incompetence or ignorance, will justify his dimissal, notwithstanding a contract for a term, where he was hired on the understanding that he had the requisite skill: *Harmer* v. *Cornelius*, 5 C. B. N. S. 236; and the same case decides that there is an implied warranty that he possesses that skill. A dismissed servant, if he can, ought to enter into another service: *Hochster* v. *De la Tour*, 2 E. & B. 691. He is not entitled to his full salary for the unexpired period of the contract for service, but that is to be reduced by the probabilities of his having other employment during such service: *Hartland* v. *The General Exchange Bank*, 14 L. T. N. S. 863; *Yelland's case*, L. R. 4 Eq. 350; see *Broughton* v. *The Corporation of Brantford*, 19 C. P. 434; *Reg.* v. *The Poor Law Board*, L. R. 6 Q. B. 785; *Shirreff's case*, L. R. 14 Eq. 417. A new County Council may, before recognition, dismiss officers appointed by previous council: *Hickey* v. *Corporation of Renfrew*, 20 C. P. 429. A clerk taken into an office at "three months on trial, at a salary of $800 per annum," *held*, not a yearly hiring: *Hughes* v. *The Canada Permanent Loan and Savings Society*, 39 U. C. R. 221. Unless a specific contract of hiring be proved, the Court will discountenance an action by child against parent for services rendered while living in parent's house: *Sprague et ux.* v. *Nickerson*, 1 U. C. R. 284; see also *Wismer* v. *Wismer*, 23 U. C. R. 519. The plaintiff sued her brother for wages during several years that she had lived with him on his farm keeping house for him while he was unmarried. *Held*, no evidence of implied promise to pay: *Redmond* v. *Redmond*, 27 U. C. R. 220. But in an action by a son against his father for wages, the only evidence tending to establish the plaintiff's claim, beyond the fact that he had worked, was that of a witness who swore that six or seven years before, the father had asked him what wages he was getting, and said that plaintiff wanted $12 50, and that he would give him $12, it was *held* sufficient evidence to be submitted to a jury: *Henricks* v. *Henricks*, 27 U. C. R. 447. The mere fact that one brother performs several years' work for another raises no presumption of a promise to pay: *Re Ritchie, Sewery* v. *Ritchie*, 23 Grant, 66. In an action for wages of plaintiff's son as defendant's servant, it was proved that defendant had said he would give the son what was going; that the son went to him at 12 years of age and worked for him four years, and that on his leaving, defendant told him to send his father and he would settle with him. *Held*, evidence of an agreement: *Pickering* v. *Ellis*, 28 U. C. R. 187. Where services rendered by plaintiff under expectation of marriage, but no contract of hiring, *held* that refusal to marry did not entitle plaintiff to maintain action for wages: *Robinson* v. *Shistel*, 23 C. P. 114. In order to justify the dismissal of a servant, the particular facts relied on must be shewn, and not mere suspicions: *O'Neill et al.* v. *Leight*, 2 U. C. R. 204; *Patterson* v. *Scott*, 38 U. C. R. 645. A dismissed servant can sue for wrongful dismissal before his original term of service has expired. He can only sue *for his wages* after such expiration: *McGuffin* v. *Cayley*, 2 U. C. R. 308.

Causes of action not to be divided.

59. A cause of action shall not be divided into two or more suits for the purpose of bringing the same within the jurisdiction of a Division Court, (*h*) and no greater sum than one hundred dollars shall be recovered in any action for the

(*h*) It has frequently been found a difficult matter to say what is "dividing a cause of action" within the meaning of this section and the corresponding section in the English Act of 9 & 10 Vic. cap. 95, s. 63. The expression "cause of action" in this section, in general, means "cause of one action," and is not limited to an action on one separate contract: *Grimbly* v. *Aykroyd*, 1 Ex. 479. In this case it was *held* that where a tradesman had a bill against a party for an amount within the jurisdiction of the Court, in which bill the items were so connected with each other that the dealing was not intended to terminate with one contract, but to be continuous, so that one item, if not paid, should be united with another, and form one continuous demand, that it was a contravention of the corresponding section of the English Act; nor does the fact that one item in a tradesman's bill is separated from the rest by an interval of *several years* prevent the statute from operating: *Copeman* v. *Hart*, 14 C. B. N. S. 731; see also *In re Grace* v. *Walsh*, 10 U. C. L. J. 65; s. c. 3 P. R. 196. In *Wickham* v. *Lee*, 12 Q. B., at p. 526, Erle, J., gives a test by which to determine whether or not a cause of action is being divided within the meaning of this section. He says, "It is not a splitting of actions to bring distinct plaints where in a Superior Court there would have been two counts. I am not sure whether the Court of Exchequer puts it so; but that is clearly the true construction of the Act." In that case it was *held* no contravention of the section to bring separate actions for rent of premises, and also for double value for overholding after notice to quit. In *Kimpton* v. *Willey*, 9 C. B. 719, the facts were these: *A.* having a cause of action against *B.* for £19 0*s.* 8*d.* for money lent between the years 1846 and 1849, and also a cause of action against him on a separate account for goods sold and delivered, work and labour, and money paid, between the years 1845 and 1849, amounting to £19 19*s.* 0*d.*, after deducting a payment on account of £8 5*s.* 3*d.*, levied two plaints in respect of them in the County Court. *Held*, that this was not a splitting or dividing of "a cause of action" within the meaning of the section. Wilde, C. J., puts the case on the ground that there were different causes of action, and consequently not one entire debt, page 728. The case of *Bonsey* v. *Wordsworth*, 18 C. B. 325, follows *Grimbly* v. *Aykroyd*, 1 Ex. 479, and *Wood* v. *Perry*, 3 Ex. 442, and decides that a tradesman's bill for a series of articles (even though the claim was contracted within the jurisdiction of different Courts), cannot be split up into different causes of action. So in *Brunskill* v. *Powell*, 1 L. M. & P. 550, it was *held* that goods sold and delivered, and money lent, though entered in plaintiff's books as one account, were not one cause of action. In *Neale* v. *Ellis*, 1 D. & L. 163, under a statute containing a clause very closely resembling this, it was *held* that a demand for a horse sold, another for rent due, and a third for goods sold and delivered, were separate and distinct causes of action, and were not *one cause of action*; and that a recovery for one was no bar to a recovery on either of the others. In *Gilbert* v. *Gilbert*, 4 L. J. N. S. 229, Logie, County J., *held* that different sums of money paid by an endorser of two promissory notes were, as against the executrix of the maker, one cause of action; and that the plaintiff, having sued for and recovered one sum, could not bring another action for the amount of another payment made by him. Where plaintiff sued defendants on an alleged promise to return a yoke of oxen in as good condition as when hired, alleging that they were not so returned, but were injured, and it appeared on the trial that defendants had been before sued by plaintiff for the hire of same oxen, on the same contract of hiring, which resulted in a judgment for plaintiff, *held* a splitting of the cause of action: *Light* v. *Lyons et al.* 7

balance of an unsettled account, (*i*) nor shall any action for any such balance be sustained where the unsettled account in the whole exceeds four hundred dollars. C. S. U. C. c. 19, s. 59; 39 V. c. 15, s. 2.

U. C. L. J. 74, *per* Hughes, Co. J. In *McRae* v. *Robins et al.*, 20 C. P. 135, it was *held* that a plaintiff had a right to bring two actions, one for work and labour, and the other for a balance due for money paid by him for goods in excess of the amount furnished to him. In the cases *supra* of *Light* v. *Lyons, et al.* and *Gilbert* v. *Gilbert*, it was *held* that a defendant has a right to say that there was a splitting of the action on the trial of the second action. In the case of *Grace* v. *Walsh*, 3 P. R. 196, Draper, C. J., expresses a doubt whether or not a prohibition can be moved for as for a contravention of this clause, if not moved for to prohibit the first suit. It is submitted on the authority of *Adkin* v. *Friend*, 38 L. T. N. S. 393, that prohibition should be moved for in the first suit. As bearing on this question, see *Winger* v. *Sibbald, et al.* 2 App. R. 610; *In re Box* v. *Green*, 9 Ex. 503. On the question generally of splitting causes of action, see pages 95 and 282 of 7 U. C. L. J., and at pages 66, 91, and 231 of 8 U. C. L. J.

(*i*) As is well known, the amount of an unsettled account inquirable into in Division Courts was by 39 Vic. cap. 15, section 2, increased from $200 to $400. The cases decided before the change in the law must now be read with the word "four" instead of "two" hundred dollars as the maximum amount of an unsettled account. The plaintiff sued defendant on a demand exceeding $200, but abandoned the excess above $99 75. Defendant claimed a set-off exceeding $400, consisting of various unconnected items. *Held*, within the jurisdiction of the Division Court: *Read* v. *Wedge*, 20 U. C. R. 456. Where the plaintiff claimed a balance of £49 on two notes of £15 each and interest, gave credit for £23 and abandoned the excess over £25, it was *held* the Division Court had jurisdiction: *In re Higginbotham* v. *Moore*, 21 U. C. R. 326. An unsettled account exceeding $200 (now $400), reduced by payment to $100, is not within the jurisdiction: *Waugh* v. *Conway*, 4 L. J. N. S. 228, *per* Logie, County J. The plaintiff in a Division Court may recover $100, being the balance of an unsettled account not exceeding $200 (now $400); but when the whole account exceeds that sum, there is no jurisdiction. An unsettled account means an account the amount of which has not been adjusted, determined or admitted by some act of the parties. The plaintiff here sued for $84, being the balance due for rent of premises occupied by defendant, as his tenant, for several years, at $160 a year, after deducting the payments made from time to time. *Held*, not within the jurisdiction: *In re Hall* v. *Curtain*, 28 U. C. R. 533, overruling *Miron* v. *McCabe*, 4 P. R. 171. The plaintiff claimed $94 88, annexing to his summons particulars of his claim, shewing an account for goods for $384 23, reduced by credits to the sum sued for; but nothing had been done by the parties to liquidate the account or ascertain the balance, except a small amount admitted to have been paid, and a credit of $33 given for some returned barrels, but which still left an unsettled balance of upwards of $300. *Held*, not within the jurisdiction: *In re the Judge of Northumberland and Durham*, 19 C. P. 299. The plaintiff, who was employed by the defendants to purchase wool for them on commission, sued them in the Division Court for this commission, and for $10 paid to an assistant. It appeared that defendants had furnished the plaintiff with $1,100, and that the plaintiff had expended $36 beyond the sum in the purchase of the wool; but no question was made at trial as to the due expenditure of $1,100; the only question being whether plaintiff was entitled to any commission at all, and no claim was made for the $36 or any portion of it, the plaintiff's demand being confined to the commission claimed on the quantity of wool purchased, and not on the price paid. *Held*, not an action for balance of an unsettled account exceeding

60. A judgment (*k*) of a Division Court upon a suit brought for the balance of an account shall be a full discharge of all demands in respect of the account of which such suit was for the balance, and the entry of judgment shall be made accordingly. C. S. U. C. c. 19, s. 60. Judgment to be full discharge.

61. In case the debt or damages (*l*) claimed in any suit brought in a Division Court amounts to forty dollars and upwards, and in case it appears to any of the Judges of the Superior Courts of Common Law that the case is a fit one to be tried in one of the said Superior Courts, and in case any Judge thereof grants leave for that purpose, such suit Causes may be removed to Superior Court by *certiorari* in certain cases.

$200; the balance of the unsettled account being $36, which was not in question: *McRae* v. *Robins, et al.* 20 C. P. 135. The plaintiff, in a suit in a Division Court brought before the passing of 39 Vic. cap. 15, sued for $30, due as a balance of an account for board for self and horse, which appeared at the trial to be a balance of an unsettled account exceeding $200. He also sued for $82 for board for self and horse for a subsequent period, and abandoned the excess of $12 over $100. On objection being taken to the jurisdiction of the Division Court, the Judge allowed an amendment. The plaintiff then altered his claim, reducing it to the $82 only, and the case was again tried and judgment reserved, whereupon application was made for prohibition.. *Held*, that the Division Court had no jurisdiction independently of the 39 Vic. cap. 15, s. 2, which gives jurisdiction in unsettled accounts over $400; but that under that Act the claim might have been investigated, as the subsequent proceedings took place after its passing, and there was, therefore, no necessity for any amendment. A plaintiff, to give a Division Court jurisdiction where his claim is excess, must abandon the excess in his claim, and cannot wait until the hearing, and then do it: *In re McKenzie* v. *Ryan*, 6 P. R. 323. We find that the decision of the Chief Justice of the Queen's Bench, in *Stogdale* v. *Wilson*, 8 P. R., was that there had been a sufficient abandonment of the excess, and that at any rate *McKenzie* v. *Ryan* was distinguishable, as the amount there claimed was unliquidated. A claim reduced by set-off is not within this section: *Woodhams* v. *Newman*, 7 C. B. 654. It is the balance of an unsettled account: *Ib.*; see *Walesby* v. *Gouldstone*, 2 L. J. N. S. 223; *Fleming* v. *Livingstone*, 6 P. R. 63. The cases of *Staples* v. *Young*, 2 Ex. D. 324, and *Blake* v. *Appleyard*, 3 Ex. D. 195, do not apply.

[It is a pity there could not be some amendment of the statute by which the law could be the better defined on the many cases which arise, for at best the decided cases go only a short way in elucidating questions that arise almost every sitting.]

(*k*) The judgment must of course be between the same parties or privies: *McIntosh* v. *Jarvis et al.*, 8 U. C. R. 535; Stephen on Evidence, 60. In *Winger* v. *Sibbald et al.*, 2 App. Rep. 610, it was *held* that the commencement of a suit in a Division Court for part only of an entire claim, and endorsing an abandonment of the balance on the summons, is not *per se* a release of the excess; but the part so abandoned cannot be sued for after the recovery of judgment in such suit: see also *Vines* v. *Arnold*, 8 C. B. 632; *Nelson* v. *Couch*, 15 C. B. N. S. 99; *Flitters* v. *Allfrey*, L. R. 10 C. P. 29; *Adkin* v. *Friend*, 38 L. T. N. S. 393; Fisher's Digest, 5023; Rob. & Jos. Digest, 1938.

(*l*) See notes to section 54.

may by writ of *certiorari* (*m*) be removed from the Division Court into either of the said Superior Courts upon such terms as to payment of costs or other terms as the Judge making the order thinks fit. C. S. U. C. c. 19, s. 61.

(*m*) This is a discretionary writ (*Reg.* v. *Newborough*, L. R. 4 Q. B. 585; *Reg.* v. *The Justices of Surrey*, L. R. 5 Q. B. 466; *Mayo County, In re*, 14 Irish C. L. R. 392 Q. B.); but is never taken away except by express words: *Scott* v. *Bye*, 2 Bing. 344; *Reg.* v. *Chantrell*, L. R. 10 Q. B. 587; *Parker* v. *Bristol and Exeter Railway Co.*, 6 Ex. 184. When a Judge has declined to grant a *certiorari*, the Court will not do so merely because it appears that possibly a serious question of law may arise, nor merely because the decision in the particular case, though involving directly only a small sum, may be of great importance to the applicant as likely to affect other cases of a similar nature: *Staples* v. *Accidental Death Insurance Company*, 10 W. R. 59 Ex. A Justice of the Peace sued in the Division Court, and having given notice of his objection under sec. 53, sub-sec. 7, cannot afterwards move for *certiorari*: *Weston* v. *Sneyd*, 1 H. & N. 703. Interpleader proceedings cannot be removed: *Ex parte Summers*, 18 Jur. 522; *Jones* v. *Harris*, 6 U. C. L. J. 16; *Russell* v. *Williams*, 8 U. C. L. J. 277. And it is submitted that under our statute it does not apply to replevin: *Mungean* v. *Wheatley*, 6 Ex. 88. We have no provision such as section 121 of the English Act, 9 & 10 Vic., cap. 95, for removing actions of replevin by *certiorari*.

All the material facts relative to the state of the cause should be brought before the Judge, and where a writ has been obtained without the Judge having been informed that the cause had already been heard for several days in the County Court, the writ was set aside as improvidently issued: *Parker* v. *Bristol & Exeter Railway Company*, 6 Ex. 184. *Certiorari* will not lie after verdict (*Tully* v. *Glass*, 3 O. S. 149), or after judgment and execution (*Douglas* v. *Hutchinson*, 5 O. S. 341; *McKenzie* v. *Keene*, 5 U. C. L. J. 225), or where a defendant knows all the facts before a trial, but, nevertheless, argues the case and obtains an opinion from the Judge, even though the Judge desire it: *Holmes* v. *Reeve*, 5 P. R. 58. The expression of a wrong opinion by a Judge is no cause for removal: *Ib.* *Certiorari* is too late, if delivered to the Judge after verdict rendered; and the spirit of the English statute, 43 Eliz. cap. 5, applies where plaintiff's witnesses were sworn and no jury called: *Black* v. *Wesley*, 8 U. C. L. J. 277, *per* Richards, J. If the Judge has entered on the hearing of the cause, *certiorari* is too late: *Gallagher* v. *Bathie*, 2 L. J. N. S. 73; *Barnes* v. *Cox*, 16 C. P. 236; s. c., 2 L. J. N. S. 67. *Certiorari* will not lie at the instance of the plaintiff to determine whether inferior Court had jurisdiction. The writ imports jurisdiction: *Meyers* v. *Baker*, *Hargreaves* v. *Myers*, 26 U. C. R. 16; *O'Brien* v. *Welsh*, 28 U. C. R. 394. A suit brought by an incorporated company will be removed where difficult questions of law are likely to arise: *Cataraqui Cemetery Company* v. *Burrowes*, 3 U. C. L. J. 47. Also where defendant resided in a part of the Province far distant from the division in which the suit was commenced, and also on account of a difficult question of law: *Nugent* v. *Chambers*, 3 U. C. L. J. 108. A plaintiff is not entitled to remove his own suit: *Prudhomme* v. *Lazure*, 3 P. R. 355; *Dennison* v. *Knox*, 9 U. C. L. J. 241. A Judge cannot be attached for disobeying a *certiorari*, unless he acted contumaciously in order to vex the party or shew contempt for the Court: *Re Judge of Niagara District Court*, 3 O. S. 437. The order for *certiorari* may be made *ex parte* (*Symonds* v. *Dimsdale*, 2 Ex. 533); but it is very unusual in this Province to do so. In the case of *Ex parte Great Western Railway Co.*, 2 H. & N. 557, the Court refused to make it a condition that defendant, if successful, should have no more than Inferior Court costs. Affidavit for order for writ of *certiorari* must be entitled in the Court *in which the application is to be made*, and not in the Division Court (*Ex parte Nohro*, 1 B. & C. 267; *Smyth et al.* v. *Nicholls*,

1 P. R. 355); and if entitled in any cause, possibly cannot be read: *Ib.* But see *Hargreaves* v. *Hayes*, 5 E. & B. 272, from which it would appear that the style of cause would be surplusage: *Re Barrowes*, 18 C. P. 493. If the writ has improperly or improvidently issued, *procedendo* is the remedy (*Rex* v. *Wakefield*, 1 Burr. 489; *Winaker* v. *Pringle*, 1 P. R. 357; and affidavits for rule or order for such should be entitled in the Court only in which they are to be used: *Jameson* v. *Schonswar*, 1 Dowl. 175; *Reg.* v. *Gilberdyke*, 5 Q. B. 207. The writ should be applied for in first instance in Chambers (*Staples* v. *Accidental Death Insurance Company*, 10 W. R. 59), and must be tested on a day in term: *Symonds* v. *Dimsdale*, 2 Ex. p. 536. Application for the writ must be made by the party himself, either in person or by attorney, and cannot be made by another person in his name: *Reg.* v. *Riall*, 11 Irish C. L. R. 280. A section in an Act taking away *certiorari* does not apply to the case of a total absence of *jurisdiction*: *Ex parte Bradlaugh*, 3 Q. B. D. 509. The return to the writ should be under seal: *Rex* v. *Kenyon*, 6 B. & C. 640. The original record must be returned: *Askew* v. *Hayton*, 1 Dowl. 510; *Palmer* v. *Forsyth*, 4 B. & C. 401. The Court will not direct how proceedings are to be carried on after removal (*Copping* v. *McDonell*, 5 O. S. 311), but might direct that the amount of the plaintiff's claim be paid into Court: *Symonds* v. *Dimsdale*, 2 Ex. p. 538. Where cases are removed from a Division Court of an outer County into one of the Superior Courts by *certiorari*, the papers should be filed in the Crown Office at Toronto; but the venue need not be laid in the County of York: *Chambers* v. *Chambers*, 3 U. C. L. J. 205, *per* Draper, J. Where *certiorari* regularly issued after new trial granted, a previous alleged understanding that the cause should be tried in the Division Court is no ground for interfering with the *certiorari*: *Help* v. *Lucas*, 8 U. C. L. J. 184. After removal, there is no way of compelling a plaintiff to proceed in the higher Court: *Dennison* v. *Knox*, 3 P. R. 150; 9 U. C. L. J. 241; *Garton* v. *The Great Western Railway Company*, 1 E. & E. 258. After removal, a plaintiff cannot declare for a different cause of action than that sued for in Court below: *Mason* v. *Morgan*, 3 P. R. 325; *Hunter* v. *Grand Trunk Railway Company*, 6 P. R. 67. Judge in Court below has no right, after *certiorari*, to interfere with case until it goes back to his Court by *procedendo*: *Barnes et al.* v. *Cox*, 16 C. P. 236; *Ewing* v. *Thompson*, 8 U. C. L. J. 332. An order for *certiorari*, to bring up a case into a Superior Court, entitles defendant to full costs of that Court if he succeeds in the action without any certificate from the Judge who tries the cause: *Corley* v. *Roblin*, 5 U. C. L. J. 225. A defendant will not, however, get the costs of removal unless the order provides for them: *Kerr* v. *Cornell*, 1 L. J. N. S. 326.

The following is a general form of affidavit for *certiorari*, which can be adapted to meet the circumstances of any case:

In the Queen's Bench (or Common Pleas).

I, *A. B.*, of the of in the County of in the Province of Ontario make oath and say:

1. That on the day of last past, I was served with a summons and particulars of claim thereto attached (or indorsed), in a suit entered in the Division Court for the (said) county of in which suit is plaintiff, and *A. B.* is defendant.

2. That the annexed papers, marked respectively "A" and "B," are true copies (or the copies) of the said summons and particulars of claim so served on me.

3. That I am the said *A. B.* mentioned and described as the defendant in the said suit in the said Division Court, and in the said summons so served on me as aforesaid.

4. That this action is brought against me for the purpose of recovering the sum of dollars for (*here set out particularly the cause of action sued for; if the particulars of claim attached to or indorsed on the summons do not do so.*)

PROCESS AND PROCEDURE.

Division in which Suits to be Entered.

In what Courts suits may be entered and tried.

62. Any suit cognizable in a Division Court may be entered and tried in the Court holden for the Division in which the cause of action arose, (*n*) or in which the defend-

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5. That I am advised, and verily believe, that several difficult questions of law are likely to arise on the hearing of the said cause, and among others the following (*here state distinctly and fully the questions of law likely to arise; also state in the affidavit all facts tending to show that such questions are likely to arise*).

6. That I have been advised, and verily believe, that I have a good defence to the said action so brought against me on the merits.

7. That the application for writ of *certiorari* to be made herein, is not made for the purpose of delaying the fair or speedy trial of the said action, or in any way to prejudice or delay the said in the prosecution of any cause of action he may have against me in any suit, nor in the recovery of any sum of money he may be found entitled to in the said suit; that the said application will be made *bona fide*, and for the sole purpose of the better determining my liability on the said alleged cause of action, and with no other object or purpose whatsoever.

Sworn, &c.

The manner of making a return to the *certiorari* is as follows. Inscribe the following on the back of the *certiorari*:

"In the Queen's Bench (or Common Pleas).

"The answer of me, *A. B.*, Judge of the County Court of the County of who, by virtue of this writ, to me directed and delivered, do, under my hand and seal, certify unto Her Majesty, in Her Court of Queen's Bench (or Common Pleas) for Ontario, at Toronto, the (*here describe what the writ calls for*), of which mention is made in the same writ. The return of this writ appears by a certain schedule annexed thereto.

"In witness whereof, I, the said *A. B.*, have to this affixed my hand and seal, this day of 18 .

"*A. B.*" [L. S]

The following schedule will be annexed to the *certiorari*:

"Schedule.

Referred to in the return to the annexed writ of *certiorari* indorsed thereon. (*Here give in regular order the papers in the suit returned with the certiorari, and annex the original papers to the schedule.*)

A. B.

Judge of the County Court of the County of ."

(*n*) There have been many decisions on the meaning of the words "cause of action." These words in this section were taken from the English County Court Act of 9 & 10 Vic. cap. 95, s. 60, and the decisions upon their meaning there have a direct application here. They mean "the whole cause of action:" *Noxon et al.* v. *Holmes*, 24 C. P. 541, and the cases there referred to. Where a debt matures after the death of the intestate, the grant of letters of administration is part of the cause of action: *Fuller* v. *Mackay*, 2 E. & B. 572. The plaintiffs, carrying on business at Manchester, sold goods by their traveller to defendants in Oxford, which goods were sent by plaintiffs to the railway station at Manchester for shipment to the defendants. It was *held* that the "whole cause of action" did not arise at Manchester: *Borthwick* v. *Walton*, 15 C. B. 501; see also *Gold* v. *Turner*, L. R. 10 C. P. 149. The defendant resided at M.,

in the County of Hereford. An association, of which he was a member, offered a reward for the apprehension, and prosecution to conviction, of persons committing certain offences, and the plaintiff, within a district of the County Court of G., apprehended an offender, who was tried and convicted within a district of the County Court of H. *Held*, that the County Court of G. had no jurisdiction to entertain a plaint for the recovery of the reward: *Hernaman* v. *Smith*, 10 Ex. 659. In this case Parke, B., remarked, "the term cause of action means *all those things* necessary to give a right of action." A bill of exchange was drawn and accepted, and the endorser put his name on it within the City of London, but it was delivered to the endorsee in the County of Middlesex. It was *held* that the cause of action did not arise in London (*Buckley* v. *Hann*, 5 Ex. 43), the endorsement not being complete until delivery (*Marston* v. *Allen*, 8 M. & W. 494), and a material part of the cause of action: *Heath* v. *Long*, 1 L. M. & P. 333. On a contract for the carriage of timber by a barge from a wharf at Swindon to London, it was *held* that the contract was not complete until the delivery of the timber in London, and that the County Court at Swindon had no jurisdiction: *Barnes* v. *Marshall*, 18 Q. B. 785. Where goods were ordered at Leeds, deliverable at Manchester, the County Court at Leeds was *held* to have no jurisdiction to try the case: *Jackson* v. *Beaumont*, 11 Ex. 300; 24 L. J. Ex. 391, s. c. The plaintiff went to the defendant's residence, which was beyond the jurisdiction of a particular County Court, and there agreed to purchase a horse for £28, to be delivered the next day at the plaintiff's residence, which was within the jurisdiction of that County Court. The defendant brought the horse to the plaintiff's residence, where he required and obtained a warranty. *Held*, that the whole cause of action arose the second day when the warranty was given, and not until then; and that the suit brought for breach of warranty was within the jurisdiction of plaintiff's County Court: *Aris* v. *Orchard*, 6 H. & N. 160. The plaintiff, within the jurisdiction of a County Court, made a contract with a broker who professed to act for the defendant, in these terms, "Sold the cargo of corn per T., now at Q., at 27 shillings per quarter, including cost, freight and insurance, to a safe port in the United Kingdom. Payment, cash in exchange for shipping documents and policy of insurance." Q. was out of the jurisdiction, so was the ship, also the port to which she was desired to be sent. *Held*, that the non-delivery of the cargo was a breach of contract and a cause of action, but out of the jurisdiction of the County Court: *In re Walsh*, 1 E. & B. 383. One Patterson sued Graham, the plaintiff, who lived in the County of Grenville, for the price of a reaper, in a Division Court in the County of Hastings. At the trial no defence was offered, and Patterson's witness swore that the machine had been ordered by Graham in Hastings. The Judge entered judgment for Patterson. *Held*, in an action of trespass against the Judge, Clerk, execution creditor, &c., that the Judge who tried the trespass action rightly declined to hear further evidence as to where the cause of action arose; that the Judge of the Division Court could only be guided by what appeared before him, and that he rightly decided on the evidence given, that the cause of action arose within his jurisdiction: *Graham* v. *Smart et al.*, 18 U. C. R. 482. Defendants, residing at Goderich, made a contract *at Brantford* to deliver goods at the railway station at Goderich. Plaintiff brought action for the bad quality of the goods at Brantford. *Held*, that the cause of action was not the contract only, but the contract and the breach; and that as one arose in Brantford and the other in Goderich, the plaintiff must avail himself of the other alternative of this section, and sue where the defendants resided: *Watt* v. *Vanevery et al.*, 23 U. C. R. 196; *Kemp* v. *Owen*, 14 C. P. 432, and *Carsley* v. *Fisken et al.*, 4 P. R. 255, are to the same effect. The defendant, residing and carrying on business in London, wrote to plaintiffs, residing and carrying on business in S., ordering them to do certain work for him. The letter was received, and the work was done in S. In an action in the County Court of S., it was *held* that the whole cause of

ant or any one of several defendants resides or carries on business (*o*) at the time the action is brought, notwithstanding that the defendant at such time resides in a County or Division different from the one in which the cause of action arose. C. S. U. C. c. 19, s. 71.

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action arose within the district of S. and that the County Court there had jurisdiction: *Newcomb et al.* v. *DeRoos*, 2 E. & E. 271. Cockburn, C. J., says, "The request of the defendant was made in London by letter; but it was not such a request as created a contract until it was received and accepted by the plaintiffs, and that took place at Stamford, where also the work was done. The whole cause of action therefore, both the work and contract under which it was performed, arose at Stamford." Hill, J., says, "Suppose the two parties stood on different sides of the boundary line of the district, and that the order was then verbally given and accepted, the contract would be made in the district in which the order was accepted:" page 275. The principle of this case appears to be that, from the moment the letter was sent until it reached the plaintiffs' hands, there was a reiteration of the request to do the work, and that as it reached the hands of the plaintiffs *in Stamford*, the order was taken to have been made as well as accepted there: see also *Green* v. *Beach*, L. R. 8 Ex. 208. The plaintiff, residing at N., drew a bill of exchange upon the defendant, who resided at L. The defendant accepted the bill at L., and returned it to the plaintiff at N. It was *held* that the County Court at N. had no jurisdiction: *Wilde* v. *Sheridan*, 1 B. C. C. 56; 21 L. J. Q. B. 260; see editorial on this subject at page 34 of 10 U. C. L. J.; *Rennie* v. *Ratcliffe*, 35 L. T. N. S. 833; *O'Donohue* v. *Wiley et al.*, 43 U. C. R. 350. Where the evidence of the delivery of goods as part of the cause of action is doubtful, they will be presumed to have been delivered at defendant's residence: *Arndt* v. *Porter*, 30 L. J. Ex. 19. The retainer of an attorney in one division to draw a mortgage and its execution in another would shew a cause of action arising partly in each division: *Jackson* v. *Grimley*, 16 C. B. N. S. 380. Where an action is brought in Division Court, in a county in which defendant does not reside, nor the cause of action arose, the defendant is entitled to prohibition; but if the cause proceeds to judgment, with his *acquiescence*, he loses his right: *Robertson* v. *Cornwell*, 7 P. R. 297, *per* Hagarty, C. J. "Parties ought not to lie by and defend on the merits, and after judgment disclose the facts which bar the right of the Court below and ask our intervention:" *Archibald* v. *Bushey et al.*, 7 P. R. 304; see also *Re Smart and O'Reilly*, 7 P. R. 364.

(*o*) These words are partly taken from the same section of the English statute as are the words referred to in the previous note. Where a railway company had their principal office in London for the regulation and guidance of their undertaking in the various places through which their railway passed, and a station at A., *held*, that they carried on business in London, and not at A.: *Shields* v. *The Great Northern Railway Co.*, 30 L. J. Q. B. 331; 7 Jur. N. S. 631; and 8 U. C. L. J. 195. A corporation has been held to "dwell" where its business is carried on: *Taylor* v. *The Crowland Gas and Coke Company*, 11 Ex. 1. The Great Western Railway Co. has its principal station at Paddington, where the directors meet, the secretary resides, and general meetings are held, and whence orders emanate. *Held*, that the company "dwells" at Paddington, within the meaning of 9 & 10 Vic. cap 95, s. 128: *Adams* v. *The G. W. R. Co.*, 6 H. & N. 404. See the difference between a person's *residence* and place of business: *Reg.* v. *Hammond*, 17 Q. B. 772. In *Buckley* v. *Hann*, 5 Ex. 43, it was *held* that where the defendant, a clerk in the Admirality, lived in Greenwich, but attended daily at his office in London, he did not "carry on his business" in London. It was *held*, in *Brown* v. *L. & N. W. R. Co.*, 4 B. & S.

326, that a railway corporation "dwells" at the place it carries on its business, that is, its *general* business, and not where they carry on a part, or even a material part of their business. A person who has no permanent place of abode "dwells" at the place at which he may be temporarily residing: *Alexander* v. *Jones*, L. R. 1 Ex. 133. The domicile of the husband is that of the wife: *Macdonald* v. *Macdonald*, 5 U. C. L. J. 66. *Shea* v. *United Assurance Co.*, L. R. 3 C. P. 21, was under a very differently worded section to this. Defendant worked in the Province of Quebec, but his wife and family lived across the river, in Ontario, where his wife kept a store, and where he often came to see her. *Held*, that the defendant's residence was with his family, and that he was subject to be sued in the proper Division Court in Ontario: *In re Ladouceur* v. *Salter*, 6 P. R. 305. In *Ahrens* v. *McGilligat, The Grand Trunk Railway Company, Garnishees*, 23 C. P. 171, it was *held*, on the construction of 32 Vic. cap. 23, s. 7 (now section 133 of the present Division Courts Act), that a railway company did not "live and carry on business" at any other place than its head office, at which its business was managed; followed in *Westorer* v. *Turner, Grand Trunk Railway Company, Garnishees*, 26 C. P. 510, in which case it was also held that the fact of the railway company having, in addition to its local station, a factory for the making and repair of the rolling stock used on the road, and employing a number of workmen therein, did not bring such place within the statute. See also, *The Oldham Building and Manufacturing Company (Limited)* v. *Heald*, 3 H. & C. 132. The words "carries on business" were said by Coleridge, J., in *Rolfe* v. *Learmouth*, 14 Q. B. 199, to mean "some fixed place at which the party's business is carried on, at least for a certain time." A clerk to the Privy Council was held not a person "who carried on his business" at the Privy Council: *Sangster* v. *Kay*, 5 Ex. 386. Where a man, having his permanent residence at one place, has a lodging for a temporary purpose only at another place, *held*, that he does not "dwell" at the latter place: *Macdougall* v. *Paterson*, 11 C. B. 755. In the argument and from the remarks of Maule, J., at page 763 of the report of this case, it appears to have been taken for granted that a "residence" and "dwelling" were synonymous terms. The same view was taken by Cockburn, C. J., in *Butler* v. *Ablewhite*, 6 C. B. N. S., 747. A temporary or a compulsory residence at the time of the commencement of an action in a gaol does not constitute the place of detention the dwelling of the party: *Dunston* v. *Paterson*, 5 C. B. N. S. 267. The "residence" must be of a *permanent* character, and not merely for a *temporary purpose*: *Marsh* v. *Conquest*, 17 C. B. N. S. 418. A man may have two *permanent places* of residence (*Butler* v. *Ablewhite*, 6 C. B. N. S. 740), and the question of jurisdiction must depend on the fact "where his actual residence *at* the time of action brought was:" *per* Cockburn, C. J., page 747; *Pigrim* v. *Knatchbull*, 18 C. B. N. S. 798. A plaintiff, having hired a house at Margate, occupied it with his wife, family and servants, as their home; at the same time the plaintiff, carrying on business in London, occupied two houses there for the purpose of his business, and passed three or four days and nights of each week there, occupying two rooms in one of the houses, which had been fitted up for his residence while staying in London. *Held*, that he "dwelt" at Margate alone: *Kerr* v. *Haynes*, 29 L. J. Q. B. 70; 2 L. T. N. S. 211. Most of the preceding cases are on the question of "residence" or "dwelling" of a plaintiff; but Erle, C. J., says, in *Pigrim* v. *Knatchbull*, 18 C. B. N. S., at page 804, that as regards a defendant the same principle applies. A surgeon and apothecary has been held to "carry on business" where he daily attends patients, although resident out of it: *Mitchell* v. *Hender*, 18 Jur. 430; 23 L. J. Q. B. 273. A railway company does not "carry on business" at a receiving house or a booking office, kept by an agent for the receipts and booking of packages for all the railways generally: *Minor* v. *L. & N. W. Railway Company*, 1 C. B. N. S. 325. By the appointment of a general agent to do business in a place, a corporation cannot be held to be carrying on business there: *Corbett* v. *The General Steam*

Suits may be brought and tried in the Court nearest to the defendant's residence.

63. Any such suit may be entered and tried and determined in the Court the place of sitting whereof is the nearest to the residence (*p*) of the defendant, and such suit may be entered, tried and determined irrespective of the place where the cause of action arose, and notwithstanding that the defendant at such time resides in a County or Division other than the County or Division in which such Division Court is situate, and such suit entered. 27-8 V. c. 27, s. 1.

Service of summons in such cases.

2. It shall be sufficient if the summons in such case be served by a Bailiff of the Court (*q*) out of which it issues, in the manner provided in the seventieth section of this Act; and upon judgment recovered in any such suit a writ of *fieri facias* against the goods and chattels of the defendant, and all other writs, process and proceedings to enforce the pay-

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Navigation Company, 4 H. & N. 482. A company incorporated for the manufacture and sale of goods "dwells" at the place of manufacture and sale, and not at its registered office (*Keynsham Blue Lias Lime Company* v. *Baker*, 2 H. & C. 729); distinguishing this case from that of a railway company.

A joint stock company "dwells" where the substantial business of the company and its negotiations are carried on, and not necessarily in the locality where its property is situated and its immediate objects carried on: *Aberystwith Promenade Pier Company* v. *Cooper*, 13 L. T. N. S. 273. Cockburn, C. J., says the company "cannot be said to dwell at the pier at Aberystwith."

(*p*) By Rule 5, the plaintiff must in his claim set out that he enters the suit and desires to have it tried because the place of sitting is nearest to the defendant's residence. In determining the distance, the measurement must be made in a straight line from one point to the other on the horizontal plane: *Leigh* v. *Hind*, 9 B. & C. 774; *Lake* v. *Butler*, 5 E. & B. 92; *Jewel* v. *Steul*, 6 E. & B. 350; *Duignan* v. *Walker*, 5 Jur. N. S. 976; 28 L. J. Chan. 867. The distance should be measured "as the crow flies:" *Mouflet* v. *Cole*, L. R. 7 Ex. 70; in Ex. Cham. L. R. 8 Ex. 32; Maxwell on Statutes, 173. As to the meaning of the word "residence," see notes to sections 27 and 62. This makes the residence of defendant the sole test of jurisdiction. It is submitted that "place of sitting" means the actual building in which the Court is held, and not the mere municipality. There is a section of the Mutual Insurance Companies Act which is proper to insert here. Chapter 161, s. 71, of the Revised Statutes is as follows: "Any suit cognizable in a Division Court, upon or for any premium note or undertaking, or any sum assessed or to be assessed thereon, may be entered and tried and determined in the Court for the division wherein the head office or any agency of such company is situate." It has been held that this section does not apply to the suing of a premium note taken under the 46th section of that Act for the cash payment on the insurance: *The Canada Farmer's Mutual Insurance Company* v. *Welsh*, decided in 1876 (not reported), *per* Hagarty, C. J. Promissory notes to mutual insurance companies or their officers are [illegible]: *McArthur* v. *Smith, et al.*, 1 App. R. 276.

(*q*) As to the service of papers, see the notes to section 70. If a defendant gives notice of defence, he waives any irregularity as to the manner of service: *Tilton* v. *Mercer*, 21 C. P. 94.

ment of the said judgment, may be issued to the Bailiff of the Court, and be executed and enforced by him in the County in which the defendant resides, as well as in the County in which the judgment was recovered. 27-8 V. c. 27, s. 2. Execution.

64. In case any person desires to bring an action in a Division other than as in the two next preceding sections mentioned, any County Judge (*r*) may by special order authorize a suit to be entered and tried in the Court of any Division in his County adjacent to the division in which the defendant or one of several defendants resides, (*s*) whether such defendant resides in the County of the Judge granting the order or in an adjoining County. C. S. U. C. c. 19, s. 72 When suits may be brought in other than the regular Divisions.

65. Every Clerk or Bailiff may sue and be sued for any debt due to or by him, as the case may be, separately or jointly with any other person in the Court of any next adjoining Division in the same County, in the same manner, to all intents and purposes, as if the cause of action had arisen within such next adjoining Division, or the defendant was resident therein, and no Clerk or Bailiff shall bring any suit in the Division Court of which he is such Clerk or Bailiff. (*t*) C. S. U. C. c. 19, s. 83. Clerks and Bailiffs may sue and be sued in adjoining Divisions.

(*r*) The order must be granted "by the Judge before whom the action is to be tried under the order:" Rule 123. Formerly this was different: *Mc Whirter* v. *Bongard*, 14 U. C. R. 84. As to the mode of procedure to obtain the order, see Rule 16, and Forms 8 and 9. "No leave shall be given to bring a suit in a division, other than the one *adjacent* to the division in which the party to be sued resides, but the division may be in the same or an adjoining County:" Rule 123. The word "adjacent" here means, it is submitted, "contiguous or bordering upon:" see *Kingsmill* v. *Millard*, 11 Ex. 313; *Earl of Lisburne* v. *Davies*, L. R. 1 C. P. 259, and *per* Erle, C. J., at page 264.

(*s*) See notes to sections 62 and 72.

(*t*) It would be highly improper for officers of the Court to have control of suits against themselves against the will of a plaintiff, and to be allowed to sue in their own Court. For a cause of action in the shape of "any debt" against a Clerk or Bailiff, the plaintiff has his option of suing in his own division or in one "next adjoining" (that is, no other division intervening.) The prohibition as to a Clerk or Bailiff bringing in his own division "any suit" is complete. In other words a Clerk or Bailiff can be sued for a "debt" in his own division, but he cannot himself sue for anything there: 4 U. C. L. J. 157; 9 U. C. L. J, 99; 1 L. C. G. 54. In an excellent article on this subject in the latter volume, these words are used, which we entirely endorse: "The right here given is *permissive*, whilst the language prohibiting officers from suing in their own division is *imperative*:" page 54. For any other cause of action but

Actions against County Judges or Stipendiary Magistrates for amounts within Division Court jurisdiction.

66. Any suit or action, by or against a Judge or Junior Judge of a County Court, which is within the competence of a Division Court, may be brought in a Division Court of any County adjoining (*u*) that in which such Judge or Junior Judge resides; and any suit or action by or against any Stipendiary Magistrate, if the same is within the jurisdiction of any Division Court of his District, may be brought in any Division Court of any adjoining County or District. 40 V. c. 8, s. 14. *See also Rev. Stat. c.* 90, *s.* 45.

Clerk to forward summonses for service in other Divisions.

67. The Clerk of any Division Court shall, when required, forward all summonses to the Clerk of any other Division Court for service, and the Clerk of any Division Court shall receive (*v*) any summonses sent to him by any other Division Court Clerk for service, and he shall hand the same to the Bailiff for service, and when returned, shall receive the same from the Bailiff and return them to the Clerk (*w*) from whom he received them, and every Clerk shall enter all such proceedings in a book to be by him kept for that purpose. C. S. U. C. c. 19, s. 73.

Entry of Claim, Service, &c.

Plaintiff to enter copy of his claim with Clerk.

68. The plaintiff shall enter with the Clerk a copy (and, if necessary, copies) of his account, claim or demand in writing in detail (and in cases of tort, particulars of his demand), (*x*) and each such copy shall be numbered according

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a "debt" must not a Clerk or Bailiff sue in a higher Court, if cause of action arose and defendant resides in his division? He cannot sue in his own division for anything whatever, and he can only sue in "the next adjoining division" where it is for a "debt" due him: see 2 L. C. G. 142.

(*u*) It is submitted the word "adjoining" here means "contiguous," or "meeting so as to touch:" see notes to section 64. This is comparatively a new provision to prevent the necessity of a Judge suing or being sued in a higher Court. Should such now be done, costs on the higher scale would probably be withheld.

(*v*) He may, under sections 49, 50, and 51, insist on prepayment of his own and Bailiff's fees: see notes to these sections.

(*w*) If a Bailiff omit to return to the Clerk any summonses within six days after service, he forfeits part of his fees upon it: Rule 90.

(*x*) It will be observed that the plaintiff is to enter with the Clerk "a copy (and, if necessary, copies) of his account, claim or demand." These words comprise all causes of action within the jurisdiction of the Division Court. The particulars in all actions must come under one or more of these heads. One would have supposed that a plaintiff should furnish the Clerk with a copy of

to the order in which the copies are entered, and thereupon a summons shall be issued, bearing the number of the account, claim or demand on the margin thereof, and corresponding in substance with such form as may be prescribed by the General Rules or Orders relating to Division Courts

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his "account, claim or demand" for service on the defendant; otherwise it is difficult to see the necessity of making provision that "copies" should be furnished "if necessary." It may refer to copies of notes rendered necessary by the danger of sending off the original note with summons for service. However, the editor of the *Law Journal* thinks that one copy is all that in ordinary actions the plaintiff is bound to furnish the Clerk with; and we will accept that view of it: 6 U. C. L. J. 38. By Rule 3, "the claim should shew the names in full and the present or last known place of abode of the parties." The words "place of abode" here should, it is submitted, receive the same meaning as "residence:" see notes to sections 62 and 72. By Rule 4, "the claim shall in every case, admitting thereof, shew the particulars *in detail*, and in other cases shall contain a statement of the particulars of *the claim*, or the facts constituting the cause of action, in ordinary and concise language." The claim, when brought to the Clerk, should contain *all* the requisites of this section, and the rules adverted to, and would not be complete without it: see also Forms 15, 16, 17. Some Clerks are in the habit of charging defendants with the claim attached to the original summons, if made out by themselves at the plaintiff's instance. Whether made out by them or not, it is *wrong* to do so. As shewn by this section, Rule 3, and section 69, the plaintiff "shall enter" with the Clerk a copy of his account, claim, or demand, in writing, and he "shall furnish the Clerk with particulars" of it. By Rule 80, "the Clerk shall annex to every summons," that is, the original summons, "*the copy entered with him* according to the 3rd Rule." When the original summons and claim attached to it are therefore complete, there is nothing to be charged the defendant *for copies*. As to the copy of summons and claim, *only two* are, in the case of one defendant, chargeable under any circumstances. Some Clerks are in the habit of charging, *as for a copy*, that part of the claim which gives the names of the parties, and their places of abode, under Rule 3, and *also* for the particulars of claim or demand, as another copy, and the copy of summons as a third; in effect making *three* copies. This is a device to increase the number of copies, and entirely unwarranted by the statute, Rules of Court, or the tariff. It takes the names of the parties, their place of abode, *and* the subject matter of the suit, to constitute "the claim" mentioned in the first and fifth items of the tariff. Neither one would be complete without the other. For instance, in Form 16, it will be seen that it is merely given as an example; and, if necessary, "*the claim* must shew such further particulars as the facts of the case require:" Chitty's Forms, title, "Particulars of Demand." Fisher's Digest, 6224, may also be referred to on the same subject, and Forms 15, 16, 17. The Clerk is not bound to prepare a suitor's claim (2 U. C. L. J. 61), and it is submitted that Clerks would exercise a wise discretion in not doing so, and thereby be acting within the spirit, as well as the letter, of the 100th Rule. A number of valuable Forms of particulars of claim will be found at pages 21 and 41 of 1 U. C. L. J.; see also Rob. & Jos. Digest, 2654, and Bullen & Leake's Prec., and Chitty's Prec. in Pleading, under the different heads. As to claim for interest, see *McKenzie et al.* v. *Harris*, 10 U. C. L. J. 213. If debt is assigned, the action should be brought in the name of the assignee (*Wellington* v. *Chard*, 22 C. P. 518; *Cousins* v. *Bullen*, 6 P. R. 71), and assignee must take the *full* beneficial interest: *Wood* v. *McAlpine*, 1 App. R. 234. If action brought in the name of insolvent after insolvency, it is wrongly entered (*Sayer* v. *Dufaur*, 11 Q. B. 325; *Kitson* v.

from time to time in force, according to the nature of the account, claim or demand, and on the trial of the cause no evidence shall be given by the plaintiff of any cause of action (*y*) except such as is contained in the account, claim or demand so entered. C. S. U. C. c. 19, s. 74.

Plaintiff to furnish particulars of claim to the Clerk for service.

69. The plaintiff shall furnish the Clerk with the particulars of his claim or demand, (*z*) and the Clerk shall annex the plaintiff's particulars to the summons, and he shall furnish copies thereof, to the proper person to serve the same. C. S. U. C. c. 19, s. 35

Service of summons to be ten days.

70. The summons, with a copy of the account or of the particulars of the claim or demand attached, (*a*) shall be served (*b*) ten days at least (*c*) before the return day thereof. (*d*) C. S. U. C. c. 19, s. 75.

Hardwick, L. R. 7 C. P. 477, *per* Willes, J.); but if brought in name of insolvent before insolvency, it can be continued *afterwards* in his name: *Dunn* v. *Irwin et al.*, 25 C. P. 111. There can be an equitable assignment of a smaller sum out of a larger amount: *Brice* v. *Bannister*, 3 Q. B. D. 569. As to the assignment of choses in action, see Rev. Stat. 1117; *Hostrawser et al.* v. *Robinson*, 23 C. P. 350; *Blair et al.* v. *Ellis*, 34 U. C. R. 466; *Lamb et al.* v. *Sutherland*, 37 U. C. R. 143; *Reiffenstein* v. *Hooper et al.*, 36 U. C. R. 295; *O'Connor* v. *McNamee*, 28 C. P. 141; *Gould* v. *Close*, 21 Grant, 273; *Howell* v. *McFarland*, 2 App. R. 31. In the last mentioned case, it was *held* that one partner had a right, without the consent of his co-partner, to sell and assign a partnership debt. Before suing on a lost note, the plaintiff should tender sufficient security, otherwise he would be made to pay the costs of the suit: *La Banque Jacques Cartier* v. *Strachan*, 5 P. R. 159.

(*y*) Subject, of course, to the power of amendment: Rule 104, *et seq.*

(*z*) It will be seen from this and the next preceding section, that the plaintiff is at least to furnish one copy of his claim or demand to the clerk, who shall annex the same to the original summons: see Rules 1 (15), 80.

(*a*) See Rule 80, and notes to section 68.

(*b*) See notes to sections 62 and 72.

(*c*) This means ten days, *excluding* the day of service and the Court day: see Rule 82. "Fourteen days at least must mean fourteen clear days:" *Zouch* v. *Empsey*, 4 B. & Ald. 522; *Reg.* v. *Justices of Shropshire*, 8 A. & E. 173; *Mitchell* v. *Foster et al.*, 12 A. & E 472; *Norton*, App. v. *The Town Clerk of Salisbury*, Resp., 4 C. B. 32; *Reg.* v. *Aberdare Canal Company*, 14 Q. B. 854; Maxwell on Statutes, 310. Sunday is reckoned as one of the ten days, whether it be the first, last or any intermediate day: *Rowberry v. Morgan*, 9 Ex. 730. The time appointed for the sitting of a Court must be understood as the *mean time* at the place where the Court sits: *Curtis* v. *March*, 3 H. & N. 866. In this case, Greenwich time was held not to govern.

(*d*) In the higher Courts process is returnable for some purposes from the time of service: *Swift* v. *Williams et al.*, 5 U. C. L. J. 252. But here the "return day" is meant the day for which the defendant is summoned for the hearing of the case, and cannot be sooner than *ten clear days* from the day of service. If

* In any action brought to recover a sum of money due on any promissory note or note, where note or note made to file with the Clerk upon judgment - unless otherwise ordered, or unless the copy of the note to show or that of Court for some other sufficient reason is produced

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71. In case none of the defendants reside (*e*) in the County in which the action is brought, but one of them resides in an adjoining County, (*f*) the summons shall be served fifteen days, and in case none of the defendants reside in the County within which the action is brought, or in an adjoining County, the summons shall be served twenty days at least before the return day thereof (*g*). C. S. U. C. c. 19, s. 76.

When service to be 15 days and when 20 days.

72. In case the amount of the account, claim or demand (*h*) exceeds eight dollars (*i*) the service shall be personal (*k*) on the defendant, and in case the amount does not

When service to be personal or otherwise.

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a summons is made returnable on a Sunday, it would be a nullity: *Morrison* v. *Manley*, 1 Dowl. N. S. 773; *Kenworthy* v. *Peppiat*, 4 B. & Ald. 288.

(*e*) See notes to sections 62 and 63.

(*f*) Counties here referred to mean those bordering on each other.

(*g*) As to calculation of time when summons returnable, see notes to section 70 and Rule 82.

(*h*) A sum included for interest will form part of the "claim or demand;" *Rodway* v. *Lucas*, 10 Ex. 670, *per* Pollock, C. B.; *Smart* v. *Niagara and Detroit Railway Company*, 12 C. P. 406, *per* Draper, C. J.; *Northern Railway Company* v. *Lister*, 4 P. R. 120; *McKenzie et al.* v. *Harris*, 10 U. C. L. J. 213.

(*i*) Should the claim be one cent over $8, service would have to be personal. As to service at defendant's residence or place of abode, see notes to section 62.

(*k*) Personal service means serving the defendant with a copy of the process, and shewing him the original if he desire it: *Goggs* v. *Lord Huntingtower*, 12 M. & W. 503; 1 D. & L. 599. Merely shewing the summons to defendant would not be good service. A copy must be left with him: *Worley* v. *Glover*, 2 Strange, 877. If, on the refusal of a defendant to take the copy of the summons, the officer brings it away with him, the service is not good: *Pigeon* v. *Bruce et al.*, 8 Taunt. 410; *Erwin* v. *Powley*, 2 U. C. R. 270. Unless the defendant, within a reasonable time, asks to see the original summons, it need not be shewn him: *Petit* v. *Ambrose*, 6 M. & S. 274; *Thomas* v. *Pearce*, 2 B. & C. 761. It has been *held* that fifteen minutes was not an unreasonable time: *Westley* v. *Jones*, 5 Moore, 162. If inspection of the original is demanded and refused, the service is bad: *Weller* v. *Wallace*, Rob. & Jos. Digest, 2872. Notice of the summons and claim is the primary object of service: *Sheehy* v. *Professional Life Assurance Company*, 13 C. B. 787. The following have been *held* to be cases of "personal" service. In *Smith* v. *Wintle*, Barnes, 405, the writ was put through the crevice of a door to the defendant, who had locked himself in, and it was *held* good personal service. In *Boswell* v. *Roberts*, Barnes, 422, the writ and copy had been enclosed in a letter to defendant, which he had read, and from which he took out the copy; it was *held* good personal service. See also *Aldred* v. *Hicks*, 5 Taunt. 186; but see the later case of *Redpath* v. *Williams*, 3 Bing. 443. But service at a man's house is not personal service, even to save the Statute of Limitations: *Frith* v. *Lord Donegal*, 2 Dowl. 527. In *Davies* v. *Morgan*, 2 C. & J. 587, one of several defendants in an action *ex contractu* was abroad; the Court refused to order that the service of process on his wife should be good, or to restrain the other defendants from pleading in abatement. The facts were peculiar in *Goggs* v. *Huntingtower*, M. & W. 503, 1 D. & L. 599. In order to serve defendant, a person went three times to his residence, when he saw a female servant, who said her master was not at home. On the third occasion,

exceed eight dollars, the service may be on the defendant, his wife, or servant or some grown person being an inmate of the defendant's dwelling-house, or usual place of abode, trading or dealing. C. S. U. C. c. 19, s. 77.

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the servant let down over the garden wall a basket, into which the writ was put. The servant then took back the basket; and shortly afterwards the voice of the defendant was heard in the yard, saying to the servant, "Take it back; I will not have it." The party called on a subsequent day, when the servant said she had given the writ to her master. *Held*, not a personal service. In *Christmas* v. *Eicke*, 6 D. & L. 156, the facts were these. Several calls had been made at defendant's residence by the party who was endeavouring to serve the writ, without success. On the last occasion, having inquired if the defendant was at home, and having received an evasive answer, he waited in the hall. Having afterwards gone into the parlour for a few minutes, he saw the defendant running upstairs. He immediately followed after defendant, but before he could give him a copy of the writ, the defendant went into a room and fastened the door. He then called out to him, and told the defendant that he had a writ against him at the suit of the plaintiff, and, putting a copy of it through a crevice of the door, told him that that was a copy of the writ. *Held*, not actual personal service, but only constructive service. But see *Smith* v. *Winkle*, *supra*. Service upon "a female servant at the lodgings of the defendant" is not good service: *Price* v. *Thomas*, 11 C. B. 543. In *Heath* v. *White*, 2 D. & L. 40, it was *held* that where the party attempting to serve the writ of summons went to the defendant's house, and, seeing him standing at a closed window on the ground floor, told him in an audible voice the purpose for which he came, and threw a copy of the writ down in his sight, and in the presence of his wife, who had come out of the house, and who had denied that he was at home, and left it lying there in the defendant's garden, the service was not sufficient. If a defendant refuses to take a copy of the summons, the proper course is to inform him of its nature, and throw it down in his presence, *per* Patterson, J., in *Thompson* v. *Phenev*, 1 Dowl. 443. If proceedings be taken as if personal service had been effected when it was not, they are irregular only, and not *null* (*Holmes* v. *Russell*, 9 Dowl. 487); and a defendant must move promptly after knowledge of it to set them aside, or he will be taken to have waived the irregularity: *Willis* v. *Ball*, 1 Dowl. N. S. 303. But where no irreparable wrong will be done, a plaintiff who has obtained judgment by default, lapse of time is not a bar to the application to set aside: *Atwood* v. *Chichester*, 3 Q. B. D. 722. If there are conflicting affidavits as to service, and the party serving has deposed to personal service, the Courts will not set aside the proceeding upon an affidavit of the defendant that he has not been served: *Morris* v. *Coles*, 2 Dowl. 79; *Giles* v. *Hemming*, 6 Dowl. 325; *Emerson* v. *Brown*, 7 M. & G. 476. The principal office of a railway company is where the general government of the road is carried on. Service at any other station on the line, however important, was *held* insufficient: *Garton* v. *G. W. R. Company*, E. B. & E. 837. In this Province, service would be good on the president or secretary of a railway company, and where the board of directors are outside the Province, then on the general manager: *Newby* v. *Colt's Patent Fire Arms Company*, L. R. 7 Q. B. 293; *Royal Mail Steam Packet Company* v. *Braham*, 2 App. Cas. 381; *Mackereth* v. *Glasgow & S. W. R. Company*, L. R. 8 Ex. 149. In actions against trading corporations, it is submitted that service could be effected on the president or secretary of the company, and in case of joint stock companies, incorporated by Letters Patent, see Rev. Stat. cap. 150, s. 60.

If the Bailiff cannot effect the service of the summons, he shall, immediately after the time for service has expired, return the same to the Clerk, stating the reason for non-service *in writing* on the back of the summons: Rule 90. Ser-

73. The postages of papers required to be served out of the Division, and sent by mail for service, shall be costs in the cause. (*l*) C. S. U. C. c. 19, s. 78. Postages.

74. Where there is no Bailiff of the Court in which the action is brought, or where any summons, execution, subpœna, process or other document, is required to be served or executed elsewhere than in the Division in which the action is brought, it may, in the election of the party, be directed to be served and executed by the Bailiff of the Division in or near to which it is required to be executed, or by such How process, &c., may be executed at a distance.

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vice may be made at any hour of the day or night: *Upton* v. *Mackenzie*, 1 D. & R. 172; *Priddee* v. *Cooper*, 1 Bing. 66. The summons may be served in any county in Ontario, and by any Bailiff (*In re Ladouceur* v. *Salter*, 6 P. R. 305), although not bound to go outside of his own division: section 45. If served on a Sunday the service is void, and cannot be waived: *Taylor* v. *Phillips*, 3 East. 155. Service is good, though made while defendant is attending Court in his own cause: *Poole* v. *Gould*, 1 H. & N. 99; *City of Kingston* v. *Brown*, 4 U. C. R. 117. The summons, we need scarcely say, must be served by one who can read so as to be able to swear if necessary to the correctness of the copy: *Delafield* v. *Jones*, Ca. Pr., C. P. 34. But inability to write is not an objection: *Baker* v. *Coghlan*, 7 C. B. 131. Where, in an action against a father, process was served upon his son of the same name and appearance entered and defence made by the son, the Court *held* that a verdict for defendant was correct, and that, whether there was collusion or not, the plaintiff could not recover against the son so as to charge the father: *Killens* v. *Street*, M. T. 4 Vic. A writ directed to *J. S.* was, by mistake, served upon his son of the same name, who, a few days afterwards, gave it the father, the defendant telling his son that the Sheriff had made a blunder, and defendant at his son's request took it to an Attorney, who, upon defendant's instructions, entered appearance, and afterwards put in pleas; it was *held* good service: *The Provincial Insurance Company of Canada* v. *Shaw*, 19 U. C. R. 360. In an action on a mortgage the writ was served on mortgagor's father, who, by his son, an Attorney, entered an appearance and defended the suit, and a verdict was taken against the mortgagor, the verdict was set aside because served on the wrong person, and no notice or knowledge of the proceedings were shewn to have reached the defendant: *Sutherland* v. *Dumble*, 14 C. P. 156; see also *Walley* v. *M'Connell*, 13 Q. B., 903. An admission of service of summons waives all technical irregularities: *Otis* v. *Rossin et al.* 2 P. R. 48. As to mistakes in summons and copy, see Rob. & Jos. Digest, 2875. Where personal service is not necessary, the Bailiff should be particular in serving one of the three persons mentioned in this clause, and shewing the *nature* of the service in the affidavit; and when served on "some grown person, being an inmate of the defendant's dwelling-house or usual place of abode, trade or dealing," his or her name, if possible, should be stated on the affidavit, and the fact that the person was grown up and was an inmate of the particular house, &c.: see Form 106. On these points, see particularly 2 U. C. L. J., 85, 86 and 104, where the mode of service is fully discussed.

(*l*) This expression among practitioners has a pretty well understood meaning. The costs of all proceedings "which form part of the regular proceedings in the cause" are generally understood as "costs in the cause:" *Cameron* v. *Campbell*, 1 P. R. 173, *per* Burns, J.; Fisher's Digest, 2097; L. R. Digest, 773; Rob. & Jos. Digest, 822.

other Bailiff or person as the Judge, or Clerk issuing the same, orders, (*m*) and may, for that purpose, be transmitted by post, or otherwise, direct to such Bailiff or person, without being sent to or through the Clerk. 32 V. c. 23, s. 18.

Duties of Bailiff and liability of sureties.

75. In cases mentioned in the last preceding section, it shall be the duty of such Bailiff to serve and execute all such summonses, executions, subpœnas, process and other documents, and make return thereof, with reasonable diligence, (*n*) and to pay over, on demand, (*o*) all moneys by him levied or received thereon; and for neglect or default therein, in addition to any other remedy against such Bailiff, he and his sureties shall be liable, on their covenant to the parties

(*m*) At first sight it would appear that the papers mentioned in this section might be served or executed under its provisions in any County; but by Rule 34 a writ of execution cannot be issued under this clause to the Bailiff of any other Division Court *not* in the same County. The proceeding in the latter case would be by transcript under section 161. *Davy* v. *Johnson*, 31 U. C. R. 153, was an action against a Division Court Bailiff for not levying under an execution, the declaration alleging that the plaintiff recovered a judgment in the First Division Court of the County, and thereupon sued out an execution directed to the defendant as Bailiff of the Second Division Court of the same County, commanding him to make the money out of the goods of the defendant in the suit wheresoever found; and that there were goods of defendant within such Second Division Court out of which the Bailiff could have levied. *Held*, that the declaration was bad, and shewed no cause of action. In delivering the judgment of the Court, Morrison, J., says: "In my opinion, if the *fi. fa.* is one issued and to be executed under the provisions of 32 Vic. c. 23, s. 18 (the one in question), by the Bailiff of a Division Court other than the Bailiff whose duty it is to execute *fi. fa.'s* under the 135th (now the 156th) section of the Act, in such case the direction to such other Bailiff should be to levy, &c., within the division (naming it) of which he is Bailiff, or near to it; and if directed to another, who is not the Bailiff of the division in or near to which it is to be executed, it should also appear that such other Bailiff or person had been ordered to act by the Judge or Clerk; and I think the count is defective in not shewing that the *fi. fa.* was to be executed in the defendant's division, or near to it. The bare fact that the debtor resided in the defendant's division is not sufficient." The question arose as one of pleading in that case; but the language of the learned Judge is quite clear as to what facts should concur, and what is requisite to be done to take advantage of this section. If the execution is to be executed by any other person than the Bailiff of the division in or near to which it is required to be executed, the more correct practice would be to have the Judge's or Clerk's order indorsed on the writ.

(*n*) No rule can be laid down in this respect. Each case must depend on its own circumstances.

(*o*) This section makes a demand a necessary preliminary to proceedings being taken. On the subject of demand before suit, see article at page 236 of 10 U. C. L. J.; *Trustees of School Section No. 3, Caledon*, v. *The Corporation of Caledon*, 12 C. P. 301; *Bamford* v. *Clewes*, L. R. 3 Q. B., page 732, *per* Cockburn, C. J.; *Western Assurance Company* v. *McLean et al.*, 29 U. C. R. 57-62; *Llado et al.* v. *Morgan et al.*, 23 C. P. 517; *Matheson* v. *Kelly*, 24 C. P. 598.

aggrieved, as if such summonses, executions, subpœnas, process and documents had issued from or related to some suit in the Court of which he is Bailiff. 32 V. c. 23, s. 19.

Clerk to prepare affidavit of service, &c.,

76. The Clerk shall prepare affidavits of service of all summonses (*p*) issued out of his Court, or sent to him for service stating how (*q*) the same were served, the day of service, and the distance (*r*) the Bailiff necessarily travelled to effect service, and the affidavits shall be annexed to or endorsed on the summonses respectively; but the Judge may require the Bailiff to be sworn in his presence, and to answer such questions as may be put to him touching any service or mileage. C. S. U. C. c. 19, s. 80.

One of several partners may

77. In case of a debt or demand (*s*) against two or more persons, partners in trade (*t*) or otherwise jointly liable, (*u*)

(*p*) The duty here imposed on the Clerk is imperative. For the necessary formalities of all affidavits, see Rule 133. A very common mistake made by Clerks is the omission of the title of the Court and style of cause in affidavits. Any proceedings taken on such a supposed affidavit would be bad (Lush's Prac., 3rd Ed., 879, *et seq.*), unless the Judge ordered the same to be received under said Rule 133, or unless it is an affidavit of the service of an ordinary or special summons, as to which special provision appears to be made in Forms 106 and 107, dispensing with the title of the Court or cause when endorsed on such summons. The power of the Judge to make this order, except in a case where the affidavit *necessarily* comes before him, in proof of something done, is so doubtful as to make its exercise the exception, and not the rule. For forms of affidavits of service, see Forms 106, 107.

(*q*) If personal, that fact can easily be set forth; if not personal, then shewing how served otherwise: see notes to section 72.

(*r*) If less than a mile, mileage is *not* chargeable, for the tariff only provides for "*every mile*" necessarily travelled. If the distance travelled is greater than any given number of miles, and not as much as the next succeeding number, the part of a mile travelled is *not* to be reckoned. Mileage should be calculated from the point at which the officer received the paper. If two or more defendants, the mode of determining the distance travelled is by estimating it first to the place where the first defendant is served, then from there to the next, and so on; and the aggregate distance so travelled is the correct measure. It would be improper to charge mileage to each defendant's place: *Corporation of Haldimand* v. *Martin*, 19 U. C. R. 178. Too much care cannot be taken by Clerks in preparing affidavits of service of summonses, for an omission in respect of any essential might jeopardize all subsequent proceedings: *Jacomb* v. *Henry*, 13 C. P. 377; see note to the charge of mileage in the tariff of Bailiff's fees.

(*s*) As to what is a "debt or demand," see notes to section 79.

(*t*) As to who are, see *Ex parte Tennant, In re Howard*, 6 Ch. D. 303, and the test there considered.

(*u*) At Common Law, a judgment against one or more several joint debtors, without satisfaction, was a bar to any action against the others (*King* v. *Hoare*, 13 M. & W. 493); but not where the debt was joint and several (*Ib.*),

be sued in certain cases.

but residing in different Divisions, or one or more of whom cannot be found, (*v*) one or more of such persons may be served with process, and judgment may be obtained and execution issued against the person or persons served, notwithstanding others jointly liable have not been served or sued, reserving always to the person or persons against whom execution issues his or their right to demand contribution (*w*) from any other person jointly liable with him. C. S. U. C. c. 19, s. 81.

Bailiff may seize property of firm on certificate of Judge.

78. Wherever judgment has been obtained against any such partner, and the Judge certifies that the demand proved was strictly a partnership transaction, (*x*) the Bailiff, in order to satisfy the judgment and costs and charges thereon, may seize and sell the property of the firm, (*y*) as well as that of the defendants who have been served. C. S. U. C. c. 19, s. 82,

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and *Vestry of Bermondsey* v. *Ramsey*, L. R. 6 C. P., p. 251, *per* Montague Smith, J. Where one or more only of several joint debtors is sued in a Division Court, he can set up the non-joinder of the other co-debtors (Dicey on Parties, 506), except where the defendants reside in different divisions, or where one or more of them cannot be found. In which case, see Rules 113 and 151. The limit of the division in Division Courts is by this section made somewhat analogous to the provincial territorial limit as to jurisdiction of the higher Courts in this respect.

(*v*) This means after reasonable efforts have been made to find a defendant. Whether such had been made would always be a question for the Judge to determine before proceeding to hear the case against the one served: *Tomlinson* v. *Goatly*, L. R. 1 C. P. 231, *per* Erle, C. J.

(*w*) Contribution here means the payment by each person of his proper share of a joint debt: Wharton, 180. As to the liability of a person in this way, see Add. on Cont. 7th Ed. 990 and 1011; Fisher's Digest, 8267; L. R. Digest, 717; and notes to section 32. Any defendant or co-surety cannot compel an assignment to be made to him of the judgment by the plaintiff, unless such defendant or surety has paid the whole of the debt: *In re McLean* v. *Jones*, 2 L. J. N. S. 206; see also *Brown* v. *Gossage*, 15 C. P. 20; *Potts* v. *Leask et al.*, 36 U. C. R. 476; *Ianson* v. *Paxton*, 23 C. P. 439; *Fisken* v. *Gordon, et al.*, 40 U. C. R. 146; and Rob. & Jos. Digest, 745, on the general question of contribution.

(*x*) The proper test of a liability as a partner is not whether the party sought to be charged has stipulated for the participation in profits as such, but whether the trade was actually carried on by persons acting on his behalf: *Wheatcroft* v. *Hickman*, 9 C. B. N. S. 47; 8 H. L. Cases, 268; *Kilshaw* v. *Jukes*, 3 B. & S. 847; *Bullen* v. *Sharp*, L. R. 1 C. P. 86; *Ex parte Tennant, In re Howard*, 6 Ch. D. 303; *In re Randolph*, 1 App. R. 315, and cases there cited.

(*y*) Without the aid of this section, the Bailiff could, on an execution against one of two partners, seize the goods of both, but only sell the defendant's undivided interest in them: *Johnson* v. *Evans*, 7 M. & G. 240; *Lee* v. *Rapelje*, 2 U. C. R. 368. In order, however, to justify a seizure and sale of the partnership

Judgment by Default where Specially Endorsed Summons.

In proceedings by special summons final judgment entered by the Clerk, when claim not disputed, &c.

79. In actions brought in any Division Court for the recovery of any debt or money demand, (*z*) where the particulars of the plaintiff's claim, with reasonable certainty and detail, are endorsed on or attached to the summons, and a copy of the summons and particulars, with a notice in the form prescribed by the General Rules or Orders relating to

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property, it must be under the circumstances mentioned in the previous section 77, the words "*such partner*" shewing the necessity of referring to the previous section: *Eastern Counties Railway Company* v. *Marriage*, 6 H. & N. 931; *Pearson et al.* v. *Ruttan*, 15 C. P. 89.

(*z*) The provisions of these sections in respect to judgments by default on specially endorsed summonses were introduced late in the history of Division Court law, but have already been productive of good results. They afford to business men in many cases a speedy means of placing claims in judgment, and readily realizing their fruits. They save much needless trouble and expense. The inconvenience occasioned under the old system of a creditor's being obliged to attend Court with witnesses from a distance at considerable expense, even though no defence was ever intended to be offered, was frequently experienced. The hardship of it called for legislative interference; and the clauses we are now about to consider were the result. In the experience of Judges, as well as suitors, we think the virtue of these provisions can readily be attested. The ordinary routine business connected with simple undefended cases is properly confined to the Division Court office. The Judge is not troubled with matters that can better be attended to by the Clerk; and suitors in legitimately defended cases are not delayed by what formerly was the plainest and simplest parts of judicial work. The Clerk now performs that work which formerly belonged to the Judge, in a manner more to the interest of the suitors, and to the relief of those interested in matters coming before the Court. The following causes of action, it is submitted, would come within the meaning of the words "debt or money demand," as used in this section: any sum of money certain payable under any covenant, money-bond, or parol agreement; any cause of action which in the higher Courts would be declared for as money payable for goods sold and delivered; goods bargained and sold; work done; money lent; money paid; money had and received; interest upon money; accounts stated; lands sold and conveyed; use and occupation; rent; money payable on bills of exchange and promissory notes; on an award; the price of shares or stocks sold; freight; hire of goods; on a guarantee for the payment of a sum certain; carriage of goods; board and lodging; agistment of cattle or horses, &c.; premiums of insurance or assessments made by Mutual Insurance Companies; medical or other attendance; on a penal statute where jurisdiction not excluded (*Brash qui tam* v. *Taggart*, 16 C. P. 415); in cases where damages liquidated; goodwill of premises, and on a judgment of a Division Court: section 216. Under this section an action cannot of course be commenced until the "debt or money demand" is past *due*. A debt means something due or coming due: *Geraghty* v. *Sharkey*, 30 L. T. Rep. 204; *Cohen* v. *Hale*, 3 Q. B. D. 371. A bond with a penalty for the doing anything but payment of money would not be the subject of a suit under this section: *Griswold* v. *Buffalo, Brantford and Goderich Railway Company*, 3 U. C. L. J. 115. A money bond would: *Johnson* v. *Diamond*, 11 Ex., page 80, *per* Parke, Baron. A claim for unliquidated damages would not be suable under this clause:

Division Courts from time to time in force, annexed to or endorsed on such copy, has been duly served, (*a*) then, unless the defendant has left with the Clerk, within eight days after (*b*) the day of such service (where the service is required to be ten days before the return), or within twelve days after the day of such service (where the service is required to be fifteen days or twenty days before the return) a notice to the effect that he disputes the claim, or some part, (*c*) and how much thereof, final judgment may be entered by the Clerk on the return of such summons (*d*) or at any time within one month thereafter for the amount claimed in such particulars, or so much thereof as has not been disputed, if the plaintiff is content with judgment for such part, (*e*) and exe-

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Jones v. *Thompson*, 1 E. B. & E. 63; *Dresser* v. *Johns*, 6 C. B. N. S. 429; *Bank of Toronto* v. *Burton*, 4 P. R. 56; *Boyd et al.* v. *Haynes*, 5 P. R. 15. An unsettled balance between partners could not be sued: *Campbell* v. *Peden et al.*, 3 U. C. L. J. 68. If interest is claimed, the particulars should either state the amount of interest or the date from which it is to be calculated: *Bardell* v. *Miller*, 7 C. B. 753. The rate of interest need not be specified unless above six per cent.: see *Allen* v. *Bussey*, 4 D. & L. 430. A claim partly liquidated and partly unliquidated cannot be joined: *Rogers* v. *Hunt*, 10 Ex. 474; *Westlake* v. *Abbott*, 4 U. C. L. J. 46. Interest should only be claimed when recoverable by contract, either express or implied: *Inglis* v. *Wellington Hotel Company*, 29 C. P. 387; see *McKenzie et al.* v. *Harris*, 10 U. C. L. J. 213. It is submitted that an action can be brought on a Division Court judgment in a Division Court (see section 216), and is not open to the objection raised in *McPherson* v. *Forrester*, 11 U. C. R. 362, and *Donnelly et al.* v. *Stewart*, 25 U. C. R. 398; and if so, could be sued under this section: *Hodsoll* v. *Baxter*, E. B. & E. 884; *Dick* v. *Tolhausen*, 4 H. & N. 695. An action for not returning goods let to hire would not be within this section: *Collis* v. *Groom*, 3 M. & G. 851, *per* Tindal, C. J. A claim for an account stated with interest would be within the section: *Smart* v. *Niagara and Detroit Rivers Railway Company*, 12 C. P. 404: see *Northern Railway Company* v. *Lister*, 4 P. R. 120. As to the meaning of the word "debt," see the discussion in *Williams* v. *Harding*, L. R. 1 H. L. 9, and *Re Greensill*, L. R. 8 C. P. 24; *Reg.* v. *The Guardians of Stepney Union*, L. R. 9 Q. B. 383.

(*a*) See notes to sections 62 and 72.

(*b*) The day of service is not to be reckoned as one of the eight days: *Young* v. *Higgon*, 6 M. & W. 49; *Weeks* v. *Wray* L. R., 3 Q. B. 212; *McCrea* v. *Waterloo Mutual Fire Insurance Company*, 26 C. P. p. 437; Rule 82. But if the last day is a Sunday it is included: *Rowberry* v. *Morgan*, 9 Ex. 730; see *Mayer* v. *Harding*, L. R. 2 Q. B. 410.

(*c*) See Rule 132 and Form 103. As to a defendant's preparing for his defence between putting in the disputing notice and the sittings, see 2 U. C. L. J. 23. If no disputing notice be filed, the Clerk must notify the plaintiff: Rule 88.

(*d*) That is when the time for appearance has expired.

(*e*) This would be a bar to any subsequent suit for any part of the claim sued for: *Winger* v. *Sibbald et al.*, 2 App. R. 610; see Rules 21 to 23 inclusive. Execution may issue on judgment under this section forthwith: see Rule 149.

cution may afterwards issue thereon at the instance of the plaintiff. 32 V. c. 23, s. 2.

Summons, particulars and affidavit to be filed.

2. The final judgment so entered may be in the form prescribed by the General Rules or Orders relating to Division Courts from time to time in force, but no such judgment shall be so entered until the summons and particulars, with an affidavit of the due service of both, (*f*) have been filed. 32 V. c. 23, s. 3.

Judge may set aside judgment.

3. The Judge may set aside such judgment, and permit the case to be tried, on sufficient grounds shown (*g*) on such

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(*f*) As to the care necessary in preparing such affidavit, see notes to section 76 and Rule 133; and if judgment should be signed on an insufficient affidavit, it would be set aside for irregularity (*Levy* v. *Wilson*, 9 L. J. N. S. 191; but see *Potter* v. *Pickle*, 2 P. R. 391), and the Clerk might possibly be liable as a trespasser: Addison on Torts, 14; *Carey* v. *Lawless*, 13 U. C. R. 285; *Roissier* v. *Westbrook et al.*, 24 C. P. 91. For this affidavit, see Form 107. A judgment can be signed on a holiday (*Bennett* v. *Potter*, 2 C. & J. 622), but not on a non-juridical day: *Harrison* v. *Smith*, 9 B. & C. 243.

(*g*) The authorities shew that a mere general affidavit of merits would not meet the requirements of this section (*Whiley* v. *Whiley*, 4 C. B. N. S. 653; *Anderton* v. *Johnston*, 8 U. C. L. J. 46; *McDonald et al.* v. *Burton et al.*, 2 L. J. N. S. 190; *The Wooster Coal Company* v. *Nelson et al.*, 4 P. R. 343), nda that properly as full an affidavit is necessary as would be required to set aside a verdict in the higher Courts on the merits; but in Division Courts great allowances must be made: *Proudfoot* v. *Harley*, 11 C. P. 389; *Vidal* v. *Bank of Upper Canada*, 15 C. P. 421; *Bouchier et al.* v. *Patton et al.*, 3 U. C. L. J. 48. An affidavit of merits is only necessary where the judgment is properly entered: *Hall* v. *Scotson*, 9 Ex. 238, *per* Parke, B., at page 240. An irregular judgment can be set aside by a defendant without shewing merits: *Ib.* It is suggested that a proper form of affidavit would be, in the case of the defendant making the affidavit, thus, "That I am advised and verily believe that I have a good defence to this action on the merits;" and in the case of his Attorney, "That defendant has, as I am instructed (*or informed*), and verily believe, a good defence to this action on the merits;" and in both cases *shewing* the facts, or *some fact*, constituting such good defence. "He need not set out the whole defence with minute particularity:" *per* Cockburn, C. J., at page 659 of 4 C. B. N. S. The affidavit must apply the defence to the particular action, by stating that the defendant has a good defence "herein," or "in this cause," or "in this action," on the merits: *Tate* v. *Bodfield*, 3 Dowl. 218: *Lane* v. *Isaacs*, 3 Dowl. 652; *McGill et al.* v. *McLean*, 1 Cham. R. 6. It should be made by the defendant, his Attorney or agent, or some person who has been concerned in the cause, in such a way as to make him acquainted with its merits: *Rowbotham* v. *Dupree*, 5 Dowl. 557. In setting aside a regular judgment, the Court refused to restrain a defendant from pleading the Statute of Limitations (*Maddocks* v. *Holmes*, 1 B. & P. 228; see *Knox* v. *Gye*, L. R. 5 H. L. 656-674); or infancy: *Delafield* v. *Tanner*, 1 Marsh. 391. Nor would the Court refuse to set aside a regular judgment, though bankruptcy was going to be pleaded: *Evans* v. *Gill*, 1 B. & P. 52. In an action on an Attorney's bill, the non-delivery of a signed bill is not a defence on the merits (*Beck* v. *Mordant*, 2 Bing. N. C. 140); nor is a set-off: *Anderton* v. *Johnston*, 8 U. C. L. J. 46. It is not only necessary for the defendant to shew merits, but to account for his not putting in notice in the

and order trial of case.

terms as to costs and otherwise (*h*) as he thinks just. 32 V. c. 23, s. 2.

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proper time as well, (*per* Cotton, L. J., in *Atwood* v. *Chichester*, 3 Q. B. D. 725); and especially if a trial has been lost: *Arnold* v. *Robertson*, 4 U. C. L. J. 69. But the Judge will let the case go to a trial if the merits are in dispute, as shewn by the affidavits: *Wilson* v. *Municipal Council of the Town of Port Hope*, 10 U. C. R. 405, and *The Wooster Coal Company* v. *Nelson et al.*, 4 P. R 343. A judgment should not be set aside to allow a defendant to set up matters subsequent to it: *Schofield* v. *Bull*, 3 U. C. L. J. 204. The truth of the merits shewn by defendant's affidavit cannot be inquired into: *Blewitt* v. *Gordon*, 1 Dowl. N. S. 815; but see 10 U. C. R. 405.

(*h*) The plaintiff should be placed as nearly as possible in the same situation as though the action had proceeded in the usual way: *Smith* v. *Blundell*, 1 Chitty, 226. Defendant should be compelled to pay the costs (*Sisted* v. *Lee*, 1 Salk. 402; *Westlake* v. *Abbott*, 4 U. C. L. J. 46), and to go to a hearing as soon as possible (*Matthews* v. *Stone*, Barnes, 242); and sometimes will be ordered to bring the money, or part of it, into Court: *Wade* v. *Simeon*, 13 M. & W. 647; *Every* v. *Wheeler*, 3 U. C. L. J. 11. And where application is made to set aside a judgment not regularly entered, defendant will, if necessary, be restrained from bringing any action: Archbold's Practice, 12th Ed., 989. So long as an irregular judgment remains it can be enforced: *Tait* v. *Harrison*, 17 Grant, 458. If the defendant does not first comply with the terms by the order imposed on him, he cannot take advantage of it. It is submitted that a judgment should only be set aside on a summons to shew cause: *Reg.* v. *Cheshire Lines Committee*, L. R. 8 Q. B. 344, and the cases there cited. But where the time has expired and no judgment entered, the order ought to be granted *ex parte*; but in either case the grounds of defence should be shewn. Where no irreparable wrong will be done a plaintiff who has obtained judgment by default, lapse of time is not a bar to the application to set it aside: *Atwood* v. *Chichester*, 3 Q. B. D. 722; see earlier cases in our Courts, referred to at page 1931 of Rob. & Jos. Digest. A judgment will be set aside at the instance of a subsequent creditor if fraud be shewn: *Balfour* v. *Ellison et al.*, 8 U. C. L. J. 330; *Girdlestone* v. *Brighton Aquarium Company*, 3 Ex. D. 137.

The following is a form of affidavit to be allowed in to defend under this section:

In the Division Court for the County of .

A. B., Plaintiff,

against

C. D., Defendant.

I, of the of in the County of and Province of Ontario (*addition*), make oath and say:

1. That I am the (or "one of the") above named defendant in this cause. (If made by an Attorney or agent it may be in this form, "That I am the Attorney [or duly authorized agent] of the above named defendant in this cause, and, when not otherwise herein expressed, that I have a personal knowledge of the matters herein deposed to").

2. That the summons herein was served on me (or the above named defendant, as I am informed and believe) on or about the day of last past.

3. That notice disputing the plaintiff's claim (or the Statute of Limitations, &c., as the case may be, as mentioned in Rule 20), was intended to be given herein, but (here set out particularly the reason why such notice was not given in time and accounting for any delay).

4. That I have (or "the said defendant has") a good defence to this action on the merits, as I am advised and verily believe (or if made by Attorney or

Leave to dispute at any time before judgment.

80. The Judge, at any time before judgment actually entered, (*i*) although the time for giving such notice disputing the plaintiff's claim has expired, (*k*) may, on sufficient grounds shown, and on such terms (*l*) as he thinks just, grant leave to the defendant to dispute (*m*) the plaintiff's claim; in which case the requisite notice disputing such claim shall immediately be left with the Clerk, (*n*) and also sent to the plaintiff, by prepaid letter through the post or otherwise. 32 V. c. 23, s. 4.

TRIAL.

Judge may summarily dispose of

81. In cases in which a trial is to be had, the defendant shall, on the day named (*o*) in the summons, either in person,

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agent, "as I am instructed and verily believe,") and such defence consists in this (here particularly shew one or more of the grounds of defence relied on, so that the Judge may see that there is something to be tried should the application be granted).

5. That the application to be made herein is not for the purpose of delaying the plaintiff in the recovery of judgment and execution against me (or "the said defendant") in this cause, but solely for the purpose of my (or the above named defendants) being allowed in to dispute the plaintiff's claim, and to defend this action on the merits aforesaid.

Sworn, &c.

(*i*) If the Clerk is in the act of entering up judgment, it is not "actually entered:" *Harris* v. *Andrews*, 3 U. C. L. J. 31.

(*k*) This depends of course upon where defendant resides: see sections 70, 71, 72 and 79, and notes.

(*l*) See notes to section 79, sub-section 3.

(*m*) Unless the claim be one within the 79th section, no notice of dispute would be necessary; and if a judgment should be entered in a suit where the claim was not within that section, it could be set aside, without shewing any merits.

(*n*) "Immediately" here means *within a reasonable time: Toms* v. *Wilson*, 4 B. & S. 442; and at page 454 of same case, *per* Blackburn, J., 14 L.J. N. S. 191; Maxwell on Statutes, 311; *Forsdike* v. *Stone*, L. R. 3 C. P. 607; *Massey* v. *Sladen*, L. R. 4 Ex. 13.

(*o*) No better exposition of correct procedure at the hearing can be given than in the following words: "The causes entered for trial at a Court are set down for hearing in the order in which they were in the first instance entered with the Clerk. If there be a jury case, it is first disposed of; and, unless the Judge should see cause for proceeding differently, the other causes are then taken up in regular order, and gone through with. The adjourned cases that stand over from the last Court are usually put at the head of the list. It is not usual to strike out a cause when the parties do not appear at the first call; that is, if the Court has not been sitting for half an hour, or longer, after the hour appointed for the Court; they are commonly 'put aside for the present,' or placed at the 'foot of the list;' but the practice in different Courts varies in this particular. It is always advisable that the plaintiff should be present at the opening of the Court, or immediately after, even though his case should stand low on

cause or nonsuit plaintiff.

or by some person on his behalf, (*p*) appear in the Court to answer, and, on answer being made, the Judge shall, without further pleading or formal joinder of issue, proceed, in a summary way, to try the cause and give judgment; and in case satisfactory proof is not given to the Judge entitling either party to judgment, he may nonsuit (*q*) the plaintiff;

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the list, for all those previously entered may be put below his, or be otherwise disposed of. As to the defendant, it is essential that he should be present, for the case may be called on in his absence and judgment by default pass against him. Punctuality is necessary to dispatch; and if parties suffer from their own negligence, they have no right to complain. The plaintiff may appear by Attorney or by agent, if he finds it inconvenient to appear personally. Any neighbour or member of the plaintiff's family may act as agent; but an appearance by some one must be made on the plaintiff's behalf:" 2 U. C. L. J. 61.

(*p*) At one time no one but a Barrister or Attorney could appear for another in Division Courts (*In re The Judge of the County Court of York*, 31 U. C. R. 267); but the statute of 35 Vic. cap. 8, allowed "any person" to appear: see sec. 84. Counsel has a right to be heard before a Court of Revision: *per* Hughes, J., at page 295 of 6 L. J. N. S.

(*q*) In the higher Courts, a plaintiff cannot be nonsuited against his will: *Corsar et al.* v. *Reed*, 17 Q. B. 540. But this section gives the power to a Judge to nonsuit in Division Courts, even against the will of a plaintiff; so also in jury cases: Rule 122. In an action of contract, a plaintiff may be nonsuited as to some or one of several defendants though judgment by default has been entered against the others (*Benedict* v. *Boulton*, 4 U. C. R. 96; *McNab* v. *Waystaff*, 5 U. C. R. 588); and, if a joint contract, the nonsuit to those defending would enure to the benefit of those who did not defend: *per* Robinson, C. J., at page 97 of 4 U. C. R.; see also *Commercial Bank* v. *Hughes et al.*, 3 U. C. R. 361; s. c., 4 U. C. R. 167. If a defendant moves for a nonsuit and afterwards examines witnesses, the plaintiff is entitled to any benefit which he can obtain from the defendant's evidence: *Brock* v. *McLean*, Tay. R. 398; *Allen* v. *Carey*, 7 E. &. B. 463. A plaintiff may be nonsuited on an interpleader issue: *Bryson et al.* v. *Clandiman*, 7 U. C. R. 198. There may be a nonsuit after payment of money into Court (*Gutteridge* v. *Smith*, 2 H. B. 374), or after a plea of tender: *Anderson* v. *Shaw*, 3 Bing. 290; *Oakes* v. *Morgan*, 8 L. J. N. S. 248. A plaintiff may take a nonsuit at any time before the pronouncing of the verdict by a jury, but not after it is rendered and before it is recorded: *Van Allan* v. *Wigle et al.*, 7 C. P. 459. A nonsuit should be entered unless there is evidence on which a rational verdict for the plaintiff could be sustained: *Campbell* v. *Hill*, 23 C. P. 473; *Irwin* v. *Maughan*, 26 C. P. 455 and and 460, *per* Gwynne, J.; see *Dublin, Wicklow & Wexford Railway Company* v. *Slattery*, 3 App. Cases (H. L.), 1155. If a plaintiff take a nonsuit in deference to a Judge's ruling, he can apply for a new trial (*Burn* v. *Beecher*, 14 C. P. 415; *Hatton* v. *Fish*, 8 U. C. R. 177); but not if he accepts a non-suit rather than go to the jury on an unfavourable charge (*McGrath* v. *Cox*, 3 U. C. R. 332), or when he takes a non-suit during the charge: *Fraser* v. *North Oxford and West Zorra Plank Road Company*, 15 U. C. R. 291. As to the right to move when the Judge's ruling is acquiesced in either on a point of law or on the Evidence, see *Stoker* v. *The Welland Railway Company*, 13 C. P. 386; *Wood* v. *Bowden*, 23 U. C. R. 466; *Taylor* v. *Rose*, 24 U. C. R. 446; *Miller* v. *The Corporation of Hamilton*, 17 C. P. 514; *Conway* v. *Shibly*, 39 U. C. R. 519. In a jury case, if a plaintiff's counsel should decline to take a nonsuit, the Judge should properly refuse him the right to address the jury, and should charge the jury to find for defendant: *Storey* v. *Veach*, 22 C. P. 164. The evidence given

and the plaintiff may, before verdict in jury cases, and before judgment pronounced (*r*) in other cases, insist on being nonsuited. (*s*) C. S. U. C. c. 19, s. 84.

Proceedings in case defendant does not appear.

82. If on the day named in the summons the defendant does not appear, or sufficiently excuse his absence, or if he neglects to answer, (*t*) the Judge, on proof of due service of the summons and copy of the plaintiff's account, claim or demand, may proceed to the hearing or trial of the cause on the part of the plaintiff only, and the order, verdict or judgment thereupon shall be final and absolute, (*u*) and as valid as if both parties had attended; and, except in actions of tort or trespass, in case of the personal service (*v*) of the

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by a defendant may be used for the purpose of a nonsuit (*per* Lord Chelmsford, in *Giblin* v. *McMullen*, L. R. 2 P. C. 339; *Storey* v. *Veach*, 22 C. P. 176; *Daniel* v. *Metropolitan Railway Company*, L. R. 5 H. L. 45); but the rule now appears to be to submit all reasonably disputed facts to a jury: *Johnson* v. *Provincial Insurance Company*, 27 C. P. 464; *Dublin, Wicklow & Wexford Railway Company* v. *Slattery*, 3 App. Cases, 1155. Where two defendants defend an action on a joint contract, there cannot be a nonsuit as to one and a verdict against the other: *Revett* v. *Brown*, 2 M. & P. 12; *McNab* v. *Wagstaff*, 5 U. C. R. 588.

(*r*) A judgment may be said to be "pronounced" when the Judge publicly and openly declares the decision of a case: Worcester, 1140.

(*s*) With the object, if necessary, of suing again. In *Outhwaite*, App., *Hudson*, Resp., 7 Ex. 380, it was *held* that a plaintiff in a County Court case has a right to be nonsuited at any time before the jury have delivered their verdict; or, if the cause be tried by a Judge alone, at any time before the Judge has delivered his judgment. This is equivalent to "judgment pronounced" in the section in question; and it is submitted that if the Judge delivers his decision on the case, a plaintiff cannot take a nonsuit, even if the judgment so delivered is not noted by the Judge: *Van Allan* v. *Wigle et al.*, 7 C. P. 459. Of course a judgment of nonsuit entitles a defendant to his costs.

(*t*) A defendant served with a summons should make it a point to be at Court not later than the hour fixed for opening the sittings, for if proper service of the summons is effected the Judge may proceed with the case in his absence. If necessary to call witnesses, or in the event of the claim being one for which the Judge could, under the latter part of this clause, give judgment by default, the defendant might in either case, from his own neglect or inattention, have judgment recorded against him.

(*u*) The policy of the law is, that there should only be one trial of a cause, and that a verdict or judgment should not be disturbed unless it clearly appears to be wrong: *Hooper* v. *Christoe*, 14 C. P. 121, *per* Richards, C. J. If there was no provision for granting new trials in Division Courts, no power would exist in such Court to grant new trials: *Reg.* v. *Doty*, 13 U. C. R. 398; *Great Northern Ry. Co* v. *Mossop*, 17 C. B. 138, *per* Jervis, C. J. The judgment is to be "final and absolute," subject of course to a new trial being granted.

(*v*) It will be observed that judgment can only be entered by default on "personal service" being made. Should a Summons for a claim less than $8 not be personally served, a plaintiff would not be entitled to judgment without

summons and of detailed particulars of the plaintiff's claim, the Judge may, in his discretion, give judgment without further proof. C. S. U. C. c. 19, s. 85.

Judge may adjourn hearing of cause.

83. In case the Judge thinks it conducive to the ends of justice, he may adjourn (*w*) the hearing of any cause in order to permit either party to summon witnesses or to produce further proof, or to serve or give any notice necessary to

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proof. It will be observed, too, that a plaintiff, in an action of "tort or trespass," cannot obtain judgment by default, nor in any case, unless "*detailed* particulars of the plaintiff's claim" have also been served. It is said "the Judge may, *in his discretion*, "give judgment without further proof." The usual practice is to exercise the discretion.

(*w*) A wide discretion is here given to the Judge: see also Rule 140. It should only be exercised when a refusal to adjourn would work injustice unless by consent of parties. If the power of adjournment had not been conferred by statute, it is doubtful if it could be exercised: *Reg.* v. *Murray*, 27 U. C. R. 134; *Reg.* v. *G. W. R. Co.*, 32 U. C. R. 506. It is submitted that whatever would be a good ground for postponing a trial at *Nisi Prius* would be a good ground for adjournment of a cause in a Division Court. No order is necessary to be drawn up unless by direction of the Judge: Rule 139. A cause will not be postponed at *Nisi Prius* until after the trial of an indictment for perjury in a matter relating to the cause: *Johnson* v. *Wardle*, 3 Dowl. 550. A trial was put off because a material witness was prevented from attending by fraud of the Attorney for the opposite party: *Turquand* v. *Dawson*, 1 C. M. & R. 709. It is the practice to accede to an application to postpone the trial of a cause on the ground of the absence of a material witness when the application appears reasonable: *Stevens* v. *Esling*, 2 F. & F. 136. If a person allows a witness to leave the country, knowing that his evidence is material, he cannot have the trial postponed on that account: *Solomon* v. *Howard*, 12 C. B. 463. A Judge has a discretion in refusing the postponement of a case, notwithstanding the absence of a witness: *Turner* v. *Merryweather*, 7 C. B. 251. A trial will not be postponed where a witness is in defendant's employ, and he has neglected to subpœna him in time and allowed him to leave: *Wright* v. *M'Guffie*, 4 C. B. N. S. 441. Unless an endeavour has been made to procure the attendance of a witness, a postponement will be refused (*Ward* v. *Wilkinson*, 2 F. & F. 173); or if it appears that no application has been made to the witness to know if he will attend: *Worsley* v. *Bassett*, 3 Dougl. 58. If a witness is kept out of the way by plaintiff, a trial will be postponed: *Duberly* v. *Gunning*, Peake, 97. If witness is out of the country, and it does not appear that there is a likelihood of his returning, the postponement will be refused: *Rex* v. *D'Eon*, 1 W. B. 515. Sometimes the application will be refused if the party applying has conducted himself unfairly, or has been the cause of any improper delay: *Saunders* v. *Pittman*, 1 B. & P. 33. A trial will not generally be postponed to enable a defendant to prove a plea in abatement: *Wade* v. *Birmingham*, 2 Chitty, 5. The illness of defendant's Attorney was *held* a good cause for postponing a trial (*Hayley* v. *Grant*, Sayer, 63), but not where Counsel was unprepared: *Colebrook* v. *Dobbs*, 3 Burr. 1319. A party should apply at once (see Rule 140), otherwise he would have to pay the costs of the opposite party in preparing for trial: see *Dale* v. *Heald*, 1 C. & K. 314; *Ward* v. *Ducker*, 5 M. & G. 377. The party obtaining an adjournment on payment of costs should take the means at once to have costs taxed: *Waller* v. *Joy*, 16 M. & W. 60; *Brega* v. *Hodgson*, 4 P. R. 47. When application is made on the ground of the absence of a witness, it is not enough to shew that the witness is material, and may and probably

enable such party to enter more fully into his case or defence, or for any other cause which the Judge thinks reasonable, upon such conditions as to the payment of costs and admission of evidence or other equitable terms, (*x*) as to him seems meet. C. S. U. C. c. 19, s. 86.

All persons empowered to act as agents or advocates in Division Courts.

84. Any person (*y*) may appear at the trial or hearing of any cause, matter or proceeding as agent and advocate for any party to any such cause, matter or proceeding in the Division Courts. 35 V. c. 8, s. 1.

Judge may prevent any one from

85. The Judge or acting Judge may, wherever in his opinion justice appears to require it, (*z*) prevent any person

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will give important evidence, or to swear that his evidence will be material and necessary, without shewing that it will assist the case of the person making the application: *Kerr* v. *G. T. R. Co.*, 4 P. R. 303. In *Speers* v. *G. W. R. Co.*, 6 P. R. 170, it was *held*, in an action for a personal injury, that the inability properly to calculate the damages to the plaintiff, owing to sufficient time not having elapsed from the receipt of the injury, was a sufficient ground for postponing the trial. The Judge may under this section *adjourn the hearing of a cause* from the regular sitting of the Court to his chambers, within the territorial limits of the division; and such adjournment of the hearing of the cause is in effect, if not objected to by the parties, *an adjournment of the Court to hear that cause*: *In re Burrowes*, 18 C. P. 493; see also notes to section 79, and an article at page 35 of 3 L. C. G., on the adjournment of causes for the purpose of putting in statutory defences by leave of the Judge.

(*x*) It is not unusual to require the party applying to admit some matters of formal proof (*Brown* v. *Murray*, 4 D. & R. 830); and, if the plaintiff is likely to lose his debt, payment of the amount in dispute into Court is usually made a condition: Lush's Prac. 537; see also *Dale* v. *Heald*, 1 C. & K. 314. Whatever terms the Judge thinks just can be imposed. His discretion in this respect should be reasonably exercised, and not capriciously: Maxwell on Stat. 100.

(*y*) It is submitted that this is wide enough to include the case of a woman appearing on behalf of another person (see Rev. Stat., page 4); but it is probable a Judge would not, under section 85, allow it to become general. On this subject, see *Cobbett* v. *Hudson*, 15 Q. B. 988; and notes to section 81. A party can appear as his own advocate, and be a witness in the cause too (*Cobbett* v. *Hudson*, 1 E. &. B. 11); but a plaintiff or defendant will not be allowed to be heard in his own case after counsel has addressed the Court (*Newton* v. *Chaplin*, 10 C. B. 356); and a Barrister is in no better position than any one else: *Ib.* Where defendants at a trial appear by different counsel, it is a matter for the discretion of the Judge, to be exercised under all circumstances of the case, whether more than one ought to be allowed to address the jury: *Nicholson* v. *Brooke*, 2 Ex. 213. As to the authority of a counsel to bind his client, see *Strauss* v. *Francis*, L. R. 1 Q. B. 379, and cases cited; *Brown* v. *Blackwell*, 26 C. P. 43. An advocate can act as such in a cause, and as a witness as well: *Davis* v. *The Canada Farmers' Mutual Insurance Company*, 39 U. C. R. 452, But see remarks as to the impropriety of such a course: *Ib.*

(*z*) It is submitted that under this section a Judge could even refuse to allow a Barrister or Attorney appearing in a Division Court case as "agent and

acting as agent or advocate in certain cases.

from appearing at the trial or hearing of any cause, matter or proceeding in the said Court, as agent and advocate for any party or parties to any such cause, matter or proceeding. 35 V. c. 8, s. 2.

Tender or Payment of Money into Court.

Plea of tender and payment of money into Court.

86. If the defendant in any action of debt or contract (*a*) brought against him in any Division Court, desires to plead a tender (*b*) before action brought, of a sum of money in full satisfaction of the plaintiff's claim, he may do so on filing his plea with the Clerk of the Court before which he is summoned to appear, at least six days before the day appointed for the trial of the cause, and at the same time paying into Court the amount of the money mentioned in such plea; and notice of such plea and payment shall be forthwith communicated by the Clerk of the said Court to the plaintiff by post (on receiving the necessary postage), or by sending the same to his usual place of abode or business. C. S. U. C. c. 19, s. 87.

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advocate." The power is not given to prohibit generally, but at "trial or hearing of *any cause, matter or proceeding.*" If a Barrister or Attorney should misconduct himself, either towards the Judge or a witness, or otherwise, it is submitted that the Judge would not only have the power, but it would be his *duty*, to prevent such person from further appearance in the case; and this too in addition to any fine that he might find it necessary to impose for contempt of Court under section 217.

(*a*) It will be observed that the statute does not apply to any action of tort, but to actions in "debt or contract" only. It is submitted that in any action *ex contractu*, in a Division Court a plea of tender is admissible, even where the damages are unliquidated, and that *Dearle* v. *Barrett*, 2 A. & E. 82, does not apply, as it was decided under a different statute.

(*b*) "The principle of a plea of tender is this, that the defendant has always been ready at all times to pay upon request, and on a particular occasion offered the money:" *Hesketh* v. *Fawcett*, 11 M. & W. 356. "The defence of tender consists in the defendant having been always ready and willing to pay the debt, and having tendered it before action to the plaintiff, who refused to accept it. It is a performance of the contract on the part of the defendant so far as he could perform it, and was not prevented by the plaintiff:" Bullen & Leake, 3rd Ed. 693. A plea of tender (like a plea of payment into Court) operates as an admission of the special contract stated in the claim to which it is pleaded: *Cox* v. *Brain*, 3 Taunt. 95. It supersedes the necessity of shewing that a guarantee was in writing: *Middleton* v. *Brewer*, Peake, 15. It admits the defendant's liability on the contract to the amount tendered, but no more: *Willis* v. *Langridge*, 2 H. & W. 250. Tender can only be pleaded in Superior Courts where the defendant has not been guilty of any breach of his contract (*Hume* v. *Peploe*, 8 East. 168 and 170, *per* Lord Ellenborough); but it is doubtful if such is law under the words of this section. Thus, where a debt was pay-

able on a day certain, as on an acceptance, a tender on a subsequent day was *held* no answer: *Poole* v. *Tumbridge*, 2 M. & W. 223; *Dobie* v. *Larkan*, 10 Ex. 776. Where a bill or note is payable on demand, a tender any time before action is good: *Norton* v. *Ellam*, 2 M. & W. 461. An endorser can tender after dishonor of the bill: Byles on Bills, 9th Ed. 399; *Siggers* v. *Lewis*, 1 C. M. & R. 370; *Walker* v. *Barnes*, 5 Taunt. 240. This defence must under this section be put in writing, and it is necessary to aver that the defendant was "always ready and willing:" 1 Wms. Saunders, 33 c. (2); *Whitlock* v. *Squire*, 12 Mod. 81; *Bennett* v. *Parl* 9 Irish C. L. R. 89 Ex. If pleaded to the whole cause of action without ...ent of the money into Court, the Clerk could, in actions under section 79, enter up judgment by default: 1 Tidd's Prac. 612; *Chapman* v. *Hicks*, 2 C. M. & R. 633. In an action on the common counts, if the plaintiff relies on the debt being payable on a particular day, and the tender not made in time, he must shew it: *Smith* v. *Manners*, 5 C. B. N. S. 632.

By and to whom.—A tender of money to an agent or servant authorised to receive payment is a good tender: *Goodland* v. *Blewith*, 1 Camp. 477. So is tender to a managing clerk good, though he should have received orders not to accept of it: *Moffat* v. *Parsons*, 5 Taunt. 307. Where an Attorney sends a letter to demand and the debtor makes a tender to him, it is a good tender, unless the Attorney disclaims his authority at the time; and if the Attorney is absent, a tender to a clerk at his office is sufficient: *Wilmot* v. *Smith*, 3 C. & P. 453. Where a person demands payment of money at his office, it amounts to a special authority to his Clerk there to receive it; and in the absence of the Attorney a tender to his Clerk is good, although he states that he is not authorized to receive the money: *Kirton* v. *Braithwaite*, 1 M. & W. 310. But without any previous demand, a tender to the managing clerk of the plaintiff's Attorney, who disclaims authority to receive it, is insufficient: *Bingham* v. *Allport*, 1 N. & ... 398; but see *Finch* v. *Boning*, Weekly Notes, March 8, 1879, C. P. D.; ... *on* v. *Hetherington*, 1 C. & K. 36. A tender by an agent of a debtor of t... ...ole sum demanded, by pulling out his pocket book and offering, if the creditor would go into a neighbouring public house, to pay it, which the latter refused to take, although the agent was only authorized by the debtor to tender a sum short of the whole sum demanded, and offered the rest at his own risk, was *held* a good tender: *Read* v. *Goldring*, 2 M. & S. 86. A tender to the Attorney of the plaintiff, so long as he remains such, is good: *Crozer* v. *Pilling*, 4 B. & C. 26. So also is a tender good if made to a person in the office of the plaintiff's Attorney, to whom the defendant was referred by a clerk in the office, and who refused the tender only as being too little, without shewing who that person was: *Wilmot* v. *Smith*, *supra*. A tender to a person in a merchant's place of business, who appeared to be conducting it, is good, though in fact not entrusted to receive money: *Barrett* v. *Deere*, M. & M. 200. It is otherwise where the payment is not connected with the plaintiff's business, but quite collateral to it: *Sanderson* v. *Bell*, 2 C. & M. 304. Where the money was brought to the plaintiff's house, and delivered to his servant, who appeared to go with it to his master, and returned, saying that his master would not take it, it was *held* to be evidence from which a tender might be inferred: *Anon*, 1 Esp. 349. A tender of a partnership debt to one of several partners is good: *Douglas* v. *Patrick*, 3 T. R. 683. If a man is indebted to several persons in different sums, and, when they are all together, tenders them one gross sum sufficient to satisfy all their demands, which they refuse to receive, insisting on more being due, this is a good tender: *Black* v. *Smith*, Peake, 88. But where a party has separate demands for unequal sums against several persons, an offer of one sum for the debts of all will not support the defence, that a certain portion of this sum was tendered for the debt of one: *Strong* v. *Harvey*, 3 Bing. 304. A tender of a cheque is good, if not objected to and the drawer has funds to meet it: Roscoe's N. P. 674. Interest

ceases to run after a tender: Byles on Bills, 9th Ed. 298; *Dent* v. *Dunn*, 3 Camp. 296.

Before action brought.—If made any time before summons *actually* issues, it is good (*Briggs* v. *Calverly*, 8 T. R. 629; *Kirton* v. *Braithwaite*, 1 M. & W. 310), and the debtor cannot be charged with a letter from the creditor's Attorney, (*Ib.*); and if he issue the writ because the debtor will not pay for the letter, the summons can be set aside: *Holman* v. *Stephens*, 6 Jur. N. S. 124; *Caine* v. *Coulton*, 1 H. & C. 768.

Mode of making.—A tender, to be strictly legal, should be made in legal coin: *Polglass* v. *Oliver*, 2 C. & J. 15. Up to $10 it may be made in silver: 34 Vic. cap. 4, sec. 7 (Can.). Bank notes are a good tender if not objected to: *Wright* v. *Read*, 3 T. R. 554; *Tiley* v. *Courtier*, 2 C. & J. 16, note (*c*). A tender made in the form of a cheque in a letter is good where no objection is made to the quality but the quantity of the tender; and if the letter contain a *request* for a receipt to be sent back, it does not vitiate the tender, it not being a *condition: Saunders* v. *Graham*, Gow, 111. An offer of money by a debtor to a creditor, and a request by the latter for a day's delay before receiving it on account of an accident, are not a tender and refusal of the money, and do not discharge the debtor: *Jenkyns* v. *Brown*. 14 Q. B. 503. A tender to an executor may be good, though he has not proved the will, provided he afterwards proves the will, and takes upon himself the burthen of administration: Add. on Contracts, 264.

Production of the money.—There must be production of the money, or that dispensed with by the express declaration or equivalant act of the creditor: *Thomas* v. *Evans*, 10 East 101. A tender is not good where the money is not in sight, but the witness supposed it was in a desk and did not see it produced; so that it did not appear that if the party was willing to accept the money it could at once be paid; the money should be at hand and capable of immediate delivery: *Glasscott* v. *Day*, 5 Esp. 48. But where more is claimed to be due, it is not necessary to produce the money tendered: *Black* v. *Smith*, Peake, 88. Where the facts were found to be that the defendant's Attorney called on the plaintiff, and said, "I come to pay you £1 12*s*. 5*d*., which the defendant owes you," that the Attorney put his hand in his pocket, but did not produce the money, the plaintiff said, "I cannot take it, the matter is now in the hands of my Attorney," *held*, not a sufficient tender: *Finch* v. *Brook*, 1 Bing. N. C. 253. A tender made with the money twisted up in bank notes in the person's hand, he stating how much, and not shewn to the party, is good: *Alexander* v. *Brown*, 1 C. & P. 288. If the plaintiff says he can't take the money, when an offer is made to go up-stairs and fetch it, such offer is a good tender (*Harding* v. *Davis*, 2 C. & P. 77); but if it did not appear that the person tendering had the money up-stairs, it might not be: *Kraus* v. *Arnold*, 7 Moore, 59. In this case, where the defendant ordered *A*. to pay the plaintiff £7 12*s*. 0*d*., and the Clerk of the plaintiff's Attorney demanded £8, on which *A*. said that he was only ordered to pay £7 12*s*. 0*d*. which sum was in the hands of *B*., and *B*. put his hand to his pocket, with a view of pulling out his pocket-book to pay £7 12*s*. 0*d*., but did not do so, by the desire of *A*., but *B*. could not say whether he had that sum about him, but swore that he had it in his house, at the door of which he was standing at the time; *held*, that this was not a legal tender, as the money should have been produced to the Attorney's clerk: but see *Long* v. *Long*, 17 Grant, 251. Where a vendor admits a tender would be fruitless, it is unnecessary: *Jackson* v. *Jacob*, 3 Bing. N. C. 869. If a party tells his creditor that he will pay him so much, and puts his hand in his pocket to take out the money, but before he can get it out the creditor leaves the room, and the money is not produced till he is gone, it is no tender: *Leatherdale* v. *Sweepstone*, 3 C. & P. 342. Where the plaintiff disputes the *quantum* to prove a tender, some money must be proved to have been produced, though it is not necessary to prove the exact

sum: *Dickinson* v. *Shee*, 4 Esp. 68. A trader who, under a trader debtor summons, had signed an admission of debt, went to his creditor with the amount of it in his pocket in money, and told the creditor that he had come to pay that amount, the creditor said it was of no use, as it was too late, and that the debtor must see the creditor's Attorney; it was *held* that the production of the money was dispensed with, and that the tender was good: *Danks, Ex parte*, 2 De. G. M. & G. 936; s. c. 22 L. J. N. S. Bank. 73; see also *Reynolds* v. *Allan*, 10 U. C. R. 350; *Western Assurance Company* v. *McLean*, 29 U. C. R. 57. Where, on tendering payment of money due upon a mortgage, a receipt was required, and the plaintiff did not object on that ground, but gave a different reason for refusing the money, *held* a good tender: *Lockridge* v. *Lacey et al.*, 30 U. C. R. 494; see also *Llado et al.* v. *Morgan et al.*, 23 C. P. 517. In order to constitute a legal tender, the money must either be produced and shewn to the creditor, or its production expressly or impliedly dispensed with: *Matheson* v. *Kelly*, 24 C. P. 598, and cases there cited. Where a tenant said to a landlord, "Here is the rent," which he had, and told the defendant he had in his right hand in a desk, but did not produce it, or shew it to the landlord, who said nothing, and left the premises, *held*, no evidence of tender or dispensation of tender: *Ib.*

Requiring change.—A plea of tender of £20 is supported by evidence of the tender of a larger sum, though such larger sum was tendered as the sum which the creditor was to receive, and not as the sum out of which he was to take the £20 (*Dean* v. *James*, 4 B. & Ad. 547); but a tender of a larger sum, requiring change, is not a good tender of a smaller sum: *Robinson* v. *Cook*, 6 Taunt. 336; *Betterbee* v. *Davis*, 3 Camp. 70. A tender of £2, to pay £1 13*s.* 0*d.*, is good, if the plaintiff objects to receive it only because he is entitled to a larger sum, and not on the ground that he has no change: *Cudman* v. *Lubbock*, 5 D. & R. 289. A tender of part of the claim, and a counter claim for more than the full amount of the debt, is not a good tender: *Brady* v. *Jones*, 2 D. & R. 305, and see *Holland* v. *Phillips*, 6 Esp. 46. The defendant owed £108, demanded by the Attorney for his creditor; he sent a man, who laid down on the desk one hundred and fifty sovereigns, out of which he desired the Attorney to take the principal and interest, but the Attorney refused to do so, unless a shop account due from plaintiff to defendant was fixed at a certain amount. *Held*, a good tender of the £108: *Bevans* v. *Rees*, 5 M. & W. 306; see also *Gretton* v. *Mees*, 7 Ch. D. 839.

Demand of a receipt.—Going with money in hand to make a tender, and demanding whether the creditor has a receipt stamp, and receiving an answer in the negative, but not offering the money, was *held* not a tender: *Ryder* v. *Townsend*, 7 D. & R. 119. A tender is not good if accompanied by a demand for a receipt in full of all demands (*Griffith* v. *Hodges*, 1 C. & P. 419); or where a receipt was demanded that the sum tendered was the balance due: *Higham* v. *Baddely*, Gow. 213. But if the creditor refuse to receive the money on account of more being due, he cannot afterwards object that a receipt was demanded: *Richardson* v. *Jackson*, 8 M. & W. 298. Where the words of a tender were, "I offer you £7 16*s.* 8*d.* as the balance of £35, and request a receipt in full," it was *held* invalid as being conditional: *Foord* v. *Noll*, 2 Dowl. N. S. 617. A tender of a quarter's rent, coupled with a demand of a receipt to a particular day, the contest between the parties being whether one or two quarters' rent was due, is not a valid tender (*Finch* v. *Miller*, 5 C. B. 428); but the demand of a receipt simply for the amount of money tendered does not invalidate the tender: *Lockridge* v. *Lacey et al.*, 30 U. C. R. 494.

Must be unconditional.—A tender must not be clogged with any condition (*Peacock* v. *Dickerson*, 2 C. & P. 51, n.; *Jennings* v. *Major*, 8 C. & P. 61); so that if the creditor takes the money, and there is more due, he will not be precluded from bringing an action for the residue: *Mitchell* v. *King*, 6 C. & P.

237. It is not a good tender if by acceptance the creditor would make an admission: *Hastings (Marquis)* v. *Thorley*, 8 C. & P. 573. Where a defendant was proved to have said, "I have called to tender £8 in settlement of the account," it was *held* to be a question for the jury to determine the meaning of the language (*Eckstein* v. *Reynolds*, 7 A. & E. 80); and it is for them to say if from such language the tender was conditional or not: *Marsden* v. *Goode*, 2 C. & K. 133. An offer to a person to "take those ten sovereigns in full of his demand" is not a good tender (*Cheminant* v. *Thornton*, 2 C. & P. 50); or to take any certain sum in full of a demand (*Strong* v. *Harvey*, 3 Bing. 304); or as the whole balance due: *Evans* v. *Judkins*, 4 Camp. 156. The Attorney of *A.* put down £18, and said to the other party, "I tender you £18 for Mr. *M.*"; *held*, a good tender: *Jennings* v. *Major*, 8 C. & P. 61. An offer to pay a sum "as a settlement" of a demand is not a good tender: *Mitchell* v. *King*, 6 C. & P. 237. Where the defendant's evidence was, "I went to the plaintiff and told him I came with the amount of Oliver's (the defendant's) bill; the plaintiff said he would not take it, as it was not his bill; I offered it to him as the amount of his bill;" *held*, a good tender: *Henwood* v. *Oliver*, 1 Q. B. 409; see also *Bull* v. *Parker*, 2 Dowl. N. S. 345. A tender of a less sum than is due, accompanied with the statement "that it is more than was due, but that the plaintiff might take it all," is a good tender, and does not prevent the creditor from proceeding for balance: *Thorpe* v. *Burgess*, 8 Dowl. 603. A tender of a sum "as all that is due" is *not* a good tender (*Sutton* v. *Hawkins*, 8 C. & P. 259); nor is a tender with these words good, "I tender you £21 in payment of the half year's r.... due at Ladyday last;" because, if accepted, it would admit that that sum was the amount of the half year's rent: *Hastings (Marquis)* v. *Thorley*, 8 C. & P. 573. A tender is valid if it implies merely that a party offers a given sum as being all that he admits to be due; but if it implies also that if the other party takes the money he is required to admit that no more is due, the tender is conditional and insufficient: *Bowen* v. *Owen*, 11 Q. B. 130. In that case, a tenant sent to his landlord £26, with a letter in these words, "I have sent with the bearer £26 to settle one year's rent of Nant-y-pair." The landlord refused to take it, claiming more as due. *Held*, a good tender. A tender of a sum as being "all that is due" is bad: *Field* v. *Newport, &c. Railway Company*, 3 H. & N. 409.

Under protest.—In *Manning* v. *Lunn*, 2 C. & K. 13, the words of the tender were, "I tender you £20 under protest." It was *held* a good tender, the words "under protest" merely importing that the debtor did not acquiesce in his creditor's demand, and did not mean to preclude himself from recovering the money back again if he could. So an offer to pay under protest the amount claimed is a good tender: *Scott* v. *Uxbridge and Rickmansworth Railway Co.*, L. R. 1 C. P. 596; *Sweny* v. *Smith*, L. R. 7 Eq. 324; Addison on Contracts, 263, 7th Ed.

Entire demand.—A tender of part of an entire demand is inoperative: *Dixon* v. *Clark*, 5 C. B. 365; *Walsh* v. *Southworth*, 6 Ex. 150. "Where a claim consists of several items, the party making the tender has a right to appropriation, but that if he omits to make any appropriation, the right to appropriate is transferred to the other party:" *per* Wilde, C. J., in *Hardingham* v. *Allen*, 5 C. B., page 797. In that case, *A.* demanded from *B.* £1 7*s.* 0*d.* for several matters, including 10*s.* for a particular service performed by *A.*; *B.* tendered 19*s.* 6*d.*; it was *held* that proof of this did not sustain a plea of tender of 10*s.* on account of such service: see the remarks of Coltman, J., at page 798. A tender of part of the debt is not made good by the debtor having a set-off for the balance: *Searles* v. *Sadgrave*, 5 E. & B. 639; *Phillpotts* v. *Clifton*, 10 W. R. 135.

Waiver of tender.—Where a tender is either expressly or impliedly dispensed with, the tender in such a case, being useless, is waived: *Watson* v. *Pearson*, 9 Jur. N. S. 501; *The Norway*, 11 Jur. 892; 13 L. T. N. S. 50; 3 Moore, P.

C. C. N. S. 245. "There must either be an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor:" Selwyn's N. P., vol. 1, 13th Ed. 187; *Lockridge* v. *Lacey*, 30 U. C. R. 494; *Llado et al.* v. *Morgan et al.*, 23 C. P. 517; *Matheson* v. *Kelly*, 24 C. P. 598; *Turner* v. *Crossley*, 3 M. & W. 43.

Demand after tender.—The substance of the defence being that the defendant was "always ready and willing" to pay the debt, that defence can be defeated by shewing a subsequent demand of the amount tendered and not paid: Chitty's Prec. in Plead., 3rd Ed., 519. The onus of proving the subsequent demand is on the creditor (*Spybey* v. *Hide*, 1 Camp. 181); and if for more than the sum tendered, the demand will be bad: *Rivers* v. *Griffiths*, 5 B. & A. 630; *Brandon* v. *Newington*, 3 Q. B. 915. And it must be made by some one authorized to receive it and grant a discharge: *Coore* v. *Callaway*, 1 Esp. 115. Even in replevin: *Pimm* v. *Grevill*, 6 Esp. 95. On a tender by two on a joint contract, a demand on one is sufficient: *Peirse* v. *Bowles*, 1 Stark, 323. A letter demanding a debt sent to the defendant's house, to which answer was made that it would be settled, was *held* sufficient evidence of a demand on the issue of subsequent demand and refusal to a plea of tender: *Hayward* v. *Hague*, 4 Esp. 93; see *Marks* v. *Lahee*, 3 Bing. N. C. 408. The subsequent adoption of a demand is not sufficient: Story on Agency, s. 247.

Procedure.—Tender cannot be pleaded together with a defence denying the right of action for same claim: *Dobie* v. *Larkan*, 10 Ex. 776. On a claim under the common counts a general plea of tender is sufficient: *Smith* v. *Manners*, 5 C. B. N. S. 632. If a defendant brings money into Court on a plea of tender, the plaintiff might take it out of Court (*LeGrew* v. *Cooke*, 1 B. & P. 332), were it not that D. C. Rule 130 prevents him, unless the Judge orders otherwise. Proof of a tender of £20 19*s.* 6*d.* in bank notes and silver was *held* sufficient to support a plea of tender of £20: *Dean* v. *James*, 4 B. & Ad. 546. Proof of tender of less than pleaded is not good: *John* v. *Jenkins*, 1 C. & M. 227. An entry of tender and refusal made by a deceased clerk of a plaintiff's Attorney in a day-book, kept for the purpose of minuting his daily transactions, is admissible in evidence to prove the tender: *Marks* v. *Lahee*, 3 Bing. N. C. 408. As to proof of tender, see *Robinson* v. *Ward*, 8 Q. B. 920. The plea of tender has the same effect as to admission of liability as payment into Court: Tay. on Ev., s. 766. The plaintiff's cause of action cannot be denied and tender pleaded too: *Maclellan* v. *Howard*, 4 T. R. 194. On common counts, it is an admission only to the extent of the sum tendered: *Cox* v. *Brain*, 3 Taunt. 95; *Bulwer* v. *Horne*, 1 N. & M. 117. A plaintiff can be nonsuited after plea of tender if he does not appear, and in such case it is the proper course: *Anderson* v. *Shaw*, 3 Bing. 290; see also Fisher's Digest, 8292; R. & J's. Digest, "Tender," Roscoe's N. P. 13th Ed. 671.

The following is given as a form of plea of tender:

In the Division Court for the County of .

A. B., Plaintiff,

against

C. D., Defendant.

The defendant, for a plea herein to the plaintiff's claim (or, *if only to a part of such claim, then specify such part*), says that he always was, and still is, ready and willing to pay to the plaintiff the sum of $, and before action (or, *if the debt was payable on a day certain, naming that day, or some day anterior to it on which the tender was made*), he tendered and offered to pay the same to the plaintiff, and the plaintiff refused to accept it, and the defendant now brings the said sum into Court ready to be paid to the plaintiff.

C. D.

Amount to be paid to plaintiff, &c.

87. The said sum of money shall be paid to the plaintiff, less one dollar, to be paid over to the defendant for his trouble, in case the plaintiff does not further prosecute his suit; and all proceedings in the said action shall be stayed, (*c*) unless the plaintiff, within three days after the receipt of notice of such payment, signifies to the Clerk of the said Court his intention to proceed for his demand, notwithstanding such plea; and in such case the action shall proceed accordingly. C. S. U. C. c. 19, s. 88.

The rule as to costs in such cases.

88. If the decision thereon be for the defendant, the plaintiff shall pay the defendant his costs, charges and expenses, (*d*) to be awarded by the Court, and the amount

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(*c*) At page 181 of Vol. 5 U. C. L. J., and at page 95 of 7 U. C. L. J., the opinion is given that if the plaintiff does not, within the three days' time, signify his intention to proceed for the balance, the further prosecution of the action is not thereby barred, that the section is merely directory. With all due respect, it is submitted that this cannot be so. The defendant is permitted to file his plea and pay the amount into Court, and the plaintiff has three days, *exclusive* of the day he receives the notice of the plea (*Young* v. *Higgon*, 6 M. & W. 49; *Weeks* v. *Wray*, L. R. 3 Q. B. 212; *McCrea* v. *Waterloo Mutual Fire Insurance Company*, 26 C. P. p. 437), to determine whether he will accept or not. It may be urged that great injustice might be done a plaintiff by this construction. In some cases no doubt that would be the case; but that is only an argument to be addressed to the Legislature for extending the time beyond three days. If a plaintiff can determine what he will do after the prescribed time, then there is no limit to it and the provisions of the statute would be useless. Notwithstanding the 125th Rule (which, if it has application to this case, only applies to the *duty* of the Clerk), it is submitted that the time does not commence to run against the plaintiff until the actual receipt of the notice (*McCrea* v. *Waterloo M. F. Ins. Company*, 26 C. P., page 438, *per* Galt, J.; in Appeal, see 1 App. R. 231: *M'Cann* v. *The Waterloo M. F. Ins. Company*, 34 U. C. R. 376); and that the plaintiff "signifies" to the Clerk of the Court "his intention to proceed for his demand," *by mailing* a letter or notice to that effect: *Marshall* v. *Jamieson*, 42 U. C. R., at page 120, and cases there cited. Should he not do so within the time, it is submitted that the defendant's plea of tender should be considered as confessed: see *Nazer* v. *Wade*, 1 B. & S. 728; *Evans* v. *Jones*, 2 B. & S. 45; *London* v. *Roffey*, 3 Q. B. D. 6; *Doyle* v. *Kaufman*, 3 Q. B. D. 7; *Tobey* v. *Wilson*, 43 U. C. R. 230; and Rule 129.

The delay not being *by the act of the Court or its officers* it is submitted that the notice could not be given, nor allowed to be given, *nunc pro tunc*: *Lanman* v. *Audley*, 2 M. & W. 535; *Freeman* v. *Tranah*, 12 C. B. 406; *Moor* v. *Roberts*, 3 C. B. N. S. 845, *per* Williams, J. Where a stay of proceedings was "until the further order of the Court," it was *held* that neither party could abandon the order, because each party had an interest in it: *Wilson* v. *Upfill*, 5 C. B. 245. Wilde, C. J., says, at page 246, "It continues to be a binding order until rescinded by the authority by which it was made." Here *the statute* stays proceedings, "*unless*" the plaintiff signifies his intention of proceeding with the action, and in that case only.

(*d*) "This would also include the defendant's expenses of attending on his own behalf, if he did so attend expressly for the purpose of giving evidence on his

thereof may be paid over to him out of the money so paid in with the said plea, or may be recovered from the plaintiff in the same manner (*e*) as any other money payable under a judgment of the said Court; but, if the decision be in favour of the plaintiff, the full amount of the money paid into Court as aforesaid, shall be applied to the satisfaction of his claim, and a judgment may be pronounced against the defendant for the balance due and the costs of suit according to the usual practice of the Court in other cases. C. S. U. C. c. 19, s. 89.

Defendant may pay money into Court.

89. The defendant may at any time, not less than six days (*f*) before the day appointed for the trial, pay into Court (*g*) such sum as he thinks a full satisfaction for the plaintiff's demand, together with the plaintiff's costs up to the time of such payment. C. S. U. C. c. 19, s. 90.

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own behalf, and not to superintend the cause" (*Howes* v. *Barber*, 18 Q. B. 588), or such sum as the Judge might think proper to order a defendant, though not a witness, under section 154. As to costs generally, on a plea of tender, see Gray on Costs, 306.

(*e*) See section 156. A plaintiff cannot get the money out of Court until the suit is determined without a Judge's order: Rule 130.

(*f*) This means *clear* days: see notes to sections 70 and 87; *McCrea* v. *Waterloo Mutual Fire Insurance Company*, 26 C. P., at page 437; in appeal, 1 App. R. 218. As to "the day appointed for trial," see *Fletcher* v. *Baker*, L. R. 9 Q. B. 372.

(*g*) This section does not appear to be confined to any particular causes of action, as in section 86, or in the higher Courts by the 108th section of the C. L. P. Act (Rev. Stat. page 631), but applies to every case suable in a Division Court: see Rule 45 and Davis' C. C. Acts, 503. Even detinue: *Crossfield* v. *Such*, 8 Ex. 159. The word "defendant" in this section must, in the case of an action against two or more, be read defendants:" Rev. S. cap. 1, s. 8 s-s. 23. The section makes no provision, as section 108 of the C. L. P. Act does, for one of several defendants paying money into Court. It is therefore submitted that in such a case all defendants must join in paying money into Court (*Kay* v. *Panchiman et al.*, 2 W. B. 1029), except perhaps in actions against a maker and endorser of a promissory note or bill of exchange, which is probably governed by section 134, *et seq.*, of cap. 50, Rev. Stat. It may be argued that under the first section of that act, by the consolidation of these sections in the C. L. P. Act, they do not apply to Division Courts (see *Holcomb* v. *Hamilton*, 2 E. & A. 230); but it is submitted they do. Payment into Court has always been looked upon as a course to be encouraged. Care must be taken to pay into Court enough to satisfy the full claim to damages to the time of paying the money in. Interest must be calculated to the time of payment, and not merely to the issue of the summons: *Kidd* v. *Walker*, 2 B. & Ad. 705. Where several matters are included in one suit, payment into Court may be made to all: *Marshall* v. *Whiteside*, 1 M. & W. 188. When pleaded to a cause of action, which, in a higher Court, would come under the head of *indebitatus* counts, it admits "that the defendant is liable, in respect of some one or more contracts or causes of

Clerk to give notice of payment into Court.

90. The Clerk, having received the necessary postage, shall forthwith (*h*) send notice of such payment to the plaintiff by post or otherwise to his usual place of abode or of

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action stated in the general counts, to the extent of the sum so paid in; and the plaintiff cannot apply that admission to any particular contract he may please to select any more than the defendant:" Taylor on Evid., s. 761. It admits also the validity of every *species* of claim mentioned in the particulars, and that *some* damages are due on *each*: *Edgar* v. *Watson*, 1 C. & M. 494. It admits the character in which a plaintiff sues (*Lipscombe* v. *Holmes*, 2 Camp. 441), and his sole right to the money sued for (*Walker* v. *Rawson*, 5 C. & P. 486); and that the defendants are properly sued jointly: *Ravenscroft* v. *Wise*, 1 C. M. & R. 203. It also admits that the action is not brought too soon (*Harrison* v. *Douglas*, 3 A. & E. 396); but all such admissions only operate to the amount of the money paid into Court: *Archer* v. *English*, 1 M. & G. 873. If paid in, on an action on a special count or claim, it admits the contract as charged (*Israel* v. *Benjamin*, 3 Camp. 40; *M'Cance* v. *London and North Western Railway Company*, 7 H. & N. 477), and that nominal damages are due on it (*Archer* v. *English*, 1 M. & G. 873); and the defendant cannot be allowed to controvert it: *Lloyd* v. *Walkey*, 9 C. & P. 771. Still less will he be allowed to give evidence of facts under this plea, even in mitigation of damages, which, if pleaded before, would have been a bar to the action: *Speck* v. *Phillips*, 5 M. & W. 279. In an action for use and occupation, it admits plaintiff's sole title: *Dolby* v. *Iles*, 11 A. & E. 335. If paid in on a promissory note payable by instalments, it only admits the amount of instalments as due which the money paid in will cover, and does not preclude the Statute of Limitations being pleaded to the others: *Reid* v. *Dickons*, 5 B. & Ad. 499. It is submitted that payment into Court may be pleaded to part of the plaintiff's claim: *Charles* v. *Branker*, 12 M. & W. 743; *Brune* v. *Thompson*, 4 Q. B. 543. Where plaintiff sets out his cause of action in two ways, on either of which he can recover, it is enough to pay money into Court on one: *Early* v. *Bowman*, 1 B. & Ad. 889; *Stafford* v. *Clark*, 2 Bing. 377. Payment into Court in actions of tort has the same effect as in actions of contract. It admits *a* cause of action with damages amounting to the sum paid into Court; but it does not necessarily admit the cause of action stated in the particulars: *Schreger* v. *Carden*, 11 C. B. 851; *Robinson* v. *Harman*, 1 Ex. 850; *Story* v. *Finnis*, 6 Ex. 123. If the claim is general and unspecific, although it admits *a* cause of action, it does not admit the cause of action sued for, and therefore the plaintiff must give evidence of that cause of action before he can recover larger damages than the sum paid into Court: *Perren* v. *The Monmouthshire Railway and Canal Company*, 11 C. B. 855. See the report of this case for a general view of the effect of payment into Court in different forms of action. If pleaded as to part, and plaintiff fail on the rest, he must pay costs: *Rumbelow* v. *Whalley*, 16 Q. B. 397. A defence in denial of the cause of action will not be allowed with payment into Court: *Hart* v. *Denny*, 1 H. & N. 609; *Spurr* v. *Hall et al.*, 2 Q. B. D. 615; *Berdan* v. *Greenwood*, 3 Ex. D. 251. If a person avails himself of payment into Court, he cannot afterwards repudiate the effect of it: *Crombie* v. *Davidson*, 19 U. C. R. 369. Payment into Court operates as a notice of defence (Rule 20), and can be pleaded in an action of replevin: see Rule 45. As to costs, see section 91. Further, as to the effect of this defence, see Roscoe's N. P. Ev., 13th Ed., 79; Bullen & Leake, 3rd Ed., "Payment into Court:" Chitty's Prec. in Plead. 491, 736; Fisher's Digest, 6413; Tay. on Ev., ss. 762 to 765, inclusive; Har. C. L. P. Act, pp. 119, 120 (notes); Rob. & Jos. Dig., 2731. No written plea need be filed, as is required in tender before action.

(*h*) That is, within a reasonable time: see note *y* to section 18. As to this notice, see Rule 87 and Form 102, and sections 9 and 10 thereof. It will be

business, and the sum so paid shall be paid to the plaintiff, and all proceedings in the action stayed, unless within three days after the receipt of the notice, (*i*) the plaintiff signifies to the Clerk his intention to proceed for the remainder of the demand claimed, in which case the action shall proceed as if brought originally for such remainder only. C. S. U. C. c. 19, s. 91.

Plaintiff to pay defendant's costs if no further sum recovered.

91. If the plaintiff recovers (*k*) no further sum in the action than the sum paid into Court, the plaintiff shall pay the defendant all costs, charges and expenses incurred by him in the action after such payment, (*l*) and such costs, charges and expenses shall be duly taxed, (*m*) and may be recovered by the defendant by the same means (*n*) as any other sum ordered to be paid by the Court. C. S. U. C. c. 19, s. 92.

Set-off and Statutory Defences.

Defendant to give notice of set-off or

92. In case the defendant desires to avail himself of the law of set-off, (*o*) or of the Statute of Limita-

found the safest course to pursue for Clerks to send this notice in registered letter to the plaintiff's address, which the Clerk should obtain under Rule 125, on the suit being entered. As to plaintiff's "place of abode or business," see notes to sections 62 and 72.

(*i*) We have only to repeat here the views expressed in the notes to section 87, and to which we refer (a view entertained by many County Court Judges), that unless the plaintiff signifes his intention to proceed for the balance of his claim within the three days after the receipt of the notice from the Clerk, he *tacitly* accepts the amount paid in in full of his claim. Any other opinion would, it is submitted, be at variance with the view, that Judges, as well as others in Division Court matters, can only act in accordance with the powers conferred on them by statute. The statute makes no provision for trying a case if this notice is not given; and, it is submitted, the Judge cannot try it without it, nor allow it to be given afterwards: section 53; see also Form 102.

(*k*) The word "recovers" here may, it is submitted, be read as "obtains judgment for." The case of *Hewitt* v. *Cory*, L. R. 5 Q. B. 418, and the cases there cited, are quite distinguishable.

(*l*) As to the costs in such cases, see Arch. Prac., under the title of "Payment of money into Court, Costs on;" Lush's Prac. 826; Har. Com. Law. Pro. Act, 124, 624.

(*m*) Subject to revision by the Judge: see section 38, notes *x* and *y*.

(*n*) See section 156, and notes.

(*o*) "Set-off signifies the subtraction or taking away of one demand from another opposite or cross demand, so as to extinguish the smaller demand and reduce the greater by the amount of the less; or, if the opposite demands are equal, to extinguish both:" Waterman on Set-off, page 1. "Technically speaking, a set-off is a counter demand which the defendant holds against the plaintiff,

arising out of a transaction *extrinsic* to the plaintiff's cause of action:" *Ib.* 3. "It would seem but just that mutual claims should be set-off one against the other; that neither should be compelled to pay when the sum so paid must be refunded on a judgment rendered on the adverse claim. Reasonable as this is, the remedy by set-off was unknown at Common Law, but is a creature of the statute:" 2 Geo. II. cap. 22; 8 Geo. II. cap. 24; Waterman, 11. The right of set-off is preserved by our Insolvent Act of 1875, sec. 107 (*Brigham* v. *Smith*, 17 Grant, 512), and by the Act respecting the assignment of choses in action: Rev. Stat., cap. 116, ss. 6 to 12 inclusive. Notice of set-off, together with particulars of it, should be given to the plaintiff six days *at least* (*clear days*—see notes to sections 70 and 87) before the day appointed for the sittings. It may be left for the plaintiff at his usual place of abode, if such be within the division; or if the plaintiff lives without the division, the same may be left with the Clerk of the Court in which the action is to be tried, and the particulars of set-off must be delivered to the Clerk: Rule 128; see *Stanton* v. *Styles*, 5 Ex. 578. The particulars should be such as not to mislead a reasonable man: *Law* v. *Thompson*, 15 M. & W. 545; *Prichard* v. *Nelson*, 16 M. & W. 772. A set-off can only be pleaded in respect of *mutual debts: Isbery* v. *Bowden*, 8 Ex. 852. For instance, a debt against one partner could not be set-off against an action on a claim by the firm (*Pegg* v. *Plank*, 3 C. P. 396); nor in an action by a member of a firm could a debt against the firm be set-off: *Arnold* v. *Bainbrigge*, 9 Ex. 153; *Middleton* v. *Pollock, ex parte, Knight and Raymond*, L. R. 20 Eq. 515. Nor could a personal claim against an individual be the subject of set-off to an action by him as executor, and the converse: *Mardall* v. *Thellusson*, 6 E. & B. 976; *Rees* v. *Watts*, 11 Ex. 410; *Schofield* v. *Corbett*, 11 Q. B. 779; *Bailey* v. *Finch*, L. R. 7 Q. B. 34; *Smith* v. *Nicholson et al.*, 19 U. C. R. 27. The law of set-off does not apply to a claim for unliquidated damages (*Bell* v. *Carey*, 8 C. B. 887; *Castelli* v. *Boddington*, 1 E. & B. 66; *Rutherford et al.* v. *Stovel*, 12 C. P. 9, and *Turner* v. *Thomas*, L. R. 6 C. P. 610), thus, a liability on a guarantee where the amount is uncertain: *Morley* v. *Inglis*, 4 Bing. N. C. 58. In that case, Tindal, C. J., at page 71, laid down a rule which has ever since been generally recognized. He says, "It seems to me that the rule by which we are to determine whether or not a demand can become the subject of a set-off is by inquiring whether it sounds in damages; whether the demand is capable of being liquidated or ascertained with precision at the time of pleading:" Approved of by Hill, J., in *Crampton* v. *Walker*, 3 E. & E. 321-331; *Luckie* v. *Bushby*, 13 C. B. 864. A liability on a bond to indemnify, generally is not the subject of set-off (*Attwooll* v. *Attwooll*, 2 E. & B. 23; *Martin* v. *Clark*, 20 U. C. R. 419); nor an action for the detention of a ship (*Seeger* v. *Duthie*, 8 C. B. N. S. 45, 72); nor for unliquidated losses on a policy of insurance (*Thomson* v. *Redman*, 11 M. & W. 487); nor to a special action for indemnifying an accommodation acceptor (*Hardcastle* v. *Netherwood*, 5 B. & Ald., 93), except as to so much of the claim as is in respect of the payment of the amount of the bill: *Crampton* v. *Walker*, 3 E. & E. 321. But if money is paid under a guarantee it may be set-off (*Hutchinson* v. *Sydney*, 10 Ex. 438), or is payable on a judgment (*Turnbull* v. *Pell*, 2 Ex. 793; see *Simpson* v. *Lamb*, 7 E. & B. 84) or bond: *Lee* v. *Lester*, 7 C. B. 1008. The sum really due must be shewn; *Symmons* v. *Knox*, 3 T. R. 65. A joint stock company may set-off calls: *Moore* v. *Metropolitan Sewage Company*, 3 Ex. 333; *Milvain* v. *Mather*, 5 Ex. 55. In an action against a contributory, when a debt due by the company can be set-off, see *Garnet and Moseley Gold Mining Company* v. *Sutton*, 3 B. & S. 321. When a debtor has advanced moneys for necessaries to the deserted wife of the creditor, he can in equity set-off such moneys against the creditor's legal demands; *Jenner* v. *Morris*, 30 L. J. Chan. 361, 7 Jur., N. S., 385. A judgment recovered in the name of a trustee, which, if recovered in the name of the *cestui que trust*, would have been a good set-off in law against the plaintiff's demand, may be set up equitably: *Cochrane* v. *Green*, 9 C. B. N. S. 448; but see *Middleton* v. *Pollock*,

Ex parte Nugee, L. R. 20 Eq. 29; *Wood et al.* v. *Stevenson*, 16 U. C. R. 527; *Thornton et al.* v. *Maynard*, L. R. 10 C. P. 695. So also can money due under an equitable assignment be set-off: *Elkin et al* v. *Baker*, 11 C. B. N. S. 526 and 542. Although an Attorney cannot sue on his bill until delivered one month, he can set it off without delivery: *Brown* v. *Tibbits*, 11 C. B. N. S. 855. The debt must be due at the time action brought (*Richards* v. *James*, 2 Ex. 471), and must continue so down to the trial: *Eyton* v. *Littledale*, 4 Ex. 159. The plaintiffs' joint *and several* note can be set off: *Owen* v. *Wilkinson*, 5 C. B. N. S. 526. As to mutual credit, see *Bell* v. *Carey*, 8 C. B. 887; *Beckwith* v. *Bullen*, 8 E. & B. 682; *Lee* v. *Bullen*, 8 E. & B. 692, note *a*. In an action against the executor of a Division Court Clerk, on the covenant against him and his sureties for non-payment of money collected, set-off may be equitably pleaded for money due to the defendant as executor on a judgment against plaintiff: *Moffat* v. *Foley*, 26 U. C. R. 509. If the demand is actually liquidated, a statement of claim for special damage will not prevent its being set-off: *Birch* v. *Depeyster*, 4 Camp. 385. Sometimes a cause of action can be framed so as to preclude set-off: see *Hill* v. *Smith*, 12 M. & W. 618; *Thorpe* v. *Thorpe*, 3 B. & Ad. 580. A defendant need not avail himself of set-off, but may reserve his right for a cross action: *Laing* v. *Chatham*, 1 Camp. 252. Interest on the amount of set-off must be claimed on the particulars: Bullen & Leake, 3rd Ed., title, "Particulars of set-off." A defendant can set-off and sue for the same debt: *Evans* v. *Prosser*, 3 T. R. 186; 11 Jur., N. S., 182. In an action of covenant for rent, the tenant cannot set-off uncertain damages on any of the other covenants in the lease: *Weigall* v. *Waters*, 6 T. R. 488; *McAnnany* v. *Tickell*, 23 U. C. R. 122. So in an action for not indemnifying against taxes, no set-off is allowable: *Cooper* v. *Robinson*, 2 Chitty 161. The statutes of set-off do not apply to replevin: *Laycock* v. *Tufnell*, 2 Chitt. 531. If money is borrowed on note under an express agreement of repayment, yet it is the subject of set-off: *Lechmere* v. *Hawkins*, 2 Esp. 626. If a creditor consents that his debtor shall set-off the debt against a debt due from the creditor to another person, it seems the agreement, though not in writing, is valid: *Cuxon* v. *Chadley*, 3 B. & C. 596. If *A.* agrees to make a waggon for *B.*, and makes it, but refuses to deliver it unless the money is paid on delivery, the money that was to be paid for the waggon may be set-off against any demand of *B.* against *A.* for goods bargained and sold: *Dunmore* v. *Taylor*, Peake, 41. *B.*, a creditor of *A.*, employed him to repair a carriage, agreeing to pay ready money therefor. *Held*, that *B.* could not, upon offering to set-off an adequate portion of the debt, require redelivery of the carriage without payment of the repairs: *Clarke* v. *Fell*, 4 B. & Ad. 404. An agreement by a broker, that he will sell goods for his principals, and pay over the proceeds, without setting-off a debt due from the principals to him, is not binding: *M'Gillivray et al.* v. *Simpson*, 2 C. & P. 320. If *A.* agrees to do work for a certain sum of money, and afterwards *B.* purchases some of the materials, which are worked up by *A.*, the money expended on that account is the subject of set-off, not payment: *Allinson* v. *Davies*, Peake's Add. Cases, 82. The clerk of a race-course cannot set-off a claim of an unpaid stake due from the plaintiff on one race against the stake of another race won by the plaintiff's horse: *Charlton* v. *Hill*, 5 C. & P. 147. Where defence not the subject of set-off, but cross-action, see *Stimson* v. *Hall*, 1 H. & N. 831; *Meyer* v. *Dresser*, 16 C. B. N. S. 646; *Jones* v. *Moore* 4 Y. & C. 351; *Atterbury* v. *Jarvie*, 2 H. & N. 114. The equity which attaches to an overdue bill or note is not the subject of set-off: *Whitehead* v. *Walker*, 10 M. & W. 696; *Cripps* v. *Davis*, 12 M. & W. 159. A note can be endorsed for the purpose of defeating a set-off (*Oulds* v. *Harrison*, 10 Ex. 572; *Metropolitan Bank* v. *Snare et al.*, 10 C. P. 24); but if endorsee merely a trustee for endorser, possibly the case might be met by application of the principle of *Cochrane* v. *Green*, 9 C. B. N. S. 448; see also *Holmes* v. *Kidd*, 3 H. & N. 891; *Agra and Masterman's Bank* v. *Leighton*, 4 H. & C. 656. Where a person fails to perform certain work, and it is afterwards done by the employer, the cost of doing this part is not matter of set-off, but deduction: *Turner* v. *Diaper*, 2 M. & G. 241; *Newton*

v. *Forster*, 12 M. & W. 772; *Pardow* v. *Webb*, Car. & M. 531; *Mondel* v. *Steel*, 8 M. & W. 858. The amount of a verdict recovered cannot be a set-off unless the original debt could have been: *Gurrick* v. *Jones*, 2 Dowl. 157. One who buys goods of a person, knowing that he is selling them as agent, cannot set-off, in an action by the principal for their price, a debt due to him from the agent, even though he did not at the time of the purchase know, and had not the means of knowing, who was the real owner: *Semenza* v. *Brinsley*, 18 C. B. N. S. 467; but see *Bowmanville Machine Co.* v. *Dempster*, 2 Sup. R. 21. It is not necessary in such a case to negative the "means of knowledge:" *Borries* v. *Imperial Ottoman Bank*, L. R. 9 C. P. 38; see also *Ex parte Dixon, In re Henley*, 4 Ch. D. 133. In an action by a servant against his master for wages, the latter cannot generally set-off the value of the goods lost by the negligence of the servant; but if it was part of the original understanding that the servant should pay out of his wages for goods lost through his negligence, the value of the goods so lost may be deducted from the wages: *Le Loir* v. *Bristow*, 4 Camp. 134; *Cleworth* v. *Pickford*, 7 M. & W. 314. Salary due to a clerk on dismissal is the subject of set-off: *East Anglian Railways Co.* v. *Lythgoe*, 10 C. B. 726. A debt due to a surviving partner may be set-off against a demand on him in his own right: *French* v. *Andrade*, 6 T. R. 582. So a debt due from one who was the only apparent trader may be set-off in an action by himself and partners: *Stracey* v. *Deey*, 7 T. R. 361. The balance of partnership accounts must be final to be the subject of set-off: *Fromont* v. *Coupland*, 2 Bing. 170; *Abbott* v. *Hicks*, 5 Bing. N. C. 578. In an action to which set-off is pleaded, it is no answer to the defence to say that the claim was assigned, and that plaintiff is simply suing as assignee, without shewing that the assignment was made and defendant had notice of it *before* the set-off accrued: *Wilson* v. *Gabriel et al.*, 4 B. & S. 243; *Dennison* v. *Knox*, 24 U. C. R. 119; see *Jeffs* v. *Day*, L. R. 1 Q. B. 372; *Watson* v. *Mid. Wales Railway Co.*, L. R. 2 C. P. 593; *Chisholm* v. *Provincial Insurance Co.*, 20 C. P. 11; *Dickson* v. *Swansea Vale Railway Co.*, L. R. 4 Q. B. 44; *Higgs* v. *Assam Tea Co.*, L. R. 4 Ex. 387; *Re Assam Tea Co., Ex parte Universal Life Assurance Co.*, L. R. 10 Eq. 458; *Re Imperial Land Co. of Marseilles, Ex parte Colborne & Strawbridge*, L. R. 11 Eq. 478; *McGiverin et al.* v. *Turnbull*, 32 U. C. R. 407. As to set-off in equity, see Fisher's Digest, 7786. It is a good answer for plaintiff to say that since set-off pleaded he paid it: *Eyton* v. *Littledale*, 4 Ex. 159. In the higher Courts the Statute of Limitations must be specially replied to a plea of set-off (*Chapple* v. *Durston*, 1 C. & J. 1), but no provision is made for such a course in Division Court. If set-off more than covers plaintiff's demand, defendant can bring action for surplus: *Hennell* v. *Fairland*, 3 Esp. 104; and *Eastmure* v. *Lawes*, 5 Bing. N. C. 444; see also sec. 94. As to the effect of not giving notice of set-off to the Clerk of the Court, see *Stanton* v. *Styles*, 5 Ex. 578.

In England the statute law has made provision in cases of "admitted set-off" (*Walesby* v. *Goulston*, L. R. 1 C. P. 567); but in this Province there has been no such legislation. On an application under the equitable jurisdiction of the Court, a Division Court judgment can be set-off and allowed against a judgment of a Court of Record: *Robinson* v. *Shields*, 2 L. J. N. S. 45. A cross claim arising out of the same transaction, for plaintiff's negligence, default and misconduct, not the subject of set-off: *Best* v. *Hill*, L. R. 8 C. P. 10. In an action by the payee of a joint and several note against one who, to the knowledge of the payee, joined in it as surety only, it is competent to the surety to set up a set-off due from the payee to the principal arising out of the same transaction from which the liability of the surety arose: *Bechervaise* v. *Lewis*, L. R. 7 C. P. 372. In an action against the acceptor of several bills, it is a good answer to say that the drawers became bankrupt or insolvent, and that the plaintiff received a sum of money from their estate, as a dividend, on account of the bills, and as to that sum, was only suing as trustee for the drawers, and that the defendant had a set-off against the drawers: *Thornton* v. *Maynard*, L. R. 10 C. P. 695. As to setting off calls on stock against claim for

tions, (*oo*) or of any defence under any other statute (*p*) having force of law in Ontario, he shall, at least six days before the trial or hearing, give notice thereof in writing to the plaintiff, or leave the same for him at his usual place of abode if within the Division, or, if living without the Divi- other statutory defence.

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wages, see *Benner* v. *Currie*, 36 U. C. R. 411; *Howell* v. *Dominion of Canada Oils Refinery Co.* (Limited), 37 U. C. R. 484; *Smart* v. *Bowmanville Machine and Implement Co.*, 25 C. P. 503; *Moore et al.* v. *McKinnon*, 21 U. C. R. 140. In *Cameron* v. *Cameron*, 23 C. P. 289, it was *held* that in an action by a creditor against an executrix *de son tort*, she could not set-off a debt due by the plaintiff to her testator; also that she might be sued as executrix; and, on her defending as such, the plaintiff might reply that she was executrix *de son tort*. A note payable by instalments can be set-off: *Moore* v. *Andrews*, 13 C. P. 405. In an action by a Sheriff for the price of goods sold by him as Sheriff, a debt against him individually cannot be set-off. The same principle would apply to a Bailiff: *Kingsmill* v. *Bank of Upper Canada*, 13 C. P. 600. Where defendant has not given notice of set-off, he cannot have the advantage of any mere items of set-off, not being payments on account: *Ford et al.* v. *Spafford*, 8 U. C. R. 17. The value of a chattel given in barter is the subject of set-off: *Wright et al.* v. *Cook*, 9 U. C. R. 605. If a creditor proves his claim in insolvency, he cannot set it off: *Merrill* v. *Beaty*, 15 U. C. R. 446. Money overpaid on a building agreement is not the subject of set-off: *Sinclair et al.* v. *Town of Galt*, 17 U. C. R. 259, *sed quære*. The evidence of the statement of an uncertain claim for freight must be clear to be the subject of set-off: *Mellish* v. *Wilkes*, 4 C. P. 407. Loss occasioned through a fraudulent representation is not the subject of set-off in an action on a promissory note for the price of the subject matter for which the note was given: *The Georgian Bay Lumber Company of Ontario* v. *Thompson*, 35 U. C. R. 64. In an action for the carriage of wheat, where there was an agreement by plaintiffs to pay "shortage," *held* not the subject of set-off: *Allen et al.* v. *Chisholm*, 33 U. C. R. 237; *Meyer* v. *Dresser*, 16 C. B. N. S. 646. On an action by a married woman on her separate account, a debt of the husband's cannot be set-off, even if he join in the action: *Linden, In re, and Wife* v. *Buchanan*, 29 U. C. R. 1. In an action against the maker and endorser of a promissory note, it was *held* that neither of the defendants could separately plead a set-off not arising out of or connected with the note: *Hughes et al.* v. *Snure et al.*, 22 U. C. R. 597. Where in an action the principal gets the benefit of a sum as set-off, his sureties cannot shew that it was improperly allowed him, or get the benefit of it: *Franklin* v. *Gream et al.*, 20 U. C. R. 84. Where the consideration for a set-off entirely fails, it cannot be set up: *Sylvester et al.* v. *McCuaig*, 28 C. P. 443. An application to stay a suit, so that defendant may recover a judgment against the plaintiff, with a view of applying to set-off judgments, is entirely unauthorized: *Lynch et al* v. *Wilson et al.*, 9 U. C. L. J. 242, *per* Draper, C. J. As to set-off generally, see Fisher's Digest, 7757; R. and J's Digest, 3491; Waterman on Set-off.

(*oo*) As to the defence of the Statute of Limitations, see notes to sec. 136, sub-sec. 2; 3 L. C. G. 35 and 47; 11 L. J. N. S. 39.

(*p*) The omission to properly stamp a promissory note or bill of exchange is a statutory defence, and cannot be taken advantage of, unless notice of the statute is given: *Baxter* v. *Baynes*, 15 C. P. 237; *Stephens* v. *Berry*, 15 C. P. 548; *Kirby* v. *Hall*, 21 C. P. 377; *Edmunds qui tam* v. *Hoey*, 35 U. C. R. 495. In England the objection is taken on the evidence: *Field* v. *Woods*, 7 A. & E. 114. A plea that no stamps were ever affixed to a note was *held* to permit of evidence being given that the proper stamps were on, but had not been cancelled: *Young* v. *Waggoner*, 29 U. C. R. 35. In an action for a penalty no cause of

sion, shall deliver the same to the Clerk (*q*) of the Court in which the action is to be tried; and in case of a set-off, the particulars thereof shall be delivered to the Clerk and shall accompany the notice to be given as aforesaid to the plaintiff. C. S. U. C. c. 19, ss. 35 & 93; 39 V. c. 15, s. 1.

No evidence of set-off allowed.

93. No evidence of set-off (*r*) shall be given by the defendant except such as is contained in the particulars of set-off delivered. C. S. U. C. c. 19, s. 94.

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action exists until action brought; therefore notice of statutory defence would not be necessary: *Mason qui tam* v. *Mossop*, 29 U. C. R. 500; see Rule 128, and notes thereto. The defence to an action on Attorney's bill of costs, that no signed bill delivered, is a statutory one, and notice must be given: *Lane* v. *Glenny*, 7 A. & E. 83; *Robinson* v. *Roland*, 6 Dowl. 271; 7 U. C. L. J. 135. If signed bill delivered to one of several joint contractors it is sufficient: *Mant* v. *Smith*, 4 H. & N. 324. As to the heading and contents of bill, see *Haigh* v. *Ousey*, 7 E. & B. 578; *Pigot* v. *Cadman*, 1 H. & N. 837. If note given for the bill, non-delivery one month before action would be no answer: *Jeffreys* v. *Evans*, 14 M. & W. 210. Where three Attorneys commenced an action, and one only signed the bill, *held* insufficient: *Sullivan et al.* v. *Bridges*, 5 U. C. R. 322. As to the rights of Attorneys on their bills of costs and defences thereto, see Rob. & Jos. Digest, 322; B. & L. 3rd Ed., title, "Attorney;" Chitty's Prec. 59, *et seq.*, 319. 535, 683; Roscoe's N. P. Ev. 473; Fisher's Digest, 478, *et seq.*; Arch. Prac., "Attorneys." It is submitted that in an action by a medical man for his services, it is not necessary for a defendant to give notice of statutory defence in order to compel the plaintiff to prove registration under the "Ontario Medical Act:" Rev. Stat. cap. 142. By section 40 of that Act, he shall not practice for "hire, gain, or hope of reward," if not registered, so that proof of registration is part of the cause of action necessary to be proved: *Mason qui tam* v. *Mossop*, 29 U. C. R. 500; *Gibbon* v. *Budd*, 2 H. & C. 92; see also section 35 of that Act. Should one who is not an Attorney sue on a bill of costs, no statutory notice would be necessary; neither, it is submitted, would it be necessary where a medical man is not registered. Section 32 of the English Medical Act is different from ours, so that registration at the time of the trial merely would not be sufficient here (see *Turner* v. *Reynall*, 14 C. B. N. S. 328); and if action by two medical men, both should prove registration (*Ib.*); and the Act is not confined to cases where the patient is sued: *Alvarez De la Rosa* v. *Prieto*, 16 C. B. N. S. 578. As to proof of registration, see section 36 of our Act, and *Pedgrift* v. *Chevallier*, 8 C. B. N. S. 246, and Roscoe's N. P. Ev. 13th Ed. 484. As to the rights and liabilities of medical practitioners, see Fisher's Digest, 5782, *et seq.*; see also *Leman* v. *Fletcher*, L. R. 8 Q. B. 319; *Berry* v. *Henderson*, L. R. 5 Q. B. 296; *Leman* v. *Houseley*, L. R. 10 Q. B. 66. No notice need be given of any defence under the Statute of Frauds: *Buttemere* v. *Hayes*, 5 M. & W. 456; *Reade* v. *Lamb*, 6 Ex. 130; *Dempsey et al.* v. *Winstanley*, 6 U. C. R. 409. It may be stated generally that where a cause of action would be enforceable but for the interposition of some statutory provision avoiding the contract, then notice of such restriction should be given; but where the cause of action only commences with the suit, or is *prohibited*, except under certain circumstances, then notice is not necessary. It is difficult to reconcile the English cases on this point: see *Leaf* v. *Tatton*, 10 M. & W. 397, 398.

(*q*) See *Stanton* v. *Styles*, 5 Ex. 578.

(*r*) This is following the rule observed in *Ibbett* v. *Leaver*, 16 M. & W. 770, and *Young* v. *Geiger*, 6 C. B. 552. The object is to raise a distinct issue, which

94. If the set-off proved to the satisfaction of the Judge exceeds the amount shewn to be due to the plaintiff, the plaintiff shall be nonsuited, (*s*) or, in the election of the defendant, judgment may be given for the defendant, in which latter case such set-off shall be thereby satisfied only to the amount found due the plaintiff, and no further; and the Judge, in such case, may adjudicate that a specified amount of such set-off be satisfied by such claim of the plaintiff; but such adjudication shall be no bar to the recovery of the residue of such set-off. 32 V. c. 23, s. 17; 39 V. c. 15, s. 1. If set-off exceeds amount due plaintiff.

WITNESSES AND EVIDENCE.

SUBPŒNAS.

95. Any of the parties to a suit may obtain, from the Clerk of any Division Court in the County, a subpœna (*t*) Parties may obtain subpœnas from Clerk.

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parties may come prepared to try. An amendment could be made if necessary under Rule 118, or an adjournment under section 83 and Rule 140: see 1 L. C. G. 7.

(*s*) The section will be found at page 151, Con. Stat. U. C. The amount of a set-off is not now limited; but if more than the plaintiff's claim is proved to the satisfaction of the Judge, the defendant has the option of the plaintiff being nonsuited or judgment given for the defendant; in which latter case both claims are satisfied; or the Judge may proceed to adjudicate upon how much of the set-off has been satisfied. But the section, it will be observed, goes on to declare that "such adjudication" shall be no bar to the recovery of the *residue* of the set-off: see *Hennell* v. *Fairland*, 3 Esp. 104; *Parsons* v. *Crabb*, 31 U. C. R. 447; Law Reports Digest, 1136. In effect, where the set-off is proved to be more than the plaintiff's claim, the latter is satisfied, and so is the set-off, to the amount of the plaintiff's claim, leaving to the defendant his remedy for the recovery of the residue of his set-off: see Forms 57 and 58. There appears to be no limit to the amount of set-off that the Judge may inquire into.

(*t*) If you are not certain that your witnesses will attend at the sittings voluntarily and give evidence, you must subpœna them. (See form of Subpœna No. 38). The duty of attending is created *by the service*, and by that means only. The law was that, even if found in Court, a witness might refuse to be sworn unless subpœnaed: *Bowles* v. *Johnson*, 1 W. Black. 36; but see section 97. The Clerk issues the subpœna. It is very questionable whether or not the writ can be issued in blank: *Barber* v. *Wood*, 2 M. & Rob. 172. The subpœna must name the place of trial: *Milson* v. *Day*, 3 M. & P. 333. Also the parties to the cause: *Doe d. Clarke* v. *Thomson*, 9 Dowl. 948. If notice of change of place of sitting posted up at place designated in subpœna, witness is bound to attend at another place: *Chapman* v. *Davis*, 1 Dowl. N. S. 239. The subpœna extends to the whole sittings, if more days than one: *Scholes* v. *Hilton*, 10 M. & W. 15. The names of all the witnesses should be inserted in the original (*Malcott* v. *Hunt*, 1 C. & M. 752); and any number can be inserted in it: s. 96, and 4th item of Tariff of Clerk's Fees. The subpœna need not be personally served; it may be left at the "usual place of abode" of the witness (see sec. 97); except perhaps for the purpose of binging the witness into contempt (*Garden* v. *Creswell*, 2 M. & W. 319); and for the latter purpose the original should be proved

to have been shewn the witness: (*Pitcher* v. *King*, 2 D. & L. 755), even if an Attorney (*Smith* v. *Truscott*, 6 M. & G. 267); but in any case if the witness requires to see it a reasonable time afterwards (see notes to sec. 72), and is refused, service is defective: *Westley* v. *Jones*, 5 Moore, 162. The copy must in all cases be left with, and not merely shewn to, the witness (*Thorpe* v. *Gisborne*, 11 Moore, 55; *In re Holt*, Weekly Notes, 1879, page 48); and there must be no mistake in the day: *Doe d. Clarke* v. *Thompson*, 9 Dowl. 948. Service is not effective without the necessary witness fees being paid or tendered: *Fuller* v. *Prentice*, 1 H. Black. 49. The fees include expenses of going to, staying at, and returning from the trial: *Ib.*; *Newton* v. *Harland*, 1 M. & G. 956; also see Tariff of Witness Fees. If the attendance of the witness becomes unnecessary by settlement of the case or otherwise, and he is informed of it before expenses incurred, the sum may be recovered back: *Martin* v. *Andrews*, 7 E. & B. 1. The fees are fixed by tariff, and no distinction can properly be made in Division Courts in amount as to any class of witnesses, except under sec. 98. If a larger sum than what a witness is entitled to is *bona fide* demanded, he will not be brought into contempt: *Newton* v. *Harland*, *supra*. If a party refuse money tendered him, saying he will pay his own expenses, he is subject to the same consequences as if paid: *Gough or Goff* v. *Miller or Mills*, 2 D. & L. 23. The fee need not be tendered to the witness at the time of service; a reasonable time before the sittings is sufficient: *Webb* v. *Page*, 1 C. & K. 23. Where a witness had been brought to the place of trial by one party, the other, finding him there, subpœnaed him, it was *held* that without tender of expenses he could do so (*Edmonds* v. *Pearson*, 3 C. & P. 113), and that the witness could not refuse to be cross-examined on that account: *Ib.* In a later case, however, it was *held* that the party calling him was bound to pay all his expenses: *Allen* v. *Yoxall*, 1 C. & K. 315. Service must be made a reasonable time before the trial: *Barber* v. *Wood*, 2 M. & Rob. 172. What is reasonable must depend on the circumstances of each case (*Maunsell* v. *Ainsworth*, 8 Dowl. 869), and is in all cases a question for the Court: *Barber* v. *Wood*, *supra*. If notice is given witness that cause not yet tried, he is bound to attend, though *after* the day mentioned in subpœna (*Davis* v. *Lovell*, 4 M. & W. 678; but see *Grantham* v. *Bishop*, 1 C. P. 237), though not sufficient to bring him into contempt: *Alexander* v. *Dixon*, 1 Bing. 366. Service may be made any hour of the day or night, but not on Sunday: *Reg.* v. *Leominster*, 2 B. & S. 391, and cases cited. If the witness be a married woman, the money should be tendered her, and not her husband: Arch. Prac. 12th Ed. 351. A witness may refuse to attend or give evidence until his expenses are paid him, and if he does attend the expenses of returning are to be included: *Newton* v. *Harland*, 1 M. & G. 956. A witness may also maintain an action for his fees against the party who subpœnaed him, though he refuses to give evidence because such fees are not paid him, and he was thereupon not examined: *Hallet* v. *Mears*, 13 East. 15; *Pell* v. *Davison*, 5 Ex. 955. The Attorney is not responsible unless he agreed to be: *Robins* v. *Bridge*, 3 M. & W. 114. A witness should be served a reasonable time to allow him to put his affairs in order (*Hammond* v. *Stewart*, 1 Strange, 510); but urgent domestic business is no excuse: *Gough or Goff* v. *Miller or Mills*, 2 D. & L. 23. A summons may be served in a Court of justice on a party subpœnaed to give evidence in his own cause: *Poole* v. *Gould*, 1 H. & N. 99. Difficulty in serving does not dispense with the necessity of service: *Barnes* v. *Williams*, 1 Dowl. 615. If witness paid by both parties, neither can recover it back: *Crompton* v. *Hutton*, 3 Taunt. 230. A party to a cause, *about to attend the trial* on his own account, has no right to conduct money or expenses when subpœnaed by the other side: *Reed* v. *Fairless*, 3 F. & F. 958. A party to a cause is not entitled to his fees as a witness unless he expressly attended to give evidence on his own behalf, and not to superintend the cause (*Howes* v. *Barber*, 18 Q. B. 588); and the affidavit of disbursements should distinctly shew that fact. It is not a general rule in England that parties, if witnesses, are to have an allowance

with or without a clause for the production (*u*) of books, papers and writings, requiring any witness, resident within the ~~County~~, (*v*) or served with the subpœna therein, to attend at a specified Court or place before the Judge, or any arbitrator appointed by him under the provision hereinafter contained, and the Clerk, when requested by any party to a suit, or his agent, shall give copies of such subpœna. C. S. U. C. c. 19, s. 97.

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for their attendance on their own behalf: *Dowdell* v. *Australian Royal Mail Steam Navigation Co.*, 3 E. & B. 902. A witness should be called on his subpœna: *Rex* v. *Stretch*, 3 A. & E. 503; *Dixon* v. *Lee*, 3 Dowl. 259. But if it can be shewn he did not attend it is sufficient: *Goff* v. *Mills*, 2 D. & L. 23. It is a sufficient excuse that he was too ill to attend (*Jacobs, In re*, 1 H. & W. 123: *Scholes* v. *Hilton*, 10 M. & W. 15); but it is no excuse that he would have been in time if a previous cause on the list had not unexpectedly gone off (*Rex* v. *Fenn*, 3 Dowl. 546), and that another person had answered for him and would have fetched him in a few minutes. Before proceedings for contempt can be taken, it must appear that he was a material witness: *Tinley* v. *Porter*, 2 M. & W. 822. To sustain an action against witness, if party cannot proceed with trial, it is sufficient without calling jury or otherwise entering on the trial: *Lamont* v. *Crook*, 6 M. & W. 615. If a witness has received full fees from one side, and, when served with subpœna on the other, consents to receive a nominal sum, he is still liable to the latter if he does not attend (*Betteley* v. *M'Leod*, 3 Bing. N. C. 405); but actual damage must be shewn in any case: *Couling* v. *Coxe*, 6 C. B. 703; *Yeatman* v. *Dempsey*, 9 C. B. N. S. 881. During the attendance and returning home the witness is privileged from arrest on civil process: *Montague* v. *Harrison*, 3 C. B. N. S. 292; *Kimpton* v. *London and North Western Railway Co.*, 9 Ex. 766. On the subject of subpœnaing witnesses in time, see Article at page 62 of 1 U. C. L. J. On the question generally, see Rob. & Jos. Digest, 1309; Roscoe's N. P. 13th Ed. 169, *et seq.*

(*u*) This is called a *duces tecum*. A witness called to produce a document need not be sworn; nor unless made a witness in the ordinary way can he be cross-examined (*Perry* v. *Gibson*, 1 A. & E. 48); and if sworn by mistake the same rule applies: *Rush* v. *Smith*, 1 C. M. & R. 94. It is incumbent on the party to bring the "books, papers and writings" with him, and if he does not he is *prima facie* in default: *Amey* v. *Long*, 9 East, 473. Having a lien on them was *held* no excuse for not producing them (*Thompson* v. *Mosley*, 5 C. & P. 501, *sed quære*); nor can he shew that the document was not material: *Doe* v. *Kelly*, 4 Dowl. 273. If a witness who is sworn has a document with him in Court, he is bound to produce it, though not served with a *subpœna duces tecum*: *Snelgrove* v. *Stevens*, Car. & M. 508; *Farley et al.* v. *Graham*, 9 U. C. R. 438. A servant cannot be brought into contempt for not producing books and papers of his master in his possession, which the master will not allow him to bring: *Crowther* v. *Appleby*, L. R. 9 C. P. 23, and cases cited; see *In re Emma Silver Mining Company*, L. R. 10 Ch. 194. The remarks made in the previous note have application here also. As to corroboration of witness, see *Findley* v. *Pedan et al.*, 26 C. P. 483; and recalling him, which is in discretion of the Judge: *Gleason* v. *Williams*, 27 C. P. 93. As to Evidence generally, the student is referred to the works of Taylor, Roscoe and Stephen on that subject; Rob. & Jos. Digest, 1283 to 1411; L. R. Dig. 1140 to 1184; and Fisher's Dig. 3554 to 3826.

(*v*) A Division Court subpœna has no efficacy outside of the county in which it is issued: see sec. 98.

Services of subpœna, by whom made.

96. Any number of names may be inserted in a subpœna, and service thereof may be made by any literate person, (*w*) and proof of the due service (*x*) thereof, together with the tender or payment of expenses, (*y*) may be made by affidavit, and proof of service may be received by the Judge, either orally or by affidavit (*z*). C. S. U. C. c. 19, s. 98.

Penalty for disobeying subpœna or refusing to be sworn.

97. Every person served with a copy of a subpœna, either personally or at his usual place of abode, (*a*) and to whom at the same time a tender of payment of his lawful expenses (*b*) is made, who refuses or neglects without sufficient cause (*c*) to obey the subpœna, and also every person in court called upon to give evidence, (*d*) who refuses to be sworn (*e*) (or affirm where affirmation is by law allowed) or

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(*w*) As to mode of service of subpœna, and by whom served, the reader is referred to the notes to sections 72 and 95. The Bailiff should make a memorandum on the subpœna of time of service, of the mileage, amount paid witness, &c. 2 U. C. L. J. 124.

(*x*) See notes to sections 72 and 95, and *Baker* v. *Coghlan*, 7 C. B. 131.

(*y*) These are regulated by the tariff. The Superior Court tariff, as to the allowance of fees to Barristers, Physicians, Surgeons, Engineers and Surveyors, is not applicable to Division Courts. The Division Court tariff prescribes the limit of allowance to all classes of witnesses: see *Dartnell* v. *The Sessions of Prescott and Russell*, 26 U. C. R. 430.

(*z*) It is submitted that the best proof, and what would be a proper record of the facts, would be by affidavit.

(*a*) As to what is a man's usual place of abode, see the notes to sections 62 and 72. This provision as to service at the house is much after the law laid down in *Mallett* v. *Hunt*, 1 C. & M. 752. It is a practice to be avoided as much as possible.

(*b*) See notes to sections 95 and 96; also Rule 147, and the Tariff.

(*c*) What is sufficient cause must depend on the circumstances of each particular case. It need scarcely be said that sickness is: *Scholes* v. *Hilton*, 10 M. & W. 15; *Jacobs*, *In re*, 1 H. & W. 123; see also Arch. Prac., 12th Ed. 356, title, "Means of Evidence and Witnesses."

(*d*) Any person in Court can be called upon to give evidence in a case. On the authority of *Bowles* v. *Johnson*, 1 W. Black, 36, the law would not have been so without this provision. It is doubtful if he can be compelled to take the oath without tender of his witness fee.

(*e*) "All witnesses ought to be sworn according to the peculiar ceremonies of their religion, or, in *such manner* as they *deem binding* on their consciences:" Tay. on Ev. sec. 1255. In *Reg.* v. *Pah-Mah-Gay*, 20 U. C. R. 195, on a trial for murder, an Indian witness was offered, and, on his examination by the Judge, it appeared that he was not a Christian, and had no knowledge of any ceremony in use among his tribe binding a person to speak the truth. It appeared, however, that he had a full sense of the obligation to do so, and that

to give evidence, shall pay such fine not exceeding eight dollars as the Judge may impose, and shall, by verbal or written order of the Judge, be, in addition, liable to imprisonment for any time not exceeding ten days; (*f*) and such fine shall be levied and collected with costs, in the same manner as fines imposed on jurymen for non-attendance, and the whole or any part of such fine, in the discretion of the Judge, after deducting the costs, shall be applicable towards indemnifying the party injured by such refusal or neglect, and the remainder thereof shall form part of the Consolidated Revenue Fund. C. S. U. C. c. 19, s. 99.

Parties may obtain subpœnas from Superior Courts.

98. Any party may obtain from either of the Superior Courts of Law, a subpœna (*g*) requiring the attendance at the Division Court, and at the time mentioned in such subpœna, of a witness residing or served with such subpœna in any part of Ontario; and the witness shall obey such subpœna, provided the allowance for his expenses, according

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he and his tribe believed in a future state, and in a Supreme Being, who created all things, and in a future state of rewards or punishment according to their conduct in this life; it was *held* that his evidence was admissible: see Form of Oaths, Form No. 110, and Rule 134. A question cannot be put to a witness on cross-examination for the mere purpose of contradicting him, unless such question be relevant to the matter in issue; and if such question be put, the answer is conclusive: *Gilbert* v. *Gooderham et al.*, 6 C. P. 39; Tay. on Ev., ss. 1291 to 1296; *McCulloch* v. *Gore District Mutual Fire Insurance Company*, 34 U. C. R. 384; Rob. & Jos. Digest, 1344.

(*f*) In the case of *In re Pollard*, L. R. 2 P. C., page 120, it is laid down that "no person should be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, *and an opportunity of answering it given to him.*" At page 325 of Maxwell on Statutes, it is said that, "in giving a judicial power to affect prejudicially the rights of person or property, a statute would be understood as silently implying, when it did not expressly provide the condition or qualification, that the power was to be exercised in accordance with the rule of natural justice, that the person liable to be prejudicially affected should first have an opportunity of defending himself:" see also *Thorburn* v. *Barnes*, L. R. 2 C. P. 384; *Bullen* v. *Moodie et al.* 13 C. P. 126, and 2 E. & A. 379; *Nicholls* v. *Cumming*, 1 Sup. R. 395. As to order for imposition of fine, and the entry to be made by Clerk, see Forms 73 and 74.

(*g*) A subpœna under section 95 only extends to a witness "resident within the County," but, under this section to any one "residing or served" any where in the Province. It may be tested the day it is issued: Rev. Stat., page 779. Formerly it was not so: *Edgell* v. *Curling*, 7 M. & G. 958; *Fisher* v. *Grace*, 28 U. C. R. 312.

× Clause 10 of Act of 1877 substituted for Clause 98

to the scale settled in the said Superior Courts, (*h*) be tendered to him at the time of service. C. S. U. C. c. 19, s. 100.

Commissions to take Evidence.

Power to issue commissions to take evidence.

99. In case the plaintiff or defendant in any suit in any Division Court is desirous of having at the trial thereof the testimony of any person or persons residing (*i*) without the limits of the Province, the Judge of the County Court of the County wherein such suit is pending, may, upon the application of such plaintiff or defendant, (*k*) and upon hearing the parties, order the issue of a commission or commissions out of and under the seal of such County Court to a commissioner or commissioners to take the examination of such person or persons respectively. 39 V. c. 15, s. 3.

(*h*) The following is the Superior Court Tariff:

	$ c.
"To witnesses residing within three miles of the Court House, *per diem*	1 00
"To witnesses residing over three miles from the Court House,	1 25
"Barristers and Attorneys, Physicians and Surgeons, when called upon to give evidence in consequence of any professional services rendered by them, or to give professional opinions, *per diem*	4 00
"Engineers and Surveyors when called upon to give evidence of any professional service rendered by them or to give evidence, depending upon their skill or judgment, *per diem*	4 00

"If the witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one cause, they will be entitled to a proportionate part in each cause only. The travelling expenses of witnesses over ten miles shall be allowed, according to the sums reasonably and actually paid, but in no case shall exceed one shilling *per* mile one way:" see 23 C. P. page 438. The Clerk cannot tax more to the party issuing the subpœna, if successful, than the disbursements for the subpœna and the witness fees. No Attorney's charges for issuing are taxable: 6 L. C. G. 144.

(*i*) As to the meaning of the word "residing," see the notes to section 62, 71 and 72.

(*k*) The application can only be granted according to the conditions imposed by section 100, and will not generally be entertained until the defendant has put in his defence (*Mondel* v. *Steele*, 8 M. & W. 300; *Finney* v. *Beesley*, 17 Q. B. 86), not even to expedite proceedings: *Allan* v. *Andrews*, 5 P. R. 32; but see *Fischer* v. *Hahn*, 13 C. B. N. S. 659. This more particularly applies when made by defendant (*Brydges* v. *Fisher*, 4 M. & Scott, 458); but it also applies to the plaintiff: *Pirie* v. *Iron*, 8 Bing. 143. Sometimes a party might have the order on undertaking not to act on it until after defence put in: *Dougall* v. *Moodie*, 1 U. C. R. 257. The application must be supported by affidavit (*McNair* v. *Sheldon*, Tay. 451), which should be entitled the same way as the order, *passim*. The granting of the order is not imperative: *Mair* v. *Anderson*, 11 U. C. R. 160; *Grover & Baker Sewing Machine Company* v. *Webster*, 6 L. J. N. S. 180. Application should be made within a reasonable time after the defence put in (*Brydges* v. *Fisher*, 4 M. & Scott, 458), particularly if made

by defendant so as to exclude the idea of a purpose to delay the trial; but the application will not be refused unless upon a strong case of misconduct, and unless made for the purpose of delay (*Sparkes* v. *Barrett*, 5 Scott, 402), when it will be refused: *Lloyd* v. *Key*, 3 Dowl. 253. Great delay even is not a ground for rejecting the application (*Birnie* v. *Janson*, 2 G. & D. 630), though the amount in dispute be small (*Dye* v. *Bennett*, 9 C. . 281); but if delay is the object, a defendant will be required to pay mo.. y into Court (*Sparkes* v. *Barrett*, 5 Scott, 402), but not otherwise: *Birnie* v. *Janson*, *supra*. The rules of practice are not to be extended to allow the evidence of experts to be taken under commission: *Russell* v. *Great Western Railway Company*, 3 U. C. L. J. 116. A commission for the examination of a party will not be granted unless it is clearly shewn that it will be conducive to the ends of justice (*Price* v. *Bailey*, 6 P. R. 256; *Fischer* v. *Hahn*, *supra*); in which case the fact of a person's living out of the jurisdiction was not in itself sufficient: *Castelli* v. *Groom*, 18 Q. B. 490. If defence not entered, satisfactory reasons would have to be given before granting order. The name, and perhaps the residence, of the witness should be stated (*Gunter* v. *M'Tear*, 1 M. & W. 201); and that he is material (*Lane* v. *Bayshaw*, 16 C. B. 576); and that party cannot safely go to trial without his evidence: *Baddeley* v. *Gilmore*, 1 M. & W. 55; *Healy* v. *Young*, 2 C. B. 702. In general, it is unnecessary to state what fact witness is to be examined upon: *Abraham* v. *Newton*, 8 Bing. 274. The name of the proposed commissioner should be stated (*Doe* v. *Phillips*, 1 Dowl. 56); or must appear on the summons or application: *Fearon* v. *White*, 5 Dowl. 713. It is not in general necessary for a defendant to swear to merits, or that application is not made for delay (*Westmoreland* v. *Huggins*, 1 Dowl. N. S. 800); but if order for commission stays proceedings, that part of it will be rescinded if delay appears: *Butler* v. *Fox*, 9 C. B. 199. The affidavit could be made by the Attorney or his clerk having the management of the suit, or by an agent of the party applying. The fear of a witness to submit to cross-examination being suggested is no answer to the application: *Carruthers* v. *Graham*, 9 Dowl. 947. It need not appear that any effort was made to obtain the attendance of the witness (*Norton* v. *Melbourne*, 3 Bing. N. C. 67), or that the defence is true: *Westmoreland* v. *Huggins*, 1 Dowl. N. S. 800. It is no conclusive answer that there are witnesses within the jurisdiction who can swear to the same facts: *Adams* v. *Corfield*, 28 L. J. Ex. 31. The application under this section should be by summons to shew cause: *Doe* v. *Pattisson*, 3 Dowl. 35. Evidence improperly taken can be rejected at the trial: *Lumley* v. *Gye*, 3 E. & B. 114. The time, place and manner of examination should be fixed (*Greville* v. *Stultz*, 11 Q. B. 997; see also *Simms* v. *Henderson*, 11 Q. B. 1015; but see *Farrel* v. *Stephens*, 17 U. C. R. 250); but will be waived by appearance of opposite party to cross-examine: *Howkins* v. *Baldwin*, 16 Q. B. 375. The order will be made to suit the circumstances of each case: *Mills* v. *Wellbank*, 3 Scott N. R. 177 A time is usually fixed in the order for return of commission, but it can be extended: *Clinton* v. *Peabody*, 7 M. & G. 399. If first commission proves abortive, a second will be ordered: *Fisher* v. *Izataray*, E. B. & E. 321. The order usually contains a stay of proceedings, but only for limited time: *Forbes* v. *Wells*, 3 Dowl. 318. A copy of the order should be served on the opposite party. The following are given as forms of affidavit and order for commission; but, should any special provision, such as stay of proceedings, be required, it can be inserted in the order:

In the County Court of the County of .

In a cause in the Division Court for the County of in which *A. B.* is plaintiff, and *C. D.* is defendant.

I, *A. B.*, of, &c., the above named plaintiff, herein make oath and say:

1. That this action is brought for the recovery of (*here state shortly the cause of action*).

2. That the defendant has filed a disputing notice herein.

3. That *E. F.* is a material and necessary witness for me in the said cause, and I am advised and verily believe that I cannot safely proceed to the trial of it without his evidence.

4. That the said *E. F.* is at present residing at , without the limits of the Province of Ontario. (*If made by the defendant, add the following*):

5. That I have a good defence to this action on the merits, as I am advised and verily believe (or, if made by the Attorney or his clerk, say, "the defendant has, I am instructed and verily believe, a good defence," &c.)

6. This application for a commission is made *bona fide* for the purpose of procuring the evidence of the said , and not for delay.

Sworn, &c.

In the County Court of the County of .

In a cause in the Division Court for the County of in which *A. B.* is plaintiff and *C. D.* is defendant.

Upon hearing the parties, and upon reading the affidavit of , I do order that the plaintiff shall be at liberty to examine upon oath *E. F.* of, &c., one of the witnesses in the above mentioned cause, and now residing without the limits of the Province of Ontario, upon interrogatories to be administered to him on the part and behalf of the plaintiff by and before *G. H.* of, &c., (*addition*) at the said of at such time and place therein as the said *G. H.* shall there appoint, the plaintiff, his Attorney or agent giving previous notice in writing of his intended examination, and a copy of the said interrogatories to the defendant, his Attorney or agent; and that the defendant shall have the right to administer cross-interrogatories, and to cross-examine the said *E. F. viva voce*; and the questions so put shall be taken down, and his answers thereto, as well as to the cross-interrogatories, in writing, and returned as part of the examination.

And I further order that for the purpose of such examination a commission do issue out of and under the seal of the said County Court, according to the usual practice thereof, to the said *G. H.*, to take the said examination under such commission at the time and place and in the manner hereinbefore mentioned, and according to the usual directions of the Court.

I further order that the said interrogatories, cross-interrogatories (if any), and depositions taken thereon, together with said commission, be transmitted under the seal of the said *G. H.*, without delay, to Clerk of the County Court of the County of in the Province of Ontario, Dominion of Canada, at (*here give his P. O. address*), on or before the day of next.

Dated at Chambers, this day of 18 .

Judge of the County Court of the County of .

A copy of interrogatories should be annexed to the commission. If commission not taken out promptly, depositions might not be receivable in evidence: *Ponsford* v. *O'Connor*, 5 M. & W. 673. In framing interrogatories, leading questions should not be put, and may be struck out at the trial if objected to by the opposite party (*Alcock* v. *Royal Exchange Assurance Company*, 13 Q. B. 292), but not necessarily: *Small* v. *Nairne*, 13 Q. B. 840. If either party wants to use a document in the hands of the opposite party, he must give notice to produce it (*Cunliffe* v. *Whitehead*, 3 Dowl. 634); and the examination should, if possible, be conducted upon the same rules as in a trial at *Nisi Prius*: *Ib.* A party cannot abandon an interrogatory in part; he must do it in whole: *Wheeler* v. *Atkins*, 5 Esp. 246.

"Due notice" of commission must be given (Rev. Stat. cap. 42, s. 22), otherwise depositions would not be received (2 Starkie's Ev. 264), as the opposite party has the right to cross-examine: *Ib.*; *Attorney-General* v. *Davison*, McClel. &

Y. 160. If the witness be living in the country when deposition offered in evidence, it is not receivable: Rev. Stat. cap. 42, s. 23. The evidence under a commission is receivable, notwithstanding the affidavit of examination is made by the commissioner, and returned under his hand, but not his seal: *Beach* v. *Odell*, 4 O. S. 8. The signature and seal of one purporting to be Chief Magistrate to an affidavit of execution will be presumed genuine: *Doe Lemoine* v. *Raymond*, 5 O. S. 337. An affidavit that the examination of the witnesses was duly taken, not that the commission was duly taken in accordance with the literal wording of the statute, is sufficient, and need not be entitled in any cause: *McLeod* v. *Torrance*, 3 U. C. R. 146; *Doe Park et al.* v. *Henderson*, 7 U. C. R. 182; see also *Passmore* v. *Harris*, 4 U. C. R. 344. The affidavit of due taking of commission need not be signed by the deponent: *Wilmot* v. *Wadsworth*, 10 U. C. R. 594. When commission will be ordered to be returned when defectively executed as supposed: *Doe Hay* v. *Hunt*, 1 P. R. 44. If the affidavit substantially shews commission duly taken, it is sufficient: *Bunnel* v. *Whitlaw*, 14 U. C. R. 241. It is no objection that one of the witnesses affirmed: *Ib.* It need not appear that the witness was examined where the Mayor resides who takes the affidavit: *Stebbins* v. *Anderson*, 20 U. C. R. 239. The envelope containing commission must be under the hand and seal of commissioner, and there must be an affidavit of due taking, otherwise depositions cannot be read: *Reford* v. *McDonald*, 14 C. P. 150. The contractions "Plff." and "Deft." in the title of affidavit of execution no objection (*Frank* v. *Carson*, 15 C. P. 135); nor if entitled in one Court instead of another: *Comstock* v. *Burrowes*, 13 U. C. R. 439. The affidavit must identify the depositions: *Milligan* v. *G. T. Railway Co.*, 16 C. P. 191. If commission taken in Quebec, the affidavit can be taken before a Notary Public there: *Beard* v. *Steele*, 34 U. C. R. 43. When the commission was not returned to the office mentioned in the order, it was *held* no objection to the evidence: *Stevenson* v. *Rae*, 2 C. P. 406. An opening in the envelope not large enough to let out any of the papers is no objection: *Frank* v. *Carson*, 15 C. P. 135. The commission need not be indorsed with the style of the cause, nor need the evidence be annexed to it, and should be so framed as to bind all parties to be examined, and particularly as to the mode of administering the requisite oath to Jews or others: *Ib.* A person who acts under a commission, which contained specific directions as to the mode of return, cannot afterwards object that certain formalities prescribed by the statute, but not by the commission, have been omitted: *Frank* v. *Carson*, 15 C. P. 135; *Heyland* v. *Scott*, 19 C. P., 165. A commission produced at the trial in an envelope open at both ends, but otherwise unobjectionable, was received: *Graham* v. *Stewart*, 15 C. P. 169. The affidavit of execution may speak of depositions or examinations as synonymous terms: *Muckle* v. *Ludlow*, 16 C. P. 420. The rigid provisions of the statute commented on *Ib.* Entitling defendant's name in the cause in the commission as "William" instead of "Samuel," *held* fatal, and the taking of evidence a void proceeding: *Graham* v. *Stewart*, 15 C. P. 169. Technical objections in Superior Courts *held* not properly to be taken at the trial, but on application before it: *Lodge* v. *Thompson*, 26 U. C. R. 588. Objections to commission, if not taken, are waived: *Farrel* v. *Stephens*, 17 U. C. R. 250. Change of the day for the examination *held* no objection, in *Comstock* v. *Galbraith*, 21 U. C. R. 297; *Comstock et al.* v. *Tyrrell et al.*, 12 C. P. 173. A contraction in the name of a witness in the return of the commission is no objection: *Ib.* Where the order was that the witnesses should "sign" the depositions, but the commission contained no such clause, it was *held* that the depositions were receivable: *Hodges* v. *Cobb*, L. R. 2 Q. B. 652. The oath of the commissioner may sometimes be dispensed with: *Boelen* v. *Melladew*, 10 C. B. 898. Although there are written interrogatories, it is no objection that the commissioner put the questions *viva voce*; *Grill* v. *General Iron Screw Collier Co.*, L. R. 1 C. P 600. Commissioners have a lien on commissions for their fees: *Peters* v. *Beer*, 14 Beav. 101. A Barrister has a lien for his fees on commission: ***Smith*** v. ***Hallen***, **2 F. & F. 678**; see Roscoe's N. P.

No commission to take evidence of the person applying, unless, &c.

100. No order shall be made for the issue of any such commission, for the taking of the evidence of the person applying therefor, or any person in his employment, unless in the opinion of the Judge, a saving of expense (*l*) will be caused thereby, or unless it is clearly made to appear that such person or persons are aged or infirm, or otherwise unable from sickness to appear as a witness or witnesses. 39 V. c. 15, s. 3.

Rev. Stat. c. 62, ss. 22 and 23, made applicable to commissions

101. The provisions of sections twenty-two and twenty-three (*m*) of "*The Evidence Act*" so far as the same are applicable shall apply to every commission issued under the authority of this Act. 39 V. c. 15, s. 4.

Commission, &c., to be returned to Division Court Clerk by County Court Clerk.

102. The commission, when returned, shall with the evidence taken thereunder, and the papers returned therewith by the commissioner, be forthwith transmitted by the Clerk of the County Court to the Clerk of the Division Court in which the suit to which the same relates is pending. 39 V. c. 15, s. 5.

13th Ed. 133. An *ex parte* order can be obtained to open commission before Court. The practice is to open in presence of both parties: *Neale* v. *Withrow*, 4 U. C. L. J. 88.

(*l*) If the witness does not clearly appear to be aged or infirm, or unable from sickness to attend as a witness, then the Judge should simply consider whether the costs of commission or witness fees would be the greater, and decide in favour of the saving of expense. If the person should be unable to attend from any of these three causes, then the question of expense would not arise: see *Duke of Beaufort* v. *Crawshay*, L. R. 1 C. P. 699; *Brown* v. *Brown*, L. R. 1 P. & D. 720.

(*m*) These sections are as follows:

"22. Due notice of every such commission shall be given to the adverse party, to the end that he may cause the witnesses to be cross-examined. C. S. U. C. c. 32, s. 20."

"23. In case the examination of any witness or witnesses taken without the limits of Ontario, pursuant to any such commission, is proved by an affidavit of the due taking of such examination, sworn before and certified by the Mayor or Chief Magistrate of the City or place where the same has been taken, and in case such commission, with such examination and affidavit thereto annexed, is returned to the Court from which such commission issued, close under the hand and seal of one or more of the commissioners, the same shall *prima facie* be deemed to have been duly taken, executed and returned, and shall be received as evidence in the cause, unless it is made to appear to the Court in which such examination is returned and published, or before which the same is offered in evidence, that the same was not duly taken, or that the deponent is of sound mind, memory and understanding, and living within the jurisdiction of the Court at the time such examination is offered in evidence to such Court. C. S. U. C. c. 32, s. 21."

Costs of Commission.

103. The costs (*n*) of and attending the application for the issue, execution, return and transmission of any such commission shall be in the discretion of the Court in which the suit is pending, and shall be taxed on the County Court scale by the Clerk of the County Court out of which the same issued on notice to all parties interested, (*o*) and the Clerk shall certify the result of such taxation, accompanied by a copy of the bill of costs as taxed, to the Clerk of the Division Court in which the suit is pending; and such costs may be added to any other costs to be paid to the party entitled thereto, and may be recovered by the party entitled thereto in like manner as the ordinary costs of the suit are recoverable by the practice of the Division Courts. 39 V. c. 15, s. 6.

BOOKS OF ACCOUNT, AFFIDAVITS, &C., AS EVIDENCE.

Judge may receive in evidence plaintiffs' or defendants' books of account.

104. In any suit for a debt or demand, (*p*) not being for tort, and not exceeding twenty dollars, the Judge, on being satisfied of their general correctness, may receive the plaintiff's books as evidence, or in case of a defence of set-off or of payment, so far as the same extends to twenty dollars, may

(*n*) The costs of executing a commission in a foreign country are costs in the cause, unless some special ground is shewn for ordering otherwise (*Prince* v. *Samo*, 4 Dowl. 5), but not unless the deposition has been used at the trial: *Ridley* v. *Sutton*, 1 H. & C. 741. The taxing officer exercises a discretion as to the allowance of the expenses of an Attorney attending the commission: *Cornet* v. *Dempsey*, 1 Dowl. N. S. 422; *Potter* v. *Rankin*, L. R. 4 C. P. 76; but see *Mann* v. *Harbord*, L. R. 5 Ex. 17. But to entitle the successful party to the fees of counsel attending, special circumstances must be shewn: *Lecocq* v. *S. E. Railway Company*, 14 L. T. N. S. 401; 2 L. J. N. S. 168, s. c.; *Potter* v. *Rankin*, *supra*; see *Yglesias et al.* v. *Royal Exchange Assurance Corporation*, L. R. 5 C. P. 141. Where the Master allowed the expenses of the commissioner, a Barrister, going out to the Canaries to execute commission, the allowance was sustained: see *In re Attorneys*, &c., 26 C. P. 495. By the 103rd section, the costs of Attorney or Counsel attending on examination would, if attendance necessary, be taxable in the same manner as in a cause in the County Court. It would only be in very exceptional cases that such fees should be allowed in Division Courts. As to commissioners' fees, see *Anon*; 12 L. J. N. S. 204.

(*o*) "It is one of the first principles of justice that no man's rights shall be adjudicated upon without giving him an opportunity of being heard in support of hem:" *per* Willes, J., in *Thorburn* v. *Barnes*, L. R. 2 C. P. page 401; *Attorney-General* v. *Davison*, 1 McClell. & Y. 160. As to "due notice," see *Holmes* v. *Simmons*, L. R. 1 P. & D. 523.

(*p*) This section not only excludes the evidence of either a plaintiff's or defendant's books in actions of tort, but also in actions "for debt or demand" for amounts exceeding $20 as well: see notes to section 79. The Judge must first

receive the defendant's books as evidence, and such Judge may also receive as evidence the affidavit or affirmation (*q*) of any party or witness in the suit resident without the limits of his County, but, before pronouncing judgment, the Judge may require any such witness or any party in a cause to answer upon oath or affirmation any interrogatories that may be filed in the suit. C. S. U. C. c. 19, s. 103.

Affidavits may be sworn before Judge, Clerk or Commissioner.

105. All affidavits (*r*) to be used in any of the Division Courts, or before any of the Judges thereof, may be sworn before any County Judge or before the Clerk or Deputy Clerk of any Division Court, or before any Judge, or Commissioner for taking affidavits in any of the Superior Courts. C. S. U. C. c. 19, s. 104.

JUDGE'S DECISION.

Judge may give judgment instanter, or postpone judgment.

106. The Judge, in any case heard before him, shall, openly in Court and as soon as may be after the hearing, pronounce his decision; (*s*) but if he is not prepared to pronounce a decision instanter, he may postpone judgment and

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be satisfied of the "general correctness" of the books of the party tendering them in evidence; and if he is, it is then permissible to receive them. It is to be observed that a defendant's books can only be received where the defences are *set-off* or *payment*. The experience of most Judges is that the evidence to be obtained from well kept books, in which the original entries have been made in regular order, is of the most reliable and satisfactory character.

(*q*) To save expense this provision has been introduced. The witness must be "resident" (see notes to sections 62, 63 and 72) *without* the County in which the suit is to be tried, and, recognizing the right of cross-examination (*Attorney-General* v. *Davison*, McClel. & Y. 160), this provision as to answering interrogatories is introduced. It is submitted that the affidavit or affirmation of a person resident *out of the Province* could be received: Maxwell on Statutes, 50.

(*r*) As to affidavits generally, see Rule 133, and Rob. & Jos. Dig. 55, *et seq.*, and notes to section 76; Arch. Prac. and Lush's Prac., title, "Affidavits." As to affidavits made out of the Province, see Rev. Stat. cap. 62, sec. 38.

(*s*) By section 54, this is to be done "according to equity and good conscience." It is difficult to give a meaning to these words; but it is submitted that a fair interpretation of them is, that causes in the Division Courts shall be decided according to the general principles of equity which obtain in the Court of Chancery, in so far as they can be applied to rights, remedies and proceedings in Division Courts, as well as according to the Common and Statute Law. In this view the author is sustained by an ably written article in 5 U. C. L. J. 145; see also 7 U. C. L. J. 230. In one case, a Judge thought, under these words, that he could dispense with the necessity of evidence of presentment and notice of dishonor in an action against the endorser of a promissory note; but, as pointed out by Robinson, C. J., the County Judge was clearly wrong: *Siddall* v. *Gibson et al.*, 17 U. C. R. 98. A Judge cannot alter his decision at will (*Janes* v. *Jones*,

name a subsequent day and hour (*t*) for the delivery thereof in writing at the Clerk's office; and the Clerk shall then read the decision to the parties or their agents, if present, and he shall forthwith enter the judgment, and such judgment shall be as effectual as if rendered in Court at the trial. C. S. U. C. c. 19, s. 106.

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5 D. & L. 628); nor can it be changed by Superior Court, no matter how erroneous: *Niagara Falls Suspension Bridge Company* v. *Gardner*, 29 U. C. R. 194; see notes to sections 53, 54 and 61. When the Judge's decision is entered in the procedure book, under section 37, it only then becomes a *judgment* of the Court: *Reg.* v. *Rowland*, 1 F. & F. 72; *Strutton* v. *Johnson*, 7 L. C. G. 141; 5 U. C. L. J. 112.

(*t*) This should be carefully observed, otherwise a Judge might frequently be subjected to a motion for prohibition: *In re Burrowes*, 18 C. P. 493; see note under "Prohibition" to section 53. A party has fourteen days from the delivery of judgment in this way to move for a new trial: Rule 142 (*f*).

As the allowance or disallowance of interest is frequently a matter of consideration, it may be well to observe that the proper mode of computing interest, in the absence of payments made specially on account of principal, is to compute it on the amount due up to the time of each payment, making rests, deducting the payments and charging interest on the balance: *Bettes* v. *Farewell*, 15 C. P. 450; *Ross* v. *Perrault*, 13 Grant, 206. The method frequently adopted of charging interest for the whole debt for the whole period, as if no payment had been made, then allowing interest upon each payment from the time it was made, and so deducting all the payments and interest from the whole debt and interest, is wrong. It is so much in favour of the debtor that where there has been a long arrear of interest and payments on the debt not covering the interest alone, the debtor in a few years, without making any payment in the meantime, would make his creditor his debtor to a very large amount: *McGregor et al.* v. *Gaulin et al.*, 4 U. C. R. 378. But where the payments are not sufficient to cover the interest due at time of each payment, interest can only be computed on the balance of principal remaining due at each payment: *Barnum* v. *Turnbull*, 13 U. C. R. 277. The following is the correct method of calculating interest on an execution where part has been made on it: Where the Bailiff receives an execution endorsed to levy a named sum, as that recovered by the judgment and interest from the time of entering the judgment, or where the interest is included in the indorsement, he must make the money generally on the execution generally, and pay over what he makes; fees and expenses to be deducted when taxed by the Clerk, or more properly the whole sum, the Clerk, after taxation, paying him his proper fees. If insufficient to satisfy the execution, he returns *nulla bona* as to the residue, and the plaintiff is then entitled to a new execution; that on the endorsement of the new execution the plaintiff is entitled to consider the interest up to the date of the levy as paid, and the principal as reduced by the balance, after deducting Bailiff's costs; and the principal being so reduced to endorse the subsequent execution for such reduced principal and interest from the time of the former levy and payment: see *Cummings* v. *Usher et al.*, 1 P. R. 15. Interest is usually allowed, though no demand made on money awarded to be paid at a particular time: *Townsley* v. *Wythes*, 16 U. C. R. 139. Where principal and interest is paid for another, interest is recoverable on the whole payment: *Municipal Council of Wellington* v. *Municipality of the Township of Wilmot*, 17 U. C. R. 82. Interest is more frequently allowed in this Province than English authority would seem to warrant: *Spence* v. *Hector*, 24 U. C. R. 277. Where money was levied by a Sheriff and improperly withheld, interest was allowed: *Michie* v. *Reynolds*, 24 U. C. R. 303.

Rev. Stat. cap. 50.

"266. Interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow it. C. S. U. C. c. 43, s. 1.

"267. On the trial of any issue, or any assessment of damages, upon any debt or sum certain, payable by virtue of a written instrument at a certain time, the jury may allow interest to the plaintiff from the time when such debt or sum became payable;

"2. If payable otherwise than by virtue of a written instrument at a certain time, the jury may allow interest from the time when a demand of payment is made in writing, informing the debtor that interest will be claimed from the date of such demand. C. S. U. C. c. 43, s. 2.

"268. In actions of trover or trespass *de bonis asportatis*, the jury may give interest in the nature of damages over and above the value of the goods at the time of the conversion or seizure, and in actions on policies of insurance may give interest over and above the money recoverable thereon. C. S. U. C. c. 43, s. 3.

"269. In any suit or action in which any verdict is rendered for any debt or sum certain, on any account, debt, or promises, such verdict shall bear interest from the time of the rendering of such verdict, if judgment is afterwards entered in favour of the party or person who obtained such verdict, notwithstanding the entry of judgment upon such verdict has been suspended by the operation of any rule or order of Court made in such suit or action, and in all cases damages shall be assessed only up to the day of the verdict. 29-30 V. c. 42, s. 2."

In *Smart* v. *Niagara and Detroit Rivers Ry. Co.*, 12 C. P. page 406, Draper, C. J., says: "It has become so settled a practice to allow interest on all accounts after the proper time of payment has gone by, and particularly on the balance of an account, which imports that the accounts on each side are made up, and only the difference claimed, that I do not think we should treat the claim for interest as vitiating the special endorsement." Interest is recoverable on a bill of exchange or promissory note without any special claim for it (*Blake* v. *Lawrence*, 4 Esp. 147), but it must be produced: *Hutton* v. *Ward*, 15 Q. B. 26. In an action for not accepting goods, where the payment was to be by bill, the plaintiff may recover the amount which would have accrued on it for interest: *Boyce* v. *Warburton*, 2 Camp. 480. So in the same case for goods sold and delivered (*Farr* v. *Ward*, 3 M. & W. 25); and may be recovered as part of the price: *Davis* v. *Smyth*, 8 M. & W. 399. Interest should be claimed, if not recoverable under the statute, in which latter case it need not be: *Edwards* v. *Great Western Railway Company*, 11 C. B. 588; *Walker* v. *Constable*, 1 B. & P. 306. It is now established as a general principle that interest is allowed by law only on mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances: *per* Abbott, C. J., in *Higgins* v. *Sargent*, 2 B. & C. 349. There may be a usage to pay a certain interest on the settled balance of a merchant's account: see *Orme* v. *Galloway*, 9 Ex. 544. Where securities have been deposited to secure a loan, the latter carries interest: *In re Kerr's Policy*, L. R. 8 Eq. 331. Where the contract is to pay a sum of money with interest at a given rate on a certain day, if the sum be not paid at the stipulated time, there is no contract to pay *the same rate after the date of payment;* but damages may be awarded for the non-payment, and the former rate may be taken as a guide in estimating damages (*Cook* v. *Fowler*, L. R. 7 H. L. 27); but neither Court nor a jury is *bound* to do so: *Ib.*; *Keene* v. *Keene*, 3 C. B. N. S. 144. Lord Cairns, L. C., says, at page 33 of 7 L. R. H. L., "No doubt, *prima facie*, the rate of interest stipulated for up to the time certain might be taken, and generally would be taken, as the measure of interest, but that would not be conclusive. It would be for the tribunal to look at all the circumstances

of the case, and to decide what was the proper sum to be awarded by way of damages." In that case the contract was *sixty* per cent. per annum interest to maturity, and the House of Lords sustained a finding of *four* per cent. interest as damages *after* maturity. Since this decision, *Howland* v. *Jennings*, 11 C. P. 272; *Montgomery* v. *Boucher et al.*, 14 C. P. 45; *Young et al.* v. *Flake*, 15 C. P. 360; and *O'Connor* v. *Clarke*, 18 Grant, 422, can only be considered as authority, subject to the rule of law laid down in *Cook* v. *Fowler*, *supra*; see also *Dalby* v. *Humphrey*, 37 U. C. R. 514. Bills of exchange and promissory notes always carried interest, whether mentioned or not; if payable with interest, it runs from the date (*Rafley* v. *Greenwell*, 10 A. & E. 222); if silent as to interest, it runs from maturity. On a note payable on demand, interest runs from the time of demand (*Blaney* v. *Hendrick*, 2 W. Black. 761), or dispensed with, as by the bank which gave the note closing its doors (*In re East of England Banking Company*, L. R. 4 Ch. 14), and when no demand proved from the issue of the summons: *Pierce* v. *Fothergill*, 2 Bing. N. C. 167. Interest is only recoverable from the drawer of a bill not mentioning interest from the receipt of notice of dishonor: *Walker* v. *Barnes*, 5 Taunt. 240. The rate of interest to be allowed on a note or bill not bearing interest *on its face* is for the Court to decide: *Gibbs* v. *Fremont*, 9 Ex. 25. The endorsee of a bill may sue the acceptor for interest, although he has taken another bill from the defendant for the first, which has been paid: *Lumley* v. *Musgrave*, 4 Bing. N. C. 9. A promise to pay interest may be implied from the acts of the parties: *Calton* v. *Bragg*, 15 East. 223. Compound interest is not, unless there is an express or implied promise to pay it, or there be a custom to that effect: *Fergusson* v. *Fyffe*, 8 Cl. & F. 121; *Attwood* v. *Taylor*, 1 M. & G. 279. A party, by not objecting to accounts rendered, charging compound interest, may by lapse of time be taken to have assented to the charge (*Bruce* v. *Hunter*, 3 Camp. 467); but the party should know that such was the practice: *Moore* v. *Voughton*, 1 Stark. 487. When the business relation ceases from which by practice compound interest would be chargeable, the right to such interest also ceases: *Williamson* v. *Williamson*, L. R. 7 Eq. 542. The following cases decided under the English statute 3 & 4 Will. IV. cap. 42, from which the foregoing sections were originally taken, will have direct application. A deposit paid on a consideration that has failed may be recovered back with interest on a previous demand of interest made: *Morratt* v. *Loudesborough*, 4 E. & B. 1 (see section 267, sub-section 2 of our statute). Interest may be recovered on an over-payment made by a person to obtain his goods from a carrier on which an illegal charge had been made, if demand had been made under the statute: *Edwards* v. *Great Western Railway Company*, 11 C. B. 588. A letter of application for a loan till a certain day, not shewing any obligation to repay, is not an instrument by virtue of which the debt is payable at a certain time: *Taylor* v. *Holt*, 3 H. & C. 452; *Hill* v. *S. Staffordshire Railway Company*, L. R. 18 Eq. 154. A lump sum for freight, under a charter-party on the delivery of the cargo, is not within the section: *Merchant Shipping Company* v. *Armitage*, L. R. 9 Q. B. 114. A notice of a call made on a contributary of a company being wound up, stating that interest would be charged if payment not made by a day certain, was *held* to be within the statute: *Ex parte Lintott*, L. R. 4 Eq. 184; *Barrow's Case*, L. R. 3 Ch. 784. As to interest on calls on forfeited shares, see *Stocken's Case*, L. R. 5 Eq. 6. *Quære*: as to the right to collect interest on assessments made on premium notes or undertakings by Mutual insurance companies. It is submitted that they have the right: L. R. 3 Chan. at page 786. Where a party revives a debt barred by the Statute of Limitations, by paying into Court, but refuses to pay interest, such payment of the principal does not revive the claim for interest (*Collyer* v. *Willock*, 4 Bing. 313); and it is submitted that part payment of principal money on a *debt* barred by the statute does not revive the claim for interest; and, if principal barred, so is interest: *Parkes* v. *Smith*, 15 Q. B. 297. Where a surety has had to pay money for his principal, he is entitled to interest: *Petre* v. *Dun-*

Judge may direct times and proportions in which judgment shall be paid.

107. The Judge may order the time or times (*u*) and the proportions in which any sum and costs recovered by judgment of the Court shall be paid, reference being had to the day on which the summons was served, and at the request of the party entitled thereto, he may order the same to be paid into Court, and the Judge upon the application (*v*) of either party, within fourteen days after the trial (*w*) and

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combe, 2 L. M. & P. 107. Interest ceases on the claim at judgment (*Florence* v. *Drayson*, 1 C. B. N. S. 584; *McKay* v. *Fee*, 20 U. C. R. 268); but the judgment bears interest, 4 Ch. D. 33. Where furniture was delivered on the written terms, "one third in cash, and bills at six and twelve months for the balance," it was *held* that plaintiff was entitled to interest on one-third from date of delivery: *Duncombe* v. *Brighton Club*, L. R. 10 Q. B. 371. A "demand" for interest will be sufficient, although it does not follow the very words of the 267th section, if it gives the defendant substantial notice that if he keeps the plaintiff's money longer in his hands, he will be held liable for interest upon it from the time of the demand till the time of payment of the principal: Mayne on Damages, 3rd Ed. 141. In *Inglis* v. *Wellington Hotel Company*, 29 C. P. 387, it was *held*, under section 267, above quoted, that when a claim is payable otherwise than by written contract, interest may be allowed from the date of a demand *in writing* therefor, otherwise not. In that case, no such demand was made, and the claim for interest was refused. If a note not bearing interest is discounted at a greater rate than six per cent., yet after maturity it only bears that rate: *Royal Canadian Bank* v. *Shaw*, 21 C. P. 455. An award is not bad if more than six per cent. interest allowed, provided evidence warrants it: *Stewart* v. *Webster*, 20 U. C. R. 469. Where payments are made generally, without any specific appropriation by the debtor, the creditor may apply them first in keeping down the interest: *McGregor* v. *Gaulin*, 4 U. C. R. 378; see Rob. & Jos. Digest, 1884; Fisher's Digest, 4956; L. R. Digest, 1495; Byles on Bills; and Add. on Con., title, "Interest;" Roscoe's N. P. "Interest on money."

(*u*) If made at the time of the judgment, this order forms part of it: *Robinson* v. *Gell*, 12 C. B. 191; *Ely* v. *Monk*, 5 Ex. 918.

(*v*) Application must be made according to Rule 142 (see also Rule 144); and care should be taken in observing *all* the requirements of that rule: see also *McKenzie* v. *Keene*, 5 U. C. L. J. 225. At one time an application for new trial could not be made in interpleader cases (*Reg.* v. *Doty*, 13 U. C. R. 398; *Keane* v. *Stedman*, 10 C. P. 435); but under section 210, either party can now do so.

(*w*) The day of the trial is not counted as one of the fourteen days: *McCrea* v. *Waterloo Mutual Fire Insurance Co.*, 26 C. P. 437, and cases cited. Should judgment for instance be given on the 1st of the month, the application for new trial should be complete not later than the 15th of the same month. Whatever previous decisions have been (*Carter* v. *Smith*, 4 E. & B. 696), it is now settled law that a new trial cannot be granted after the expiration of fourteen days from the day of trial (*Mitchell* v. *Mulholland*, 14 L. J. N. S. 55; see also *Bell* v. *Lamont*, 7 P. R. 307), except in garnishee matters, (*McLean* v. *McLeod*, 5 P. R. 467), or when the Judge postpones judgment under section 105, then within fourteen days of its delivery: Rule 142 (*f*). The same point was decided by Hughes, County Judge, in *Steward* v. *Moore et al.*, 9 U. C. L. J. 82 (1863); and the same case decides that for matters of irregularity, where the proceedings were contrary to the practice and rules of the Court, the Judge might set aside a judgment. The authority of this case is amply sustained by *Bayly* v. *Bourne*, 1 Strange, 392, where the Court

upon good grounds being shown, may grant a new trial upon such terms (*x*) as he thinks reasonable, and in the meantime may stay proceedings. C. S. U. C. c. 19, s. 107.

Execution not to be postponed for more than 50 days.

108. Except in cases where a new trial is granted, the issue of execution shall not be postponed for more than fifty days from service (*y*) of the summons, without the consent (*z*) of the party entitled to the same, but in case it at

held that, though an Inferior Court had no power (without statutory authority) to grant a new trial (*Brooke* v. *Ewers, et ux.* 1 Strange, 113; see also *G. N. Railway Co.*, v. *Mossop*, 17 C. B. at page 138), yet, to prevent injustice, it would set aside a judgment where the rules and practice of the Court had been violated. So also in *Jewell* v. *Hill*, 1 Strange, 499, in a cause in the Borough Court, after notice of trial the parties agreed to refer the cause, and during the reference, the plaintiff, without new notice, went on to trial, and had a verdict, which the Judge afterwards set aside; and upon motion against him, the Court declared that the Judge of an Inferior Court might set aside such verdict "upon the foot of irregularity." But a stranger cannot apply, even though an execution creditor (*Nicholls* v. *Nicholls*, 10 U. C. L. J. 68), unless on the ground of fraud and collusion: see *Balfour* v. *Ellison et al.*, 8 U. C. L. J. 330; *McClee* v. *Baird et al.*, 8 U. C. L. J. 233; *Klein* v. *Klein*, 7 U. C. L. J. 296; *Girdlestone* v. *Brighton Aquarium Co.*, 3 Ex. D. 137. Where a Judge has decided an application for new trial and refused to grant it, his authority is at an end. He cannot again entertain it. To use the words of Jervis, C. J., in *G. N. Railway Co.* v. *Mossop*, 17 C. B. page 139. "A new trial having been moved for and refused, the play ought to be considered as having been played out." See a report of the same case at a previous stage, at page 580 of 16 C. B. A report of the case when last before the Court will also be found at page 19 of 2 U. C. L. J. At page 20, Willes, J., is reported as saying, "The object of having a court of justice is, that all litigation should be determined, and that finally. It is a long time since a reason was given why judgments should be considered final, and not opened up again, *ne lites sint immortales dum litantes mortales.* A court of justice must be suited to the lives of the persons concerned. Life is not long enough for opening up again matters that are already *res judicatae*. Then, when the Legislature gave this power to the Judges of County Courts, it must be taken to have intended that those Courts should have those incidents which belong to other Courts. The judgment, therefore, of those Courts is to be final, except where the power of granting a new trial is given. That power is to be exercised with reference to recognized principles. The judgment, therefore, is to be final, unless it comes within the power given, and therefore, when the Judge has determined that there shall not be a new trial, then the judgment must stand final:" see also *Coke* v. *Jones*, 4 L. T. N. S. 306. If application for new trial be made within the fourteen days, the death of the Judge afterwards does not affect it: *Appelbe* v. *Baker*, 27 U. C. R. 486; see also *Leslie* v. *Emmons et al.*, 25 U. C. R. 243; 2 L. J. N. S. 243, s. c. As to new trial generally, see Arch. Prac. cap. 27; Lush's Prac. 3rd Ed. 628; Fisher's Digest, 6096; R. & J.'s Dig. 2529, and Rule 142.

(*x*) See notes to section 80. As to the form of order, see No. 76.

(*y*) This excludes the day of service: *Young* v. *Higgon*, 6 M. & W. 49; *McCrea* v. *Waterloo M. F. Insurance Co.*, 26 C. P. 437; s. c. 1. App. R. 218.

(*z*) *Unless consented to*, execution cannot be stayed for more than fifty days from the day of service. In fixing the time of payment, the date of service should always be observed.

any time appears to the satisfaction of the Judge, by affidavit, affirmation or otherwise, that any defendant is unable, from sickness or other sufficient cause, to pay and discharge the debt or damages recovered against him, or any instalment thereof, ordered to be paid as aforesaid, the Judge may suspend or stay (*a*) any judgment, order or execution given, made or issued in such action, for such time and on such terms as he thinks fit, and so from time to time until it appears by the like proof that such temporary cause of disability has ceased. C. S. U. C. c. 19, s. 108.

(*a*) This provision is contrary to the policy of the law as administered in the higher Courts. Execution can only be suspended or stayed for one or more of the causes mentioned in the section. In *Zavitz* v. *Hoover et al.*, M. T. 2 Vic., *held* that the Court should not restrain a plaintiff from levying his debt out of any one of several defendants he pleased, nor will the plaintiff be compelled to proceed against the goods of several defendants *in succession*, first exhausting one, and then levying upon the goods of another: *Commercial Bank* v. *Vankoughnet et al.*, 1 C. L. Cham. 284. The Court or Judge has not *the power* to delay a plaintiff's proceedings on an execution to enable defendants to institute an action, and to acquire a position in which they may apply to set-off the judgment to be recovered by them against plaintiff's judgment: *Lynch* v. *Wilson*, 9 U. C. L. J. 242, *per* Draper, C. J.; see also *Freeland* v. *Brown*, 9 U. C. L. J. 299; *Maw* v. *Ulyatt*, 7 Jur. N. S. 1300; 5 L. T. N. S. 251, s. c.; *Johnson* v. *Lakeman*, 2 Dowl. 646; *Thompson* v. *Parish*, 5 C. B. N. S. 685. It is difficult to give a meaning to the words "or other sufficient cause" It is submitted that these words are *ejusdem generis* with the word "sickness" preceding it: Maxwell on Statutes, 297; *Fenwick* v. *Schmalz*, L. R. 3 C. P. 315, *per* Willes, J. A mere inability to pay could not have been intended as a ground of stay of proceedings; but if an immediate issue of execution would be very prejudicial to a defendant, and a plaintiff would probably realize his debt as soon otherwise, it might be considered, it is submitted, within the section. See a somewhat analogous provision in section 59 of 32 & 33 Vic. cap. 31 (Can.). In speaking of the section in question, the Editors of the U. C. L. J. in volume 8, at page 264, say: "In acting under this section, it seems to us the plaintiff should have notice of the application to the Judge, and a copy of the affidavit on which it is grounded served upon him; or that he should have been called on by the Judge to shew cause, if he had any, against granting a stay on the execution. The power is extensive and unusual, and should be sparingly and cautiously used. * * The latter part of the clause shews that the plaintiff should have notice of the application, for how otherwise can he be in a position to shew that the temporary cause of disability has ceased." Again, at page 177 of 9 U. C. L. J. it is thus laid down: "The Judge *may* suspend or stay execution, implying the exercise of judgment, not arbitrary discretion, but judicial discretion, in view of all the facts. We have no hesitation in saying that the practice of granting *ex parte* suspensions is a monstrous perversion of the true meaning of the clause, and a gross violation of the vital principle of justice." Again, the learned Editors say at the same page, "The proper practice we take to be this: the defendant applies on affidavit to the Judge, who grants a summons to hear the matter, with or without a stay of proceedings in the meantime, as may appear proper, or directing that the plaintiff shall be furnished with copies of the affidavits upon which the application is founded. On the return of the summons the parties are heard, when the order is made upon such terms as may seem just,

JURY CASES.

109. Either party may require a jury, in actions of tort, where the amount sought to be recovered exceeds ten dollars, and in all other actions where such amount exceeds twenty dollars, (*b*). C. S. U. C. c. 19, s. 119. When a jury may be had.

110. In case the plaintiff requires a jury to be summoned to try the action he shall give notice thereof in writing (*c*) to the Clerk at the time of entering his account, demand or claim, and shall at the same time pay to the Clerk the proper fees for the expenses of such jury; and in case the defendant requires a jury, he shall within five days after (*d*) Parties to give notice to Clerk if they require a jury.

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or the summons is discharged:" see also 6 U. C. L. J. 205. Of the correctness of the opinions here expressed there can be no question. As remarked by Willes, J., in *Thorburn* v. *Barnes*, L. R. 2 C. P. page 401, "It is one of the first principles of justice that no man's rights shall be adjudicated upon without giving him an opportunity of being heard in support of them:" see also *Reg* v. *Cheshire Lines Committee*, L. R. 8 Q. B. 344; Maxwell on Statutes, 325; *Wood* v. *Wood*, L. R. 9 Ex. 190. But if the plaintiff should be present, no summons to shew cause would be necessary: *Baird* v. *Story et al.*, 23 U. C. R. 624; *Watt* v. *Ligertwood*, L. R. 2 Scotch App. page 367, n.

(*b*) The right to have a jury summoned depends upon whether the suit is one for damages exceeding ten dollars in tort, and upwards of *twenty* dollars in all other actions. No right to a jury exists in an interpleader issue: *Mansie* v. *McKinley et al.*, 15 C. P. 50. And it is submitted the law is so as to replevin, except perhaps where the *damages* claimed amount to upwards of ten dollars. A party has a *right* to have his case tried by a jury, and the Judge cannot deprive him of it (*Sagy* v. *Silber*, 1 Q. B., D. 362; *Clarke* v. *Cookson*, 2 Ch. D. 746); nor should that be done, even if the power existed, unless for strong reasons (*West* v. *White*, 4 Ch. D. 631); and the Judge should receive the verdict of the jury, even though he differs with them: *Jardine* v. *Smith*, 8 W. R. 464. If a jury is irregularly summoned, and both parties appear at the trial without objection, the irregularity is waived: *Ex parte Morgan, In re Simpson*, 2 Ch. D. 72. If either party caused a jury to be summoned in the first instance, he is entitled to a jury at the second trial. He must pay the necessary fees again, and have a fresh jury summoned: Rule 142 (*c*); see *Sparrow* v. *Reed*, 5 D. & L. 633.

(*c*) The giving of the notice to the Clerk *in writing* by either party is a condition precedent to the right to have the cause tried by a jury: *Fletcher* v. *Baker*, L. R. 9 Q. B. 372. But that can be waived by appearance at the trial without objection: *Ex parte Morgan, In re Simpson*, 2 Ch. D. 72. Unless the jury is demanded in writing "at the time of entering" the suit (section 68), it cannot be obtained, and the Clerk would act improperly if he received it afterwards.

(*d*) This is *exclusive* of the day of service of the summons: Maxwell on Statutes, 310. If not required within that time, the Clerk cannot receive notice from the defendant afterwards; and should he improperly do so and summon a jury, the opposite party could not be charged with the costs of the jury, unless he, without objection, agreed to try the case with the jury so summoned. If a jury were improperly summoned at the instance of one party, the opposite party

the day of service of the summons on him, give to the Clerk or leave at his office the like notice in writing, and shall at the same time pay the proper fees as aforesaid; and thereupon, in either of such cases, a jury shall be summoned according to the provisions hereinafter contained. C. S. U. C. c. 19, s. 120.

Who may be jurors.

111. All male persons being subjects of Her Majesty by birth or naturalization, between the ages of twenty one and sixty years, (*e*) assessed (*f*) upon the Collector's roll, and resident (*g*) in the several Divisions respectively, shall be jurors for the Division Courts in such Divisions. C. S. U. C. c. 19, s. 121.

Jurors, how selected and summoned.

112. The jurors to be summoned to serve at any Division Court shall be taken from the Collector's rolls of the preceding year, (*h*) for the Townships and places wholly or partly

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could refuse to try the case with a jury; and if the Judge tried it with a jury from those so summoned, and no appearance made by objecting party, it is submitted that Prohibition would lie. The law gave him one tribunal under section 54, sub-section 2, and he could not be compelled to accept another against his will: *Hudson* v. *Tooth*, 3 Q. B. D. 46; *Munsie* v *McKinley et al.*, 15 C. P., at page 54. The Judge has power to nonsuit in jury cases (Rule 122; *Robinson* v. *Lawrence*, 7 Ex. 123); and a plaintiff has a right to be nonsuited at any time before the jury have delivered their verdict; or, if the cause is tried by the Judge alone, at any time before the Judge has "pronounced his decision:" section 106; *Outhwaite* v. *Hudson*, 7 Ex. 380; see notes to section 81.

(*e*) This, it is submitted, means *over* the age of twenty-one years, and *under* sixty years. Evidence of reputation is inadmissible to prove a person's age (*Colclough* v. *Smyth*, 10 L. T. N. S. 918); but the statement of age on the collector's roll, made up from information presumably received from the party, would be *prima facie* evidence: *Williams* v. *Huskisson*, 3 Y. & C. 80.

(*f*) It is submitted that one assessed for income or as a farmer's son would be qualified. It is not necessary that a person to be qualified should be assessed to any particular amount for real estate.

(*g*) See notes to sections 62 and 72.

(*h*) A literal reading of this section would lead to the opinion that in divisions where there are few jury cases, by taking the roll of the "preceding year" of the municipality within which the Court is held, and beginning with the first person on such roll, the same persons whose names were high on the roll would be summoned *at least once a year*, if there should be a jury case so often. It is submitted that it would be more consistent with the spirit of the law that the Clerk should go through *all* the names in alphabetical order, commencing where he left off the previous year; but on the plain words of the statute as to the *particular roll* from which the names are to be taken, it is difficult to come to this construction of the statute. Perhaps the literal construction, though leading to consequences not fair to all, is the safest to observe: Pollock, C. B., in *Huxham* v. *Wheeler*, 3 H. & C. page 80, makes use of these words: "In construing an Act of Parliament, when the intention of the Legislature is not clear, we must adhere to the natural import of the words."

within the Division, and shall be summoned in rotation, beginning with the first of such persons on such roll; and if there be more than one such Township or place within the Division, beginning with the roll for that within which the Court is held, and then proceeding to that one of the other rolls which contains the greatest number of such persons' names, and so on until all the rolls have been gone through; after which, if necessary, they may be again gone through wholly or partly in the same order, and so on *toties quoties*. C. S. U. C. c. 19, s. 122.

Collector to furnish Clerk with list of jurors

113. For the purposes of the last preceding section, the Collector for each place wholly or partly within any Division, shall furnish (*i*) the Clerk of the Division Court thereof with correct lists of the names of all persons liable to serve as jurors at such Court in the order in which they stand upon the rolls. C. S. U C. c. 19, s. 123.

Jurors to be summoned for each Court.

114. The Clerk of each Division Court shall cause not less than fifteen of the persons liable to serve as jurors to be summoned (*k*) to attend at each session of the Court (*l*) at the time and place to be mentioned in the summons, and such summons shall be served at least three days (*m*) before the Court, either personally, or by leaving the same with a grown-up person at the residence of the juror. C. S. U. C. c. 19, s. 124.

(*i*) The wilful omission of the collector to do so would render him liable to indictment for misdemeanour: Roscoe's Crim. Ev. 8th Ed. 810, 811; see *Rex v. Warren*, R. & R. C. C. 48 n.

(*k*) See notes to section 72.

(*l*) That is, if required by any party to a suit under sections 109 and 110.

(*m*) That is exclusive of the day of service of and the day of the sittings of the Court: Maxwell on Statutes, 310; see notes to section 70. Useful directions to the Bailiff, as to service of the jury summons, will be found at pages 143 and 144 of 2 U. C. L. J.: "The Bailiff should note on a list prepared for the purpose the time and mode of service on each juror, and make return to the Clerk before Court day," page 144. When service cannot be personally made (which should, if possible, be done in all cases), the Bailiff should not only leave the summons "at the residence" of the juror, but with "*a grown-up person*" there. It would be well, in the event of any proceedings for non-attendance, for the Bailiff to make a note of the name of the person so served on the original subpœna. As to "personal" service, see notes to section 72. The Bailiff should, in the event of proceedings for contempt, exhibit to party summoned the original: *In re Holt, per* James, Lord Justice, W. N. 1879, page 48.

Parties entitled to challenge.

115. Either of the parties to a cause shall be entitled to his lawful challenge (*n*) against any of the jurors in like manner as in other Courts. C. S. U. C. c. 19, s. 125.

Penalty on jurors disobeying summons.

116. Any juryman who, after being duly summoned (*o*) for that purpose, wilfully neglects or refuses (*p*) to attend the Court in obedience to the summons, shall be liable to a fine (*q*) in the discretion of the Judge, not exceeding four dollars, which fine shall be levied and collected with costs.

(*n*) The right of challenge is a Common Law right, and cannot be taken away except by express enactment: *Barrett* v. *Long*, 3 H. L. Cases, 395. If alienage is relied on as a ground of challenge, the party who has an opportunity of making it, and neglects it, cannot afterwards make the objection: *Rex* v. *Sutton*, 8 B. & C. 417. A juryman should not have an interest in the result of the suit: *Bailey* v. *Macaulay*, 13 Q. B. 815. But where a public company was a party to an action, the mere fact that one of the jurymen was a shareholder in the company was *held* no ground for granting a new trial: *Williams* v. *G. W. Ry. Co.* 2 H. & N. 869; see also *Richardson* v. *Canada West Farmers' Insurance Co.* 17 C. P. 341. A juror cannot be challenged because in a previous case he had shewn some dissatisfaction with the law as laid down by the Judge in favour of the party challenging: *Pearse* v. *Rogers*, 2 F. & F. 137. Under our General Jury Act (Rev. Stat. c. 48), alienage would be a ground of challenge in Division Courts under the 111th section of the D. C. Act. Want of qualification (except in respect of property) is a good ground of challenge: cap. 48, s. 105. On either side *three* of the jurors can be *peremptorily* challenged without assigning any cause: section 106. Because a juror affirms, affords no ground of challenge: section 107. "If a juror be challenged for *cause* before any juror sworn, two triers are appointed by the Court; and if he be found indifferent and sworn, he and the two triers shall try the next challenges; and if he be tried and found indifferent, then the two first triers shall be discharged, and the two first jurors tried and found indifferent shall try the rest:" Roscoe's Crim. Ev. 8th Ed. 210; *Reg.* v. *Smith*, 38 U. C. R. 218. The challenge of a juror must be before the oath is commenced. The moment the oath is begun it is too late. *The oath is begun by the juror taking the book*, having been directed by the officer of the Court to do so; but if the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby: *Reg.* v. *Frost*, 9 C. & P. 129. Upon a challenge for cause, the person making the challenge must be prepared to prove the cause: *Rex* v. *Savage*, M. C. C. 51. Under 21 years or over 60 years would be a ground of challenge under this statute: see *Mulcahy* v. *The Queen*, L. R. 3 H. L. 306.

(*o*) See notes to sections 72 and 97.

(*p*) It is submitted that the word "wilfully" here means "wantonly" or "causelessly:" *per* Bramwell, B., in *Smith* v. *Barnham*, 1 Ex. D. 423 and 424. Further, that where a person summoned as a witness would be bound to attend, so also must he when summoned under this section: see notes to section 97.

(*q*) Neglect or refusal to attend is a contempt of Court, for which the statute provides a remedy: see *Ex parte Lees and the Judge of the County Court of the County of Carleton*, 24 C. P. 214. If not summoned three days "at least," the juror would not be in default: *Wagner* v. *Mason*, 6 P. R. 187. A juryman should have an opportunity of being heard: see notes to sections 97, 156, 217, and 223. But the Court, in *Carrie* v. *Nichol*, 3 Dowl. 115, refused to hear counsel for a juror who had been fined for contempt.

by the same process as any debt or judgment recovered in the said Court, and shall form part of the Consolidated Revenue Fund. C. S. U. C. c. 19, s. 126.

Service as juror at Division Court not to exempt him from serving at Superior Courts.

117. Service as a juror at any Division Court shall not exempt such juror from serving as a juror in any Court of Record or in the Court of Chancery; and no person shall be compelled to serve as a juror in any Division Court who is by law exempted (*r*) from serving as a petit juror in the Superior Courts. C. S. U. C. c. 19, s. 127.

Proceedings against Collector neglecting to furnish Clerk with list of jurors.

118. If any Collector, for six days after demand made in writing (*s*) neglects or refuses (*t*) to furnish the Clerk of the Division in which the Township, Town, City or Ward for which he is Collector is wholly or in part situate, with a correct list of the names of persons liable to serve as jurors in the Division Court, according to the provisions of the one hundred and eleventh section of this Act, the Clerk may issue a summons to be personally served (*u*) on the said Collector three days at least (*v*) before the sitting of the Court, requiring him to appear at the then next sitting of the Court, to shew cause why he refused or neglected to comply with the provisions of the said section. C. S. U. C. c. 19, s. 128.

Judge may fine Collector for breach of duty.

119. Upon proof (*w*) of the service of such summons, the Judge may, in a summary manner, inquire into the neglect or refusal, or may give further time, and may impose such fine upon (*x*) the Collector, not exceeding twenty dollars, as he deems just, and may also make such order for the payment by the Collector of the costs of the proceedings as to the said Judge seems meet; and all orders made by the

(*r*) As to the persons who are exempt under this section, see Rev. Stat. cap. 48, sections 7 to 12 inclusive.

(*s*) This is exclusive of the day on which demand is made: *Young* v. *Higgon*, 6 M. & W. 49.

(*t*) It is to be observed that the word "wilfully" is not used here as in section 116.

(*u*) See notes to section 72.

(*v*) See notes to section 70.

(*w*) See notes to sections 72, 95 and 96.

(*x*) The remedy here given is cumulative, and in addition to the punishment for the offence pointed out in the notes to section 113: Maxwell on Statutes, 369; *Reg.* v. *Buchanan*, 8 Q. B. 883; *Rex* v. *Gregory*, 5 B. & Ad. 555.

Judge's order for payment by Collector, how enforced.

Judge for the payment of a fine or costs shall be enforced against the Collector by such means (*y*) as are provided for enforcing judgments in the Division Courts. C. S. U. C. c. 19, s. 129.

Judge's list and jury list.

120. The causes to be heard by the Judge alone shall be set down for hearing in a separate list from the list of causes to be tried by a jury, which two lists shall be severally called "The Judge's List" and "The Jury List," and the causes shall be set down in such lists in the order in which they were in the first instance entered with the Clerk:—"The Jury List" shall be first disposed of, and then "The Judge's List;" except where the Judge sees sufficient cause for proceeding differently. C. S. U. C. c. 19, s. 130.

Five jurors to be empanelled, &c.

121. Five jurors shall be empanelled and sworn (*z*) to do justice between the parties whose cause they are required to try, according to the best of their skill and ability, and to give a true verdict (*a*) according to the evidence, and the verdict of every jury shall be unanimous. C. S. U. C. c. 19, s. 131.

Verdict to be unanimous.

Judge may order jury to be empanelled to try any disputed fact.

122. In case the Judge before whom a suit is brought thinks it proper to have any fact controverted in the cause tried by a jury, (*b*) the Clerk shall instantly return a jury of five persons present, to try such fact, and the Judge may give judgment on the verdict of the jury, or may grant a new trial on the application of either party, in the same way and under similar circumstances as new trials are

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(*y*) See notes to section 156.

(*z*) See Form No. 110 (*y*).

(*a*) In *Ex parte Morgan, In re Simpson*, 2 Ch. D., page 82, James, L. J., says, in speaking of the verdict of a jury, "that the finding must be considered as a *res judicata*, conclusive between the parties, unless and until it is set aside." The Judge should receive the verdict of the jury, even if he differs with them: *Jardine* v. *Smith*, 8 W. R. 464. The remedy would be a motion for new trial under sec. 107, if the verdict was not warranted by the law, evidence or Judge's charge.

(*b*) It is frequently the case that Judges find certain questions in a cause can be better settled by, to use the words of Baron Bramwell, "that true Court of Equity, a jury, which, disregarding men's bargain and the law, will decide *what is right* in spite of all you can say to them," than by themselves: 5 L. J. N. S. 293.

granted in other cases on verdicts of juries. C. S. U. C. c. 19, s. 132.

Judge may discharge jury not agreeing, &c.

123. If in any case the Judge is satisfied that a jury, after having been out a reasonable time, cannot agree upon their verdict, he may discharge them (*c*) and adjourn the cause until the next Court, and order the Clerk to summon a new jury for the next sitting of the Court for that Division, unless the parties consent that the Judge may render judgment on the evidence already taken, in which case he may give judgment accordingly. C. S. U. C. c. 19, s. 133.

PROCEEDINGS TO GARNISH DEBTS.

To garnish debts.

124. Subject to the provisions of the next section, when any debt or money demand (*d*) of the proper competence (*e*) of the Division Court, and not being a claim strictly for damages, (*f*) is due and owing to any party from any other

(*c*) The rule laid down at page 304 of Roscoe's N. P. Ev. 13th Ed. is, that "the jury may by consent, but not otherwise, be discharged from giving a verdict on certain issues. If the jury cannot agree at the close of the Assizes, the Judge may, in his discretion and without consent, discharge them:" *Newton's case*, 13 Q. B. 716. This section gives a discretion whether parties consent or not. In the higher Courts, an express or *tacit* consent is usually given, if the Judge thinks the jury should be discharged.

(*d*) The same words are used in section 79, and the notes to that section have an equally direct reference to this.

(*e*) See notes to section 54.

(*f*) Any action of trespass or trover would not be the subject of a suit for garnishment proceedings under this section, both being "strictly for damages:" see *Shaw* v. *Shaw*, 18 L. T. N. S. 420; Mayne on Damages, 3rd Ed. 338 and 362. Nor could proceedings under this clause be taken for breach of warranty of chattels (Mayne, 161; *Northwood* v. *Rennie*, 28 C. P. 202); or against an Attorney for negligence (*Robinson* v. *Emanuel*, L. R. 9 C. P. 415); or compromising an action against the express direction of his client (*Butler* v. *Knight*, L. R. 2 Ex. 109); or for wrongful dismissal of a servant (*Hartland* v. *General Exchange Bank*, 14 L. T. N. S. 863, *per* Willes, J.); or for not accepting goods sold (*Boorman* v. *Nash*, 9 B. & C. 145); or for not delivering goods (*Brown* v. *Muller*, L. R. 7 Ex. 319); or for not accepting stock sold (*Pott* v. *Flather*, 16 L. J. Q. B. 366); or against a public carrier for negligence (*Simpson* v. *L. and N. W. Railway Company*, 1 Q. B. D. 274); or for breach of covenant to repair (*Williams* v. *Williams*, L. R. 9 C. P. 659); or for not leaving premises in repair (*Henderson* v. *Squire*, L. R. 4 Q. B. 170); or on a bond to do something besides the mere payment of a sum certain in money (*Brunscombe* v. *Scarbrough*, 6 Q. B. 13); or on a replevin bond (*Ib.*); or for negligent driving of carriages or trains causing damage (*Readhead* v. *Midland Railway Company*, L. R. 4 Q. B. 379); or fraudulent misrepresentation (*Swift* v. *Jewsbury*, L. R. 9 Q. B. 301-312); or for malicious arrest (*Howard* v. *Lovegrove*, L. R. 6 Ex. 43); or excessive distress (*Fell* v. *Whittaker*, L. R. 7 Q. B. 120-124); or irregular distress (*Knight* v. *Egerton*, 7 Ex. 407); or an illegal distress (*Attack* v. *Bramwell*, 3 B. & S. 520);

party, (*g*) either on a judgment of any Division Court or otherwise, and any debt is due or owing to the debtor from any other party, the party to whom such first mentioned

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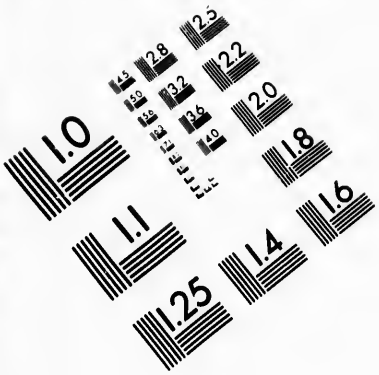
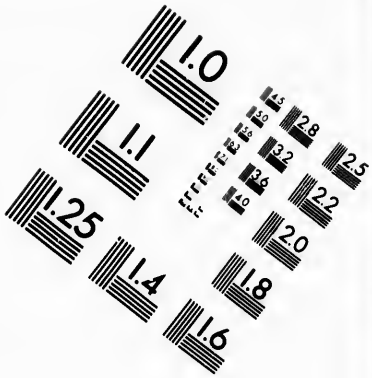
or when no rent due (*Ib.*); or in detinue (*Wiley* v. *Crawford*, 1 B. & S. 253); or replevin (*Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454); or against a Sheriff or Bailiff for wrongfully seizing goods (*Mayhew* v. *Herrick*, 7 C. B. 229); or not arresting (*Williams* v. *Mostyn*, 4 M. & W. 145); or for allowing a person to escape (*Macrae* v. *Clarke*, L. R. 1 C. P. 403); or for not levying, or a false return (*Hobson* v. *Thelluson*, L. R. 2 Q. B. 642); or on any contract of indemnity (*Theobald* v. *Railway Passengers' Ass. Company*, 10 Ex. 45); or for injuries resulting from the negligent keeping of animals (*Ellis* v. *Loftus Iron Company*, L. R. 10 C. P. 10); or for assault and battery and false imprisonment (*Warwick* v. *Foulkes*, 12 M. & W. 507); or by principal against his agent for negligence (*Parker* v. *McKenna*, L. R. 10 Ch. 96); for non-delivery of telegraphic messages (*Sanders* v. *Stuart*, 1 C. P. D. 326); or for negligence in transmitting same (*Dickson* v. *Reuter's Telegraph Company*, 2 C. P. D. 62); or for torts generally (Mayne on Damages, 36); or in an action against a witness for non-attendance on subpœna: *Featman* v. *Dempsey*, 7 C. B. N. S. 628.

(*g*) It will be observed that the claim of the primary creditor must be "due *and* owing"—that is, past due—before he can proceed; but that the "debt" of the garnishee to the primary debtor need only be "due *or* owing," that is, due *or accruing* due at the time he takes the proceeding for garnishment under this section. In *Tapp* v. *Jones*, L. R. 10 Q. B. pages 592 and 593, Blackburn, J., in construing the 61st section of the English C. L. P. Act, *held*, that the words "*the debt due*" meant "either the debt when due or the debt then due," and that an order might be made, not only attaching an accruing debt in the hands of the garnishee, but also an order for payment of the debt accruing due when it should become payable by the garnishee. It was *held* further, in that case, that it was not necessary to wait till the debt had become actually payable before making the order for payment: see also *Jones* v. *Thompson*, E. B. & E. 63, and *Sparks* v. *Younge*, 8 Irish C. L. R. 251; see also sec. 141 post, *In re Stockton Malleable Iron Company*, 2 Ch. D. 101. A fair test of a debt being garnishable is whether or not it is the subject of set-off: *Webster* v. *Webster*, 31 Beav. 393; *McNaughton* v. *Webster*, 6 U. C. L. J. 17. Any debt that is the subject of set-off can be attached under this section: *Ib.* If a debt is attachable, the recovery of judgment on it does not make it the less so: *McKay* v. *Tait*, 11 C. P. 72. A verdict in an action of trespass before judgment is not a "debt" within the meaning of this section (*Shaw* v. *Shaw*, 18 L. T. N. S. 420 Irish Q. B.); or in any other action where there is a verdict for unliquidated damages, and no judgment entered: *Jones* v. *Thompson*, E. B. & E. 63; *Dresser* v. *Johns*, 6 C. B. N. S. 429. "There is no existing debt until judgment" (*per* Willes, J., *Ib.*, page 435); *Victoria Mutual Fire Insurance Company* v. *Bethune et al.*, 1 App. R. 431. Nor is a verdict obtained in default of a delivery of a chattel a "debt:" *In re Scarth*, L. R. 10 Ch. 234. Nor a verdict against an insurance company for unliquidated damages, though not moved against, and which the company had promised to pay: *Boyd* v. *Haynes*, 5 P. R. 15; see also *Tate* v. *The Corporation of Toronto*, 3 P. R. 181; *Bank of Toronto* v. *Burton*, 4 P. R. 56; *Gwynne* v. *Rees*, 2 P. R. 282. Nor a claim for misrepresentation (*Roberts* v. *The Corporation of the City of Toronto*, 16 Grant, 236); or an uncertain amount claimable under a bond: *Johnson* v. *Diamond*, 11 Ex. 73. But otherwise if the amount is certain: *per* Parke, B., at page 80. A legacy in the hands of an executor cannot be attached, even though he promised to pay it, if ordered to do so: *M'Dowall* v. *Hollister*, 3 W. R. 522. A superannuation allowance to a retired clerk of the East India Company, granted by resolution of the court of directors, was *held* not attachable: *Innes* v. *East India Company*, 17 C. B. 351. Nor dividends pay-

debt or money demand is so due and owing (hereinafter designated the primary creditor), may attach and recover, in the manner herein provided, any debt due or owing to his

able to the wife of the execution debtor: *Dingley v. Robinson*, 2 Jur. N. S. 1145. The mere possibility that when the day of payment arrives, on attachment of a debt coming due, there may be a defence to the recovery of it, is no ground for resisting an attaching order: *Sparks* v. *Younge*, 8 Irish C. L. R. 251. The proceeds of an execution may be attached in the Sheriff's hands for a debt due by the execution creditor: *Murray* v. *Simpson*, 8 Irish C. L. R. App. xlv. A dividend payable by the assignees in bankruptcy to a creditor, who had proved in the Bankruptcy Court, was *held* not garnishable: *Boyse* v. *Simpson*, 8 Irish C. L. R. 523; *Re Greensill*, L. R. 8 C. P. 24. Upon a joint judgment recovered against several, a debt due to one or more of the judgment debtors may be attached in the hands of the garnishee (*Miller* v. *Mynn*, 1 E. & E. 1075); but a debt owing to two cannot be attached to satisfy the claim of a creditor against only one of those two: *In re Smart* v. *Miller*, 3 P. R. 385; see also *McCormick* v. *Park*, 9 C. P. 330. A judgment creditor cannot attach a debt due to the wife of the judgment debtor under a specialty given to her when she was unmarried: *Dingley* v. *Robinson*, 2 Jur. N. S. 1145. It is submitted that a creditor's taking a debtor on warrant of commitment for not making payments according to order made on judgment summons prevents an attachment of the debt during detention (*Jauralde* v. *Parker*, 6 H. & N. 431); but not so if the garnishee could be so arrested, *sed. Quere: Marples* v. *Hartley*, 1 B. & S. 1. Where judgment is recovered against an executor, a debt due from a third person to the testator's estate may be attached: *Burton* v. *Roberts*, 6 H. & N. 93. A judgment creditor cannot (without leave of the Court of Chancery) attach moneys in the hands of its receiver which have been directed to be paid by him to the judgment debtor: *DeWinton* v. *Brecon*, 6 Jur. N. S. 1046. In *Williams* v. *Reeves*, 12 Irish Ch. R. 173, it was *held* that money in a Sheriff's hands, levied under an attachment for costs awarded by a decree in equity, remained in *custodia legis*, and was not, without further order, the property of the party who issued the attachment. An order upon a garnishee has no operation upon debts of which a judgment debtor has already divested himself by *bona fide* assignment: *Hirsch* v. *Coates*, 18 C. B. 757; *Ferguson* v. *Carman*, 26 U. C. R. 26. And where the debtor assigning debt is insolvent, it is doubtful if the judgment creditor can take advantage of it: *Ib.* An unsettled balance by one partner to another cannot be attached, but if ascertained it can: *Campbell* v. *Peden*, 3 U. C. L. J. 68. Nor moneys payable under liability incurred on indemnity bond: *Griswold* v. *Buffalo, Brantford and Goderich Railway Company*, 2 P. R. 178. It was doubted in *The Commercial Bank* v. *Williams*, 5 U. C. L. J. 66, whether money in the hands of an assignee at Common Law, for the payment of debts before dividend declared, was attachable. It was *held* in *Smith* v. *Trust and Loan Company of Upper Canada*, 22 U. C. R. 525, that surplus money in the hands of mortgagees after sale under power in mortgage, without any covenant for repayment, was not garnishable; but see *McKay* v. *Mitchell*, 6 U. C. L. J. 61, and *Nicol* v. *Ewin*, 7 P. R. 331; see also *Boyd* v. *Haynes*, 5 P. R. 15; also 14 L. J. N. S. 171 & 283. Money payable under a contract for work done for a municipal corporation is garnishable: *Alden* v. *Boomer*, 2 P. R. 339. An attachment of a judgment overrides an Attorney's lien or control over it in respect of *general* costs: *Hough* v. *Edwards*, 1 H. & N. 171; *Mercer* v. *Graves*, L. R. 7 Q. B. 499; *Davidson* v. *Douglas*, 15 Grant, 347; *Reg.* v. *Benson*, 2 P. R. 350; *Bank of Upper Canada* v. *Wallace*, 2 P. R. 352; *Cotton* v. *Vansittart*, 6 P. R. 96. But if the judgment creditor has notice of the lien he will take subject to it: *Eisdell* v. *Cuningham*, 28 L. J. Ex. 213; s. c. 4 H. & N. 871, Am. Ed.; *Sympson* v. *Prothero*, 3 Jur. N. S. 711; The *Jeff. Davis* L. R. 2 A. & E. 1. Money in the hands of a





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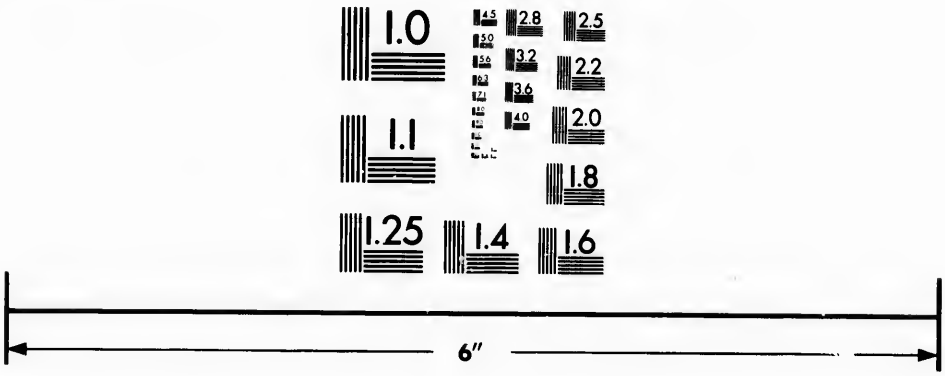

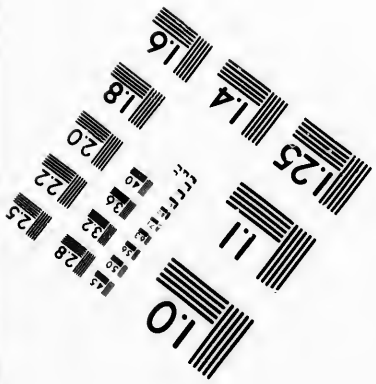

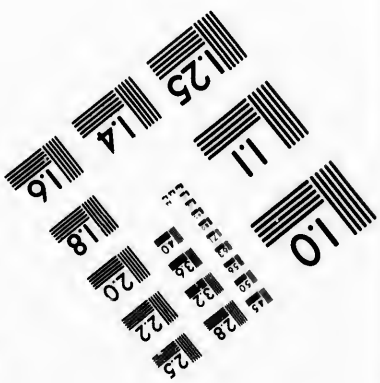

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debtor (hereinafter designated the primary debtor), from any other party (hereinafter designated the garnishee), or sufficient thereof to satisfy the claim of the primary creditor,

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corporation or company is attachable: *Salaman* v. *Donovan*, 10 Irish C. L. R. Ap. xiii. Rent not due is not attachable (*Commercial Bank* v. *Jarvis*, 5 U. C. L. J. 66; *McLaren* v. *Sudworth*, 4 U. C. L. J. 233); but rent overdue is: *Mitchell* v. *Lee*, L. R. 2 Q. B. 259. Nor is the salary of a municipal officer, who holds his office at the will of the corporation at a yearly salary, payable quarterly, garnishable until some part of it is overdue: *Shanley* v. *Moore*, 9 U. C. L. J. 264; and to the same effect is *Hall* v. *Pritchett*, 3 Q. B. D. 215. While an action is pending against a garnishee, an order for payment would not, without evidence of collusion between him and the judgment debtor, be made: *Richardson* v. *Greaves*, 10 W. R. 45. A creditor cannot obtain a charge in equity on an equitable debt by analogy to an attachment of the legal debt under the garnishee clauses: *Horsley* v. *Cox*, L. R. 4 Ch. 92; *Re Price*, L. R. 4 C. P. 155. Surplus money in the hands of an assignee of an insolvent estate would not be garnishable: *Re Greensill*, L. R. 8 C. P. 24. In *Best* v. *Pembroke*, L. R. 8 Q. B. 353, it was *held* that a person who had obtained an order for the costs of an interpleader issue, and caused it to have the force of a judgment, was not a judgment creditor within the meaning of the garnishee clauses: see also *Sunderland Local Marine Board* v. *Frankland et al.*, L. R. 8 Q. B. 18. When attaching order is made, the garnishee cannot retain any money for any claim which he may have against the primary creditor; the Judge must make order for the payment of the whole amount due from the garnishee to the judgment debtor: *Sampson* v. *Seaton and Beer Railway Company*, L. R. 10 Q. B. 28. But where there are cross claims between the garnishee and judgment debtor, the balance only can be attached: *Hesse* v. *Buffalo, Brantford and Goderich Railway Company*, Chambers, 30th March, 1857, *per* Robinson, C. J.; *Nedley* v. *same defendants*, 3 U. C. L. J. 111. A creditor who served an attaching order before bankruptcy proceedings was, in England, *held* to be a creditor holding security within their bankruptcy laws: *Lowe* v. *Blakemore*, L. R. 10 Q. B. 485; *Ex parte Joselyne, In re Watt*, 8 Ch. D. 327; see also *Emanuel* v. *Bridger*, L. R. 9 Q. B. 286.

Quære, the effect of an attaching order on insolvency proceedings in this Province? The garnishee cannot substitute any different mode of payment than that which subsisted between the primary creditor and the primary debtor: *Turner* v. *Jones*, 1 H. & N. 878. If before regular service of the attaching order or garnishment summons (an order for execution having been granted), the garnishee *bona fide* pays the debt, he is protected: *Cooper* v. *Brayne*, 3 H. & N. 972, Amer. Ed. Debts due to a corporation are attachable: ——— v. *The Hamburgh Company*, 1 Mod. 212. Part of a debt may be attached: *Johnson* v. *Diamond*, 25 L. T. 185; 11 Ex. 73. Money in the hands of Government is not garnishable unless they have made themselves personally responsible: *Gidley* v. *Lord Palmerston*, 3 B. & B. 275; *Macbeath* v. *Haldimand*, 1 T. R. 172. Where there are mutual debts between the debtor and the garnishee, the creditor can only recover *the balance* against the garnishee: *Nathans* v. *Giles*, 5 Taunt. 558. It is doubtful if a person can attach moneys in the hands of himself and another: *Nowell* v. *Hullett*, 4 B. & Ald. 646. If the garnishee has a lien on money in his hands, it must be satisfied before he will be ordered to pay over: *Nathans* v. *Giles*, 5 Taunt. 558. An executor must revive judgment in his name before he can take these proceedings: *Baynard* v. *Simmons*, 5 E. & B. 59; *Commercial Bank* v. *Williams*, 5 U. C. L. J. 66. As to the effect of a deed of composition and discharge by garnishee after order made for him to pay over. *Quære*: see *Kent* v. *Tomkinson*, L. R. 2 C. P. 502. A garnishee who pays money under the compulsion of a Court of law is protected; but should the debt be assigned,

subject always to the rights of other parties to the debts owing from such garnishee. 32 V. c. 23, s. 5.

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and he have notice of it, and not call the attention of the Court to that fact, he would not be: *Wood* v. *Dunn*, L. R. 2 Q. B. 73; *The Leader* L. R. 2 A. & E. 314. Payment into Court would be a discharge, and is the safest course: *Culverhouse* v. *Wickens*, L. R. 3 C. P. 295. A garnishee order would not be given to attach a dividend in the hands of an official liquidator of a company which was being wound up in bankruptcy: *Dawson* v. *Malley*, 1 Irish R. C. L. 207; 15 W. R. 791, s. c. A debt duly assigned is not garnishable: *Macaulay* v. *Rumball*, 19 C. P. 284; *Hirsch* v. *Coates*, 18 C. B. 757. But to make an assignment of a debt prevail over an attaching order, it is not necessary that notice of assignment should be given to the garnishee: *Brown* v. *McGaffin*, 5 P. R. 231, and cases there cited; *Robinson* v. *Nesbitt*, L. R. 3 C. P. 264; and *Grant* v. *McDonell*, 39 U. C. R. 412. An order to pay over should only be opened upon notice to all parties interested: *Bank of Upper Canada* v. *Wallace*, 2 P. R. 352. There is no power to order or permit a suggestion to be entered of the death of a garnishee so as to get execution against his representative: *Ward* v. *Vance*, 3 P. R. 323. The mere fact of a garnishee being an executor is no ground for not ordering him to pay the debt due by him as executor to the judgment creditor: *Tiffany* v. *Bullen*, 18 C. P. 91. A debt due by the garnishee to the judgment debtor as executor is not garnishable: *Macaulay* v. *Rumball*, 19 C. P. 284. A debt due to an administrator as such cannot be attached to answer a private debt: *Bowman* v. *Bowman*, 1 Chan. Cham. 172. There appears to be nothing in these Division Court sections to prevent money in the hands of an agent in this Province being garnished where the garnishee resides out of the jurisdiction (*Brown* v. *Merills*, 3 U. C. L. J. 31); but not where the garnishee is a foreign corporation: *Bank British North America* v. *Laughrey*, 2 L. J. N. S. 44; see section 127. Money in the hands of a Division Court Bailiff can be attached: *Lockart* v. *Gray*, 2 L. J. N. S. 163. So also money in the hands of a Sheriff under an execution is attachable for the debt of the execution creditor: *In re Smart* v. *Miller*, 3 P. R. 385. Money sent by a father to his son, the debtor, as a gift, through a bank, was garnished before the debtor was advised of the deposit; *held*, not garnishable: *Caisse* v. *Tharp*, 5 P. R. 265. Garnishee proceedings will not be set aside after great delay: *Gordon* v. *Bouter*, 6 U. C. L. J. 112. Where there are several attaching orders, the creditors rank in the order in which their attaching orders are served: *Tate* v. *The Corporation of Toronto*, 3 P. R. 181; *Sweetnam* v. *Lemon*, 13 C. P. 534. *Quære*: as to the effect of order on party's right to set-off, *per* Draper J., in *McNaughton* v. *Webster*, 6 U. C. L. J. 17. To discharge the garnishee there must either be payment made on order to pay over or execution levied: *Sykes* v. *The Brockville and Ottawa Railway Company*, 22 U. C. R. 459; contra, *Carr* v. *Baycroft*, 4 U. C. L. J. 209; *McNaughton* v. *Webster*, 6 U. C. L. J. 17. The garnishee cannot be compelled to pay before credit given him has expired: *Harding* v. *Barratt*, 3 U. C. L. J. 31. The difficulty in garnishing moneys due on bills of exchange and promissory notes discussed: *Mellish* v. *Buffalo, Brantford and Goderich Railway Company*, 2 P. R. 171, and 2 U. C. L. J. 230, and 3 U. C. L. J. 108, s. c. Money paid into Court cannot be garnished: *Jones* v. *Brown*, 29 L. T. Rep. 79; *French* v. *Lewis*, 16 U. C. R. 547. Nor money in the hands of a Receiver: *Ames* v. *The Trustees of the Birkenhead Docks*, 20 Beav. 332. Where claim for work done under a contract, and one for unliquidated damages referred, there can be no garnishment until after award: *Tate* v. *The Corporation of the City of Toronto*, 10 U. C. L. J. 66. The remedy by attachment in England was given to Common Law Courts only by the C. L. P. Act: *The Financial Corporation (Limited)* v. *Price*, L. R. 4 C. P. 155; *Horsley* v. *Cox*, L. R. 4 Ch. 92. Nor would equity extend the legal remedy: *Blake* v. *Jarvis*, 16 Grant, 295. It is submitted that under this statute equitable debts are within these garnish-

Debts due to mechanics, &c., for wages not to be attached, except to excess over $25.

125. No debt due or accruing to a mechanic, workman, labourer, servant, clerk, or employee for, or in respect of, his wages or salary, shall be liable to seizure or attachment under this Act, unless such debt exceeds (*h*) the sum of twenty-five dollars, and then only to the extent of such excess. 37 V. c. 13, s. 1.

Saving clause as to debts created before 1st Oct., 1874.

126. Nothing in the next preceding section contained shall affect or impair the right or remedies of any creditor whose debt has been contracted before (*i*) the first day of October, 1874. 37 V. c. 13, s. 2.

Where the Creditor's Claim is a Judgment.

Attaching order to be granted on judgment.

127. After judgment has been recovered (*k*) in a Division Court, application may be made to a Judge of such Court, by or on behalf of the primary creditor, on affidavit (*l*) that such judgment was recovered, and when, and that the whole, or some part, and how much, thereof remains unsatisfied, and that the deponent has reason to believe, and does believe, that some one or more parties (naming them, or stating that he is unable to name them) is or are within this Province, (*m*) and is or are indebted (*n*) to the primary debtor, for an attaching order (which such Judge is hereby

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ment clauses of it: see *Alden* v. *Boomer*, 2 P. R. 339. Where the assignee of a debt not only neglected to give notice of assignment, but his Attorney stood by while an attaching order was being made, and the garnishee paid the debt to the judgment creditor, the Court relieved the garnishee: *In re Jones, Ex parte Kelly*, 7 C. P. 149; see Rules 51 to 63, inclusive, and Forms 40 to 50, inclusive.

(*h*) Where an order is applied for, and the facts shew that the debt sought to be garnished is one of those mentioned in this section, the affidavit should shew that such debt *exceeds* twenty-five dollars. This provision of the law was made since the framing of Form 40.

(*i*) This does not mean when the right to sue accrued, but when the contract was made which resulted in suit. The date, and not the maturity of a note, would be the time when debt "contracted" under this section.

(*k*) That is, duly entered by the Clerk in the procedure book: see notes to sec. 37, 7 L. C. G. 141. Before proceedings can be taken in Court, to which transcript may be sent under section 161 and Rule 57, the suit must first be made a judgment of that Court.

(*l*) See Rule 51 and Form No. 40. The affidavit need not be made by any particular person. Contrast cap. 50, sec. 307; *Builder* v. *Kerr*, 7 P. R. 323.

(*m*) See notes to section 124, and *Brown* v. *Merrills*, 3 U. C. L. J. 31.

(*n*) See notes to section 124.

authorized to make), to the effect that all debts owing (*o*) to the primary debtor, whether due or not due, (*p*) be attached to satisfy such judgment; which order may be in the form (*q*) prescribed by the General Rules or Orders from time to time in force relating to Division Courts. 32 V. c. 23, s. 6 (1).

Service thereof to bind all debts, etc.

128. The service (*r*) of such order on any garnishee shall have the effect (subject to the rights of other parties) of attaching and binding (*s*) in his hands all debts then owing from him to the primary debtor, or sufficient thereof to satisfy such judgment, and a payment by the garnishee into the Court, or to the primary creditor, of the debt so attached to the extent unsatisfied on such judgment, shall be a discharge to that extent of the debt owing from the garnishee to the primary debtor. 32 V. c. 23, s. 6 (2).

Garnishee may pay in his own discharge.

Payment to any but primary creditor void.

129. Any payment by the garnishee, after service on him (*t*) of such order, to any one other than the primary creditor, or into Court, (*u*) to satisfy the said judgment,

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(*o*) See also notes to section 124.

(*p*) It is submitted that these words have substantially the same signification as the words "any debt is due or owing" in section 124: see it, and notes thereto.

(*q*) See Form 41.

(*r*) It is submitted that service of this order should, if possible, be personal (see notes to section 72); or at least it must be shewn that the order came to the knowledge of the garnishee (*Ward* v. *Vance*, 3 P. R. 130; *Mason* v. *Muggeridge*, 18 C. B. 642; *Newman* v. *Rook*, 4 C. B. N. S. 434); or that reasonable attempts have been made and proved fruitless, and the Judge has dispensed with personal service: see *Tomlinson* v. *Goatly*, L. R. 1 C. P. 231, and Rules 52, 54 and 55, and notes to section 131; 10 L. J. N. S. 65.

(*s*) That is, making "all debts then owing" subject to the payment of and charged with the amount of the attaching order: *Holmes et al.* v. *Tutton*, 5 E. & B. 80: *Tilbury* v. *Brown*, 6 Jur. N. S 1151; *Turner* v. *Jones*, 1 H. & N. 878. But the garnishee is not protected unless an order to pay over is obtained (*Ib.*; *Sykes* v. *The Brockville and Ottawa Railway Co.*, 22 U. C. R. 459; *Tate* v. *The Corporation of Toronto*, 10 U. C. L. J. at page 67); or he pay into Court: *Culverhouse* v. *Wickens*, L. R. 3 C. P. 295. A debt due by any person in the Province served with the order would be bound. As to service of summons under section 131, see article at page 65 of 10 L. J. N. S. An assignment in insolvency by the principal debtor would prevent garnishment: *Re Fair and Bell*, 2 App. R. 632.

(*t*) If service not good, the garnishee could probably pay over the money to the primary debtor with impunity: *Cooper* v. *Brayne*, 3 H. & N. 972, Amer. Ed.; see notes to section 128.

(*u*) Payment into Court is the safest course to take: *Culverhouse* v. *Wickens*, L. R. 3 C. P. 295; see remarks of Willes, J., at page 297.

shall to the extent of the primary creditor's claim, be void ; (*v*) and the garnishee shall be liable to pay the same again, to the extent of the primary creditor's claim, to satisfy his said judgment (*w*). 32 V. c. 23, s. 6. (3).

Primary creditor may summon garnishee, etc.

130. Whether any such attaching order is or is not made, the primary creditor may cause to be sued out of the Division Court for the Division in which the garnishee, or one or more of them, if there be joint garnishees, reside or carries on business, (*x*) a summons (*y*) in the form prescribed by the General Rules or Orders, from time to time in force, relating to Division Courts, upon or annexed to which shall be a memorandum shewing the names of the parties as designated in the judgment, the date when, and the Court in which, it was recovered, (*z*) and the amount unsatisfied; which summons shall be returnable either at any ordinary sittings of such Court, or at such other (*a*) time and place (to be named therein) as the Judge may permit or appoint, either by a general order for the disposal of such matters or otherwise. 32 V. c. 23, s. 6 (4).

How to be served, etc.

131. A copy of such summons and memorandum shall be duly served on the garnishee, (*b*) or, if there be joint garnishees, (*c*) then on such of them as are within reach of the process, (*d*) at the time and in the manner (*e*) required

(*v*) See Rule 58. This means "voidable:" Maxwell on Stat. 190.

(*w*) See the reasoning in *Horsley* v. *Cox*, L. R. 4 Ch. 92.

(*x*) These words are used in the 62nd section, and the remarks made and cases cited there equally apply here; see also notes to section 72.

(*y*) See Form 43.

(*z*) Should the judgment be recovered in a division other than that in which "*one or more*" of the garnishees "reside" or carry on business, and proceedings under this section are desired, the judgment must be transferred under section 161 and rule 57; and then, on the judgment being *fully entered* in the Court of the division in which the garnishees or one or more of them reside or carry on business, all proceedings can thenceforth be entitled and taken in that Court as if originally commenced and judgment "recovered" there.

(*a*) This would allow the Judge to appoint any "time and place" within the County for the disposal of such matters. It is submitted that justice and the convenience of parties will be best served by trying such matters at regular sittings only, unless under exceptional circumstances.

(*b*) See notes to sections 72 and 128, and Rules 53, 54 and 55.

(*c*) Such as partners in trade.

(*d*) That is anywhere in the Province of Ontario.

(*e*) See notes to sections 62, 71 and 72, and Rules 53, 54 and 55.

for the service of summonses in ordinary suits for corresponding amounts, and also on the primary debtor, if thought advisable, (*f*) or if required by the Judge. 32 V. c. 23, s. 6 (5).

Judgment at hearing.

132. At the hearing of the summons, or at any adjourned hearing, on sufficient proof (*g*) of the amount owing by the garnishee to the primary debtor, and no sufficient cause appearing (*h*) why it should not be paid and applied in satisfaction of the judgment, the Judge may give judgment (*i*) against the garnishee (which judgment may be in the form

(*f*) See notes to section 128. It is all important that the judgment debtor should, if possible, be served; and it is submitted that only in the most exceptional cases, such as absence from or residence out of the Province, should this be departed from. Rule 56 declares that "if the garnishee or the primary debtor, *having been served*, does not appear on the return of such summons, *judgment may be given against him by default;* and if only some of the parties required to be served are served, the Judge may give the same judgment *against those served* as in ordinary cases:" see also Rule 54. At Common Law, every person whose rights are to be affected by any legal proceeding has a right to be heard: Maxwell on Statutes, 325; *Thorburn* v. *Barnes*, L. R. 2 C. P. 384; *Re Pollard*, L. R. 2 P. C. 106. This section and the rule of Court are an infringement of that right (*Ferguson* v. *Carman*, 26 U. C. R. 26); and their operation should not be extended to any cases but those where *actual necessity* requires it. The debtor should know of the proceedings, for the judgment upon which they were founded might possibly have been satisfied by him years before, or have become *effete;* or if the debt had been assigned, and no notice given by the assignee, as he is not bound to do (*Robinson* v. *Nesbitt*, L. R. 3 C. P. 264), the proceeding would lead to a great deal of trouble, if not injustice. On this question we cannot do better than quote the words of a writer in the Law Journal. "We think * * * that a Judge could not, for any reason of such mere convenience of the creditor and garnishee, dispense with service, but should insist on its being made in every case which requires personal service in ordinary cases, *if practicable*:" 10 L. J. N. S. 65, 66. Attempts should at least be made to serve the party, and evidence of these presented to the Judge. "Whether or not the efforts made to serve the defendant are reasonably sufficient, must in all cases be matter for the discretion of the Judge:" *Tomlinson* v. *Goatly*, L. R. 1 C. P. page 231, *per* Erle, C. J. In that case the process-server had called twice at the defendant's office, and once by appointment of his clerk, at none of which times was the defendant in; but nothing was said to the clerk of the purpose of the process-server. Willes, J., appeared to think it insufficient to warrant ulterior proceedings: page 232.

It will be observed that the Judge can only give judgment "by default" where the garnishee or primary debtor *has been served*. If service has been "dispensed with" under section 134 and Rule 54, and this section, it is submitted the liability of the primary debtor and garnishee must be established by evidence.

(*g*) See notes to section 131.

(*h*) That is, no question arising which the Judge has to try.

(*i*) If debt assigned, and no notice given by assignee, costs would not be given him: *Grant* v. *McDonnell*, 39 U. C. R. 412.

(*k*) prescribed by the General Rules or Orders from time to time in force relating to Division Courts), for the amount so owing (*l*) from him, or sufficient thereof to satisfy the judgment (*m*); and execution against the garnishee to levy the same, may issue thereon as of course, if due, or when and as it becomes due, (*n*) or at such later period as the Judge may order, which execution may be according to the form (*o*) prescribed as aforesaid. 32 V. c. 23, s. 6 (6).

WHERE THE PRIMARY CREDITOR'S CLAIM NOT A JUDGMENT.

Where no judgment, summons on garnishee, &c., to issue.

133. Where judgment has not been recovered for the claim (*p*) of the primary creditor, he may cause a summons to be issued out of the Division Court of the Division in which the garnishee, or one or more of them, if there be joint garnishees, live or carry on business, (*q*) in the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts upon or annexed to which shall be a memorandum, shewing the names of the primary creditor, the primary debtor, and of the garnishee, and the particulars of the claim of the primary creditor, with reasonable certainty and detail; which summons shall be returnable, as required by section one hundred and thirty of this Act, in respect to the summonses therein mentioned. 32 V. c. 23, s. 7 (1).

Service thereof.

134. A copy of such summons and memorandum shall be duly served on the garnishee, or if there be joint garnishees, then on such of them as are within reach of the process, at the time and in the manner required for service in ordinary

(*k*) See Form 45.

(*l*) The Legislature here clearly intended to use no uncertain expression, but employed a word meaning a debt *past due* or *maturing*.

(*m*) This would include the costs of recovering the judgment, and which form part of it; but would not, it is submitted, cover the costs of garnishment proceedings as well, even should there be enough in the garnishee's hands to pay them: see also section 135.

(*n*) The order went in this form in *Tapp* v. *Jones*, L. R. 10, Q. B. 591.

(*o*) See Form 86.

(*p*) That is, a "debt or money demand," as mentioned in section 124.

(*q*) See notes to sections 62 and 130.

+ See Clause 11 of Act of 1886 for additional notes &c

cases; and also, if practicable, on the primary debtor, unless the Judge for sufficient reason dispenses therewith (*r*). 32 V. c. 23, s. 7 (2).

Judgment in such case.

135. If in such case the primary debtor has been duly served (*s*) with a copy of such summons and memorandum, judgment (in the usual form in other cases) may be given against him at the hearing for the primary creditor, for the whole, or such part of the claim as is sufficiently proved, (*t*) and execution may afterwards issue thereon as in other cases; and whether such judgment is or is not given, (*u*) the Judge, on sufficient proof (*v*) of the debt due and owing from the primary debtor, and also of the amount owing to him from the garnishee, may then, or at any adjourned hearing, give judgment against the garnishee (which may be according to the form prescribed (*w*) as aforesaid) for the amount so found due (*x*) from the garnishee, to the extent of the amount so found due from the primary debtor, which sum the garnishee shall pay into Court, or to the primary creditor, towards the satisfaction of such claim, or in default thereof, execution may issue to levy the same forthwith, or at such later period as the Judge may direct, which execution may be according to the form prescribed as aforesaid. 32 V. c. 23, s. 7 (3).

General Provisions.

All parties interested may show cause, etc.

136. In all cases under this Act, and whether the claim of the primary creditor is or is not a judgment, the primary debtor, the garnishee, and all other parties in any way

(*r*) The notes to section 131 apply to this; see also notes to sections 62 and 72.

(*s*) See notes to sections 131 and 134.

(*t*) Advantage can of course be taken of Rule 56.

(*u*) The adjudication against the primary debtor and garnishee need not be made at the same time, nor embraced in the one order, but it frequently is so: see *Victoria Mutual Insurance Co.* v. *Bethune et al.*, 1 App. R. 434, and notes to the tariff.

(*v*) See Rule 56.

(*w*) See Form 46.

(*x*) This only refers to the debt, and would not include the amount of creditor's costs if enough also to meet them in the hands of the garnishee. The judgment is final and conclusive: *per* Moss, J., at pages 431, 433 and 434 of 1 App. R.

interested (*y*) in, or to be affected by, the proceeding, shall be entitled to set up any defence, as between the primary creditor and the primary debtor, (*z*) which the latter would be entitled to set up in an ordinary suit, and also any such defence as between the garnishee and the primary debtor, and may also show any other just cause (*a*) why the debt sought to be garnished should not be paid over or applied in or towards the satisfaction of the claim of the primary creditor.

Notice of statutory defence.

2. Notice of any statutory defence (*b*) shall be given to the primary creditor at the time and in the manner required

(*y*) This is the principle of section 29 of chapter 126 of 23 & 24 Victoria of England, the want of which was so long felt in the Superior Courts here (*Kerr* v. *Fullarton*, 8 U. C. L. J. 222; *Chapman* v. *Shepherd*, 8 U. C. L. J. 275; *Spencer* v. *Conley*, 26 C. P. 274); but which has been lately remedied by Statute: see also *Victoria Mutual Fire Insurance Co.* v. *Bethune*, 1 App. R. 423.

(*z*) The Courts have tried to carry out this equitable principle: *Hesse* v. *Buffalo, Brantford and Goderich Railway Co.*, 30th March, 1877, *per* Robinson, C. J., and *Nedley* v. *Same defendants*, 3 U. C. L. J. 111.

(*a*) This, it is submitted, means either of a legal or equitable nature: *Hirsch* v. *Coates*, 18 C. B. 757. An equitable assignment would prevent garnishment (*Lutscher* v. *The Comptoir D'Escompte de Paris*, 1 Q. B. D. 709; *In re Irving, Exparte Brett*, 7 Ch. D. 419), or even the assignment of part of a debt: *Brice* v. *Bannister*, 3 Q. B. D. 569; see also *Brown* v. *McGuffin*, 5 P. R. 231; *McKenzie* v. *Montreal and Ottawa Junction Railway Co.*, 27 C. P. 224; *Fowler* v. *Vail*, 27 C. P. 417; *Postmaster-General* v. *Robertson*, 41 U. C. R. 375; *Robinson* v. *Nesbitt*, L. R. 3 C. P. 264; *Emanuel* v. *Bridger*, L. R. 9 Q. B. 286; *Lamb* v. *Sutherland*, 37 U. C. R. 143.

(*b*) The Statute of Limitations is one of the most usual of statutory defences under the 92nd as well as this section. The Statute commences to run when the right to bring an action has accrued (*Colvin* v. *Buckle*, 8 M. & W. 680), and stops on the issue of the summons and during its currency: *Turley* v. *Williamson*, 15 C. P. 538, and Rule 127. The fraudulent concealment by the defendant of the plaintiff's right of action does not prevent the statute running: *Imperial Gas Co.* v. *London Gas Co.*, 10 Ex. 39. If a cause of action accrues after the death of a creditor, the statute only commences to run on the appointment of an executor or administrator; but it is otherwise if it accrues before death: *Grant* v. *McDonald*, 8 Grant, 468. If the statute commences to run, subsequent disability does not stop it: *Rhodes* v. *Smethurst*, 6 M. & W. 351. For limitation of different kinds of action, see caps. 61 & 117 of Rev. Stat. In ordinary actions on simple contract or tort the limit is six years, and on specalities twenty years: Rev. Stat. pp. 773 and 1121. The time is reckoned exclusively of the day on which the cause of action arose: *Freeman* v. *Read*, 4 B. & S. p. 183. For the purposes of the statute the date of the summons cannot be contradicted: *Whipple* v. *Manley*, 1 M. & W. 432. Foreign Statutes of Limitation which bar the remedy only have no force here: *Harris* v. *Quine*, L. R. 4 Q. B. 653. An action for calls in a company incorporated by Act of Parliament could be brought within twenty years: *Cork and Bandon Railway Co.* v. *Goode*, 13 C. B. 826; *Buck* v. *Robson*, L. R. 10 Eq. 629. Where money is lent by cheque, the statute only begins to run on payment by the banker: *Garden* v. *Bruce*, L. R.

in respect to such notice in ordinary cases. 32 V. c. 23, s. 18.

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3 C. P. 300. When a bill is not accepted, the statute runs from the time the holder gives notice to the drawer: *Whitehead* v. *Walker*, 9 M. & W. 506. The statute only commences to run against an accommodation maker, acceptor or indorser, suing his principal for money paid, from the time he pays the money: *Angrove* v. *Tippett*, 11 L. T. N. S. 708. The statute begins to run immediately on a note payable on demand (*Norton* v. *Ellam*, 2 M. & W. 461); but if payable so many days or months after demand, it begins to run only after that number of days or months has expired after demand: *Thorpe* v. *Booth*, R. & M. 388. So if a note is payable after sight, the statute does not commence to run until presentment: *Holmes* v. *Kerrison*, 2 Taunt. 323. The statute runs on money lent to a banker from the deposit: *Pott* v. *Clegg*, 16 M. & W. 321. The contract of an Attorney to conduct a suit is entire; so that if the suit has ended within six years of action brought, the Attorney is entitled to recover for all business done in the suit (*Harris* v. *Quine*, L. R. 4 Q. B. 653; see also *Lizars* v. *Dawson*, 32 U. C. R. 237); the reason being that the Attorney cannot sue for costs during the pendency of the suit, although he may refuse to proceed for want of disbursements: *Whitehead* v. *Lord*, 7 Ex. 691. An acknowledgment in writing or part payment revives the debt: see Roscoe, 643, 645. The writing must be unconditional; or, if conditional, the plaintiff must shew performance of it: *Meyerhoff* v. *Frechlich*, 3 C. P. D. 333; Roscoe, 652. A promise in these words is a sufficient acknowledgment: "I will try to pay you a little at a time if you will let me. I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week:" *Lee* v. *Wilmot*, L. R. 1 Ex. 364. A letter written "without prejudice" is not sufficient: *In re River Steamer Co., Mitchell's Claim*, L. R. 6 Ch. 822. A request for the creditor to send in his account was *held* a sufficient acknowledgment: *Quincey* v. *Sharpe*, 1 Ex. D. 72. So also where it was coupled with a further request for vouchers: *Skeet* v. *Lindsay*, 2 Ex. D. 314.

Part payment.—This has always been held an acknowledgment of the existence of the debt: Roscoe, 645. The payment must be made on account of the debt sued for: *Morgan* v. *Rowlands*, L. R. 7 Q. B. 493, and cases cited. Payment of interest does not necessarily revive the principal debt, but a promise to pay same may be thereby inferred: L. R. 7 Q. B. p. 498. If there are two debts, and a payment is made generally, it is for the Judge, or, if a jury, for them to say whether or not there is a payment on each of them: *Walker* v. *Butler*, 6 E. & B. 506. The creditor cannot, without the debtor's knowledge or assent, appropriate a payment to any particular debt to take it out of the statute; but it ought *prima facie* to be taken as paid on the debt not barred: *Nash* v. *Hodgson*, 25 L. J. Ch. 186, *per* Lord Cranworth. The payment may be by bill or note (*Turney* v. *Dodwell*, 3 E. & B. 136); and it operates from the delivery, and not the falling due of the bill: *Irving* v. *Veitch*, 3 M. & W. 90. It is not necessary that money should pass if the transaction amounts to payment: *Maber* v. *Maber*, L. R. 2 Ex. 153; *House* v. *House*, 24 C. P. 526. If a payment of part is made as the whole amount due, it does not take the rest of the claim out of the statute: *Waugh* v. *Cope*, 6 M. & W. 824. A payment made by a third person on account of the debtor to the creditor cannot be appropriated by the latter so as to bar the statute: *Waller* v. *Lacy*, 1 M. & G. 54. Part payment can be proved by the oral admission of the defendant (*Cleave* v. *Jones*, 6 Ex. 573), or by his answer in Chancery: *Baildon* v. *Walton*, 1 Ex. 617. While a payment is made by one of two joint debtors, with the knowledge and consent of the other, the operation of the statute in favour of the latter is not prevented: *Jackson* v. *Woolley*, 8 E. & B. 783. As to acknowledgments which have been held sufficient, see *Bourdin* v. *Greenwood*, L. R. 13 Eq. 281; *Chasemore* v. *Turner*, L. R. 10 Q. B. 500; *Poole* v. *Poole*, L. R. 7 Ch. 17;

× Section 12 of Act of 1886 substituted for this section

Service of summons on garnishee to bind debt until hearing.

137. In all cases under this Act (except where an attaching order has been served, already provided for), service of the summons on the garnishee shall have the effect of attaching and binding (*c*) in his hands (subject to the rights of other parties) the debt sought to be garnished, from the time of such service until a final decision (*d*) made on the hearing of such summons; and any payment of such debt by the garnishee during such period, to any one other than the primary creditor, or into Court (*e*) for satisfying his claim shall, to the extent of such claim, be void, (*f*) and the garnishee shall be liable to pay the same again to the extent of such claim, to satisfy the same, unless the Judge otherwise orders (*g*). 32 V. c. 23, s. 9.

Roscoe's N. P. 649. And as to such as have been held insufficient, see Roscoe, 650, and cases there cited; and Rob. & Jos. Digest, 2153. The acknowledgment may be made by the party or his agent, "duly authorized:" Rev. Stat. cap. 117, sec. 1. An admission by a bankrupt in his balance sheet will not take the debt out of the statute: *Ex parte Topping*, 12 L. T. N. S. 787. The better opinion seems to be that an admission to a stranger is insufficient: Roscoe, 648; *Ex parte Topping, supra.* But see Add. on Con. 7th Ed. 303. An unstamped note cannot be used as an acknowledgment: *McKay* v. *Grinley*, 30 U. C. R. 54. On the subject generally of "Limitation of Actions," see Rob. & Jos. Digest, 2121, 2172; Fisher's Digest, 5473; L. R. Digest, 1641; Add. on Con. 7th Ed. 294, 309; Rev. Stat. caps. 61 & 117; Roscoe's N. P. 739, 653. In equity the Statute of Limitations need not be pleaded, but the Statute of Frauds must: *Dawkins* v. *Lord Penrhyn*, 4 App. Cas. H. L. 51.

(*c*) See notes to section 128.

(*d*) When the Judge *fully* decides the matter, the "attaching and binding" shall be at an end, unless under section 138, when judgment is given against the garnishee: see *Bellhouse* v. *Mellor*, 4 H. & N. 116.

(*e*) The safest course is to pay the amount into Court: *Sykes* v. *The Brockville and Ottawa Railway Co.*, 22 U. C. R. 459, and *Culverhouse* v. *Wickens*, L. R. 3 C. P. 295.

(*f*) "It has been said that when a statute not only declares a contract void, but imposes a penalty for making it, it is not voidable merely. In general, however, it would seem that where the enactment has relation only to the benefit of particular persons, the word 'void' would be understood as 'voidable' only at the election of the persons for whose protection the enactment was made, and who are capable of protecting themselves; but that when it relates to persons not capable of protecting themselves, or when it has some object of public policy in view, which requires the strict construction, the word receives its natural full force and effect:" Maxwell on Statutes, 190. By Rule 58, it is declared that "no payment shall be made by a garnishee to a primary creditor before judgment given against the primary debtor," except on order of the Judge.

(*g*) This a Judge would probably do if the primary creditor had, either by his words or acts, assented to the payment by the garnishee to any other than himself of the moneys garnished: *In re Jones Ex parte Kelly*, 7 C. P. 149; *Freeman* v. *Cooke*, 2 Ex. 654; *Johnson* v. *Credit Lyonnais Co.*, 3 C. P. D. page 40;

and after judgment.

138. If judgment be given for the primary creditor against the garnishee, the debt garnished shall, unless the Judge otherwise orders, continue bound (*h*) in the hands of the garnishee to satisfy the claim of the primary creditor; and payment in such case by the garnishee of such debt to the extent of such claim, either into Court or to the primary creditor, shall, to that extent, be a discharge (*i*) to the garnishee, as between him and the primary debtor; and any payment thereof, otherwise than last aforesaid, except by leave of the Judge, shall be void (*k*); and the garnishee in such case shall be liable to pay the same again to satisfy the claim of the primary creditor. 32 V. c. 23, s. 10.

Costs.

139. The garnishee shall not be liable for the costs of the proceeding, (*l*) unless and in so far only as occasioned by setting up a defence, which he knew, or ought to have known, (*m*) was untenable; and, subject to this provision, the costs of all parties shall be in the discretion of the Judge. 32 V. c. 23, s. 11.

Summons and memorandum of particulars to be filed.

140. Judgment shall not be given either against the primary debtor or the garnishee until the said summons and memorandum, with an affidavit of the due service of both on the proper parties, are filed, (*n*) unless the Judge for special reasons orders otherwise. 32 V. c. 23, s. 12.

De Bussche v. *Alt*, 8 Ch. D. 286; *In re Bahia and San Francisco Railway Co.*, L. R. 3 Q. B. 584, and that class of cases.

(*h*) See notes to section 128.

(*i*) See *Wood* v. *Dunn*, L. R. 2 Q. B. 73; *Brice* v. *Bannister*, 3 Q. B. D. 569.

(*k*) See notes to section 137.

(*l*) This is only declaratory: *Bank of Montreal* v. *Yarrington*, 3 U. C. L. J. 185. If it becomes necessary to issue execution against the garnishee, he becomes liable for the costs of it, and the Bailiff's fees thereon: Rule 61.

(*m*) Each case must depend on its own circumstances. The expression is a peculiar one, and no definite meaning can be given to it. It is submitted that if, in the opinion of a reasonable minded man, and one of ordinary intelligence, a defence should not have been set up, it would be within this part of the section, and costs would be imposed: see Maxwell on Statutes, 100, 104.

(*n*) The affidavit should be entitled in the Court and cause, and otherwise according to Rule 133: see notes to section 76. It should shew that *both* the primary debtor and garnishee were served and *how*: see Rule 53, and notes to section 72; see 10 L. J. N. S. 66.

No execution, till garnishee's debt due.

141. No execution shall in any case issue to levy the money owing from any garnishee until, and so far only as such money has become fully due. (*o*) 32 V. c. 23, s. 13.

Application to discharge debt from attachment.

142. Any party entitled to or interested in any money or debt attached or bound in the hands of the garnishee by a proceeding under this Act, may, at any time before actual payment (*p*) thereof by the garnishee, apply to the Judge (*q*) for an order (which the Judge is hereby authorized to make), to the effect that such money or debt be discharged from the claim of the primary creditor; and thenceforth such money or debt shall cease to be attached or bound for such claim; and such an application and such an order may also be made, if the Judge thinks fit, after such money or debt has been paid over by the garnishee, in which case all parties shall be remitted to their original rights in respect thereto, except as against the garnishee having already paid such debt or money, whose payment shall not be affected thereby, but shall be and remain an effectual discharge to him. (*r*) 32 V. c. 23, s. 14.

Security from primary creditor.

143. If the Judge, on the hearing of any summons under this Act, or on special application for the purpose, thinks proper, he may, before giving judgment against the garnishee, or at any time before actual payment by the garnishee, order such security (*s*) to be given as may be approved by himself

(*o*) The decision in *Tapp* v. *Jones*, L. R. 10 Q. B. 591, was substantially the same under the 61st section of the English C. L. P. Act of 1854.

(*p*) "I see no reason why a payment in goods may not be as good as a payment in money:" *per* Bolland, B., in *Cannan* v. *Wood*, 2 M. & W. 470. "It may be in money or money's worth:" *per* Parke, B., at page 469; see also *Wilkins* v. *Casey*, 7 T. R. 713. Or a bank-draft: *Caine* v. *Coulton*, 1 H. & C. 764. Or cheque: *Hopkins* v. *Ware*, L. R. 4 Ex. 268. The cases of *Whittemore* v. *Macdonell et al.*, 6 C. P. 547; *Benedict et al.* v. *VanAllen et al.*, 17 U. C. R. 234; *Elkington's Case*, L. R. 2 Ch. 511; and *Cleland's Case, In re Metropolitan Public Carriage and Repository Co.*, L. R. 14 Eq. 387, are clearly distinguishable from the foregoing authorities on the question of payment: see also Roscoe's N. P., 13th Ed., and Add. on Contracts, title, "Payment;" Fisher's Digest, 6383; Rob. & Jos. Digest, 2715.

(*q*) As to the mode of application see Rule 59.

(*r*) See *Wood* v. *Dunn*, L. R. 2 Q. B. 73; *Culverhouse* v. *Wickens*, L. R. 3 C. P. 295.

(*s*) This is for the protection of the garnishee, and was probably inserted in the statute of 1868-69, to get over the difficulty, suggested by the decision of *Wood* v. *Dunn* in the Court below: L. R. 1 Q. B. 77.

or the Clerk, by or on behalf of the primary creditor, for the repayment into Court to abide the Judge's order, in case a Judge's order is made for such repayment;

2. Such bond (*t*) shall be to the Clerk by his name of office, and shall enure for the benefit of all parties interested in or entitled to the money, and may by order of the Judge, (*u*) and on such terms as to indemnity against costs and otherwise as he may impose, be sued in the name of the Clerk of the Court for the time being, for the benefit of the party entitled. 32 V. c. 23, s. 15 (1).

Cases of adverse claims.

144. In case any one other than the primary creditor or primary debtor claims to be entitled to the debt owing from the garnishee, by assignment thereof (*v*) or otherwise, the Judge, when adjudicating in any of the cases aforesaid, or by calling the proper parties before him by summons for the purpose, may enquire into and decide upon such claim, and may allow or give effect to it, or may hold it void as against the primary creditor for being a fraud upon creditors, (*w*) or otherwise, as the justice of the case may require; and for such purpose he may require the attendance of such parties and such witnesses (their conduct money being first paid) (*x*) as he may think necessary. 32 V. c. 23, s. 15 (2).

(*t*) As to the requisites of this bond, see Rule 60 and its Form; Form No. (47 *a*).

(*u*) The Judge must first make order for suit to be brought: see *Stapf* v. *McCarrow et al.*, 35 U. C. R. 22; *Haldan* v. *Smith*, 25 C. P. 349.

(*v*) Should the legal or equitable right to the debt be assigned before garnishment, such assignment would prevail: *Hirsch* v. *Coates*, 18 C. B. 757; *Grant* v. *McDonell*, 39 U. C. R. 412; *Brice* v. *Bannister*, 3 Q. B. D. 569; and contrast *Cohen* v. *Hale*, 3 Q. B. D. 371. In the late case of *Buck* v. *Robson*, 3 Q. B. D. 686, it was *held* that these words used in a letter, "I hereby assign to Messrs. R. & Son the sum of £40, now due, or that may hereafter come due, in respect of the steam launch which I am building for you," constituted an assignment of the debt, and not a mere order for the payment of money. The case of *Ex parte Shellard*, L. R. 17 Eq. 109, is much shaken by the authority of *Buck* v. *Robson*. As to the effect of the previous assignment of debt on garnishment proceedings, in addition to cases above referred to, and those cited in the reports of them, we refer to Rob. & Jos. Digest, 266; Fisher's Digest, 367-9178; L. R. Digest, 267. As to what is an equitable assignment, of a debt, see *Ryall* v. *Rowles*, 2 White & Tudor's L. C. 4th Ed. 770, 823; *Farquhar* v. *City of Toronto*, 12 Grant, 186; L. R. Digest, 1122; see also notes to sections 124 and 136.

(*w*) For the authorities on the subject of fraud on creditors, we refer to Kerr on Fraud, 144-157; L. R. Digest, 957; Rob. & Jos. Digest, 1584, and titles there mentioned; Snell's Equity; Fisher's Digest, 940 and 3913: Add. on Cont. 7th Ed. 199; and Leake on Cont., title, "Fraud on Creditors."

(*x*) The same fees would be allowable as to a witness: see the Tariff.

Judge may postpone or adjourn proceedings.

145. The Judge may postpone or adjourn from time to time, (*y*) the hearing and other proceedings in all garnishee cases, to allow time for giving omitted notices of defence, or to produce further evidence, or for any other purpose; and may require service on, and notice to, other or additional parties, and may prescribe and devise forms for any proceeding, and may amend all summonses, memoranda, claims, accounts, notices and other papers and proceedings, and copies thereof, as justice may require (*z*). 32 V. c. 23, s. 16.

Debt attachment book.

146. The Clerks of the several Division Courts shall keep in their respective offices a Debt Attachment Book, according to the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts, in which shall be correctly entered the names of parties, the dates, statements, amounts and other (*a*) proceedings under this Act, as indicated by the said form, and copies of any entries made therein may be taken by any one on application free of charge. 32 V. c. 23, s. 20.

ARBITRATION.

Judge may order cause to be referred to arbitration.

147. The Judge may, in any case, with the consent of both parties (*b*) to the suit, or of their agents, order the same, with or without other matters in dispute between such

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(*y*) As often as he pleases: see *Neilson* v. *Jarvis*, 13 C. P. 176. This discretion should only be exercised "according to the rules of reason and justice, not private opinion; according to law, and not humor; it is to be, not arbitrary, vague and fanciful, but legal and regular:" Maxwell on Statutes, 100.

(*z*) Where justice requires it, the Judge has power in garnishee proceedings to grant a new trial *after* fourteen days: *McLean* v. *McLeod*, 5 P. R. 467. Very extensive powers are conferred by this section, but should be used by a Judge "in the honest and *bona fide* exercise of his own judgment:" *Macbeth* v. *Ashley*, L. R. 2 Scotch App. 360, *per* Lord Selborne.

(*a*) The names of all parties and other particulars should be entered exactly as in the suit: see Form 6.

(*b*) There is no power in the Division Court, such as exists under the C. L. P. Act, to compulsorily refer any cause to arbitration. *Consent* must be given, either by parties themselves or those who represent them. It may be laid down generally that all suits the subject of Division Court jurisdiction may be referred to arbitration: see Russell on Awards, 3rd Ed. 1–10. "Every one capable of making a disposition or release of his right can make a submission to an award" (*Ib.* 14.); but "persons that cannot contract cannot submit to arbitration:" *Ib.* Wherever a married woman has the right under our statute to sue, she can be a party to the reference of that suit to arbitration, and probably any other matters

parties, being within the jurisdiction of the Court, to be

that she might have the right to sue for: see Russell, 15. It is submitted that a husband would have no power to refer matters to arbitration for which an action could be maintained by his wife, except as her agent: *Ib.* 16. An infant cannot refer; but if he should do so, it is like most of his contracts, the subject of ratification when he comes of age: *Ib.* 18. A partner cannot bind his co-partner by reference: (*French et al.* v. *Weir*, 17 U. C. R. 245); and the power to sue does not give a power to refer (Russell, 18 and 19); and in the case of partners all must be bound by a reference, otherwise none are bound: *Ib.* 19. Corporations can refer, but it must be the act of the corporate body: *Ib.* 20. An interested party may be added by consent, and, on that being done, the award would be binding on him: *Ib.* 21. An agent duly authorized has authority to refer; so also has the assignee of a contract or a debt: *Ib.* 23. An Attorney has an implied authority to refer a cause to arbitration (*Ib.* 24); and in order to bind a corporation, it is not necessary that his retainer should be under seal: *Fariell* v. *Eastern Counties Railway Co.*, 2 Ex. 344. Counsel has the power to refer (*Wilson* v. *The Corporation of the United Counties of Huron and Bruce*, 11 C. P. 548), and probably even against the wish of his client, unless the client's dissent were communicated to the opposite party: *Strauss* v. *Francis*, L. R. 1 Q. B. 379; *King* v. *Pinsonealt*, L. R. 6 P. C. 245; Russell, 26 and 27. "An executor or administrator may, as such, submit to arbitration matters relating to the estate of the deceased; but (it is said) if the arbitrator does not award as much as he would be entitled to at law, it will be a *devastavit* for the residue:" Russell, 28. "It amounts to an admission of assets:" *Ib.* 29. "Matters may be referred to arbitration in any manner that expresses the agreement of the parties to be bound by the decision of the person chosen to determine the matters in controversy:" *Ib.* 37. A submission by word of mouth is generally binding; but, like all contracts of a like character, its exact import is often difficult of proof and the subject of much contradiction: Russell, 46. So also is an agreement not under seal; also by bond or deed: *Ib.* 46, 50. As to referring future disputes to arbitration, see *Pegg* v. *Nasmith et al.*, 28 C. P. 330; *London Tramways Company* v. *Bailey*, 3 Q. B. D. 217; Russell, 58, 65. A submission of reference is not amendable without consent of parties, except in furtherance of the agreement: *Ib.* 77. It cannot be altered to allow a set-off: *Ashworth* v. *Heathcote*, 6 Bing. 596; *Morgan* v. *Tarte*, 11 Ex. 82; but see *Bustros* v. *Lenders*, L. R. 6 C. P. 259, and *Vanderbyl* v. *M'Kenna*, L. R. 3 C. P. 252. The submission operates as a stay of proceedings: Russell, 82. It also discharges sureties in replevin if without their consent: *Ib.* 83. *Burke* v. *Glover*, 21 U. C. R. 294. Any person may be an arbitrator, even idiots, lunatics, infants, and married women: Russell, 102. Acceptance of the position is necessary to the completeness of the appointment: *Ringland* v. *Lowndes*, 15 C. B. N. S. 173. A party interested cannot properly be an arbitrator, unless known to both parties beforehand: Russell, 103. An arbitrator must be incorrupt, and taking money for arbitrator's charges of one of the parties, before award made or bill delivered, invalidates award: *Ib.* 106. He must not purchase any claims in dispute, and must be impartial. Any private agreement between the arbitrator and a party, respecting the subject of reference intended to be considered in the award, is objectionable: *Ib.* 107. An arbitrator usually stands in the place of Judge and jury. He is a judge of law and fact, and he should endeavour to arrive at his conclusion upon the same rules and principles which would have actuated the tribunals for which he is substituted in coming to a decision: Russell, 108. He should look at the rights of the parties, not only in a legal light, but according to the principles of equity: *Ib.* 109. When the award must, by the submission, be made within a given time, it cannot be made afterwards, unless the time is duly extended; and for that purpose a Judge would have power to do so, even after the time fixed had expired: *Denton* v. *Strong*, L. R. 9 Q. B. 117.

referred to arbitration to such person or persons, and in such

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Where submission is to three arbitrators, an award made by two is good, unless the submission calls for a unanimous decision: *Province of Ontario* v. *Quebec Privy Council* (not yet reported). As a rule, after an award is made, the arbitrator is *functus officii*: *Mordue* v. *Palmer*, L. R. 6 Ch. 22. Unless power is given to enlarge, an arbitrator has no power to do so: Russell, 130. And if power is given, it must be done within the time limited for making award: Russell, 131. Unless special power be given to deliver award afterwards, the death of one of the parties revokes submission: *Ib.* The enlargement must be made according to the submission, and by all the arbitrators together: Russell, 132. The submission usually provides for doing so by endorsement; but no particular form is necessary: *Ib.* 132, 133. A consent to an enlargement after time for making award expired amounts to a new submission: *Ib.* 134; but see *Dunstan* v. *Norton*, 13 L. T. N. S. 722. An enlargement of the time for making award, without the consent of a surety to the submission, will discharge him: *Ib.* 136. After the arbitrator has accepted the reference, he should grant an appointment of the time and place of meeting; and, unless both parties have sufficient notice of it, he cannot properly proceed with the reference: *In re Potter* v. *Knapp*, 5 P. R. 197. The attendance of witnesses can be enforced by a subpœna issued from the Court: see section 95.

It is the duty of the arbitrator to hear *all* the evidence, and that too when both parties have had an opportunity of being present; for if evidence is taken in the absence of either one, and not afterwards waived, the award would be bad: *Thomas* v. *Morris*, 16 L. T. N. S. 398; Russell, 180, 186. Or if secret conversations on the subject matter of the reference take place with one of the parties (*Re Lawson and Hutchinson*, 19 Grant, 84; *Pardee* v. *Lloyd*, Ch. (not yet reported), the arbitrator should take notes of the evidence: Russell, 180. If a party refuses or neglects to attend on due notice, or refuses to acknowledge the authority of the arbitrator, then the arbitrator may proceed *ex parte*: but, as a precaution, peremptory notice is frequently given as well: *Ib.* 189; see also *In re Potter* v. *Knapp*, 5 P. R. 197; *Ward* v. *McAlpine*, 25 C. P. 119. The arbitrator should observe the rules of evidence; but if he does not do so, yet the award cannot be impeached unless it amounts to misconduct of the arbitrator: Rus. 190; *Re Grant* v. *Eastwood*, 22 Grant, 563. An arbitrator cannot be *compelled* to make an award: Russell, 193. If arbitrator has acted wrongly, the Court will sometimes revoke submission before award made, but more generally will give directions: *Ib.* An arbitrator cannot delegate his authority, but he may adopt the opinion of another, and has power to call in a valuer (*Gray* v. *Wilson*, L. R. 1 C. P. 50); or, if a layman, may call in an Attorney or accountant: Russell, 196, 198. He should not, however, adopt an opinion he considers wrong: *Ib.* He may consult counsel on a point of law: *Ib.* 200. If two arbitrators appointed, they must concur in the appointment of an umpire, or third arbitrator: *Re Hopper*, L. R. 2 Q. B. 367. Each arbitrator must act, and all must act together; but one may adopt the opinion of another; they must all sign the award together: Rus. 204, 207; R. & J. Digest, 140. As an umpire is very seldom appointed in our arbitrations in this Province, a general reference to authority is all that is considered necessary: see Russell, 211 to 231. The award must follow the submission, and if it be silent as to form, it may be by parol; but this is objectionable, it should be in writing: *Ib.* 233. It is not desirable that the award should be drawn up by the Attorney of either party: *Manley* v. *Anderson*, 2 P. R. 354; *Underwood* v. *The Bedford and Cambridge Railway Company*, 11 C. B. N. S. 442. When the award is made, notice of it should be given to the parties: Russell, 235. The arbitrator may hold award till payment of his fees: *Ib.* 236. Any words expressing a decision is an award; no recitals are necessary, but advisable; but a false recital does not vitiate it: *Ib.* 243. The award cannot be made in parts; it must be entire: *Ib.* 245.

manner and on such terms as he thinks reasonable and just. ×
C. S. U. C. c. 19, s. 109.

"The arbitrator must be careful to see that his award is a final decision on all matters requiring his determination:" *Ib.* 246. If matters within the scope of the reference, but not brought to the notice of the arbitrator, yet the award is good: *Rees* v. *Waters*, 16 M. & W. 263. If one matter is left undecided, the whole award is bad: Russell, 248. An award of mutual releases is a decision of all matters: *Ib.* 254. An intendment is made in favour of an award, and more especially where it is made "of and concerning the premises:" *Jewell* v. *Christie*, L. R. 2 C. P. 296. The general finding is presumed final: *In re Whitworth* v. *Hulse*, L. R. 1 Ex. 251. An award in the alternative is sufficiently final if either alternative is certain: Russell, 265. An arbitrator cannot reserve any part of his authority any more than he can delegate it (*Ib.* 266), provided his reservation is of a judicial function. He may reserve or delegate a merely *ministerial* duty: *Thorp* v. *Cole*, 2 C. M. & R. 367; *Harrington* v. *Edison*, 11 U. C. R. 114. The award must be certain to a common intent, but it need not name any time for doing any act, nor contain a date: Russell, 271. The precise amount to be paid must be fixed: *Ib.* 273; Rob. & Jos. Digest, 128. The exact amount of costs need not be ascertained: Russell, 275. An arbitrator awarding security must specify it: *Ib.* 279. An award must be possible and consistent: *Ib.* 284. An award will not be set aside on the ground of mistake on the part of the arbitrator, unless it amounts to misconduct: *Ib.* 292; *Penchen* v. *Lamb*, 25 C. P. 588; *Re Grant* v. *Eastwood*, 22 Grant, 563. As to statements made by the arbitrator after his award as to his mistake, see Russell, page 294. An award, although bad in part, may be good as to those parts well decided and separable: *Ib.* 307. Disposing of the cause without deciding it is sufficient, but not satisfactory: *Ib.* 320. An award of nonsuit is not a good determination of the cause, for in its nature it is not final: *Knight* v. *Burton*, 1 Salk. 75; *Wild* v. *Holt*, 9 M. & W. 161. The arbitrator must decide the cause when costs abide the event: Russell, 321. If an arbitrator find for plaintiff, he should award damages: *Ib.* 339. The arbitrator has an implied power over the costs of the cause; but the costs of reference and award must be provided for in the reference: *Ib.* 354. If an award is silent as to costs, costs of the cause follow the event: *Ib.* 357. An arbitrator should not award a fee to himself (*Ib.* 361), nor fix it: *McCulloch* v. *White*, 33 U. C. R. 331. Of the general powers of an arbitrator, see Russell, p. 383 to 402. A direction to pay money to a stranger is void, unless as trustee for one of the parties (*Ib.* 415); but to a party *or* his Attorney is good: *Hare* v. *Fleay*, 11 C. B. 472. So a direction to a stranger to do an act is void: *Ib.* 418. So also is any direction affecting his property: *Ib.* 420. It is doubtful if in Division Courts an award can be referred back. The right to do so is conferred by statute. *Quaere:* Would section 244 apply to such a case? As to referring back awards, see Russell, 444, 455; *Ross* v. *The Corporation of Bruce*, 21 C. P. 548. An arbitrator's fees are regulated by Rev. Statutes, cap. 64. Although an award cannot be impeached for the omission to decide any matter within the scope of the reference, but not brought under the notice of the arbitrator, yet no action can be brought for any matter within the scope of the submission, whether brought before the arbitrator or not. Parties should therefore be careful in bringing forward, at the time of the reference, every claim within the submission on which they intend to insist: *Dunn* v. *Murray*, 9 B. & C. 780. As to the performance of an award, see Russell, 491. An action may be brought (*Lievesley* v. *Gilmore*, L. R. 1 C. P. 570), or judgment entered up under section 149 on award: Russell, 499. In proving an award, in an action *on it*, the submission by *all* parties must be proved: *Ib.* 529; *Ferrer* v. *Oven*, 7 B. & C. 427. An award is no evidence against strangers: *Evans* v. *Rees*, 10 A. & E. 151. As to the grounds for motion to set aside an award, see Russell, 646; *Re Grant* v. *Eastwood*, 22 Grant, 563; *Ward* v. *McAlpine*, 25 C. P.

× See addition in Cause 139 of 1886

Only revocable with Judge's assent.

148. Such reference shall not be revocable (*c*) by either party, except with the consent of the Judge. C. S. U. C. c. 19, s. 110.

119; *Peuchen* v. *Lamb*, 25 C. P. 588. Arbitrators are not bound by the same strict rule as Judges are in a Court of law: *Glen* v. *Grand Trunk Railway Company*, 2 P. R. 377. They cannot determine the questions referred by correspondence: *Jekyll* v. *Wade*, 8 Grant, 363. If costs awarded where there is no power to do so, and are separable, the award is good as to part: *Jones* v. *Reid*, 1 P. R. 247. Differences in law as well as fact are the subject of reference: *Randegger* v. *Holmes*, L. R. 1 C. P. 679. Parties may waive irregularities in the proceedings by appearing before the arbitrator: *Ringland* v. *Lowndes*, 15 C. B. N. S. 173. So also may they waive the taking of evidence under oath (*Wakefield* v. *Llanelly R. and Dock Co.* 34 Beav. 245; 12 L. T. N. S. 509, s. c.); or the objection that evidence was taken in the absence of one of the parties: *Thomas* v. *Morris*, 16 L. T. N. S. 398. If an arbitrator admits his mistake, the award may be set aside (*In re Dare Valley Railway Company*, L. R. 6 Eq. 429; see also *Flynn* v. *Robertson*, L. R. 4 C. P. 324); and he can be examined on that point: *Buccleuch* (*Duke*) v. *Metropolitan Board of Works*, L. R. 3 Ex. 306. Parties may withdraw one point and the finding on the others is good: *Lawrence* v. *Bristol and North Somerset Railway Company*, 16 L. T. N. S. 326. An arbitrator enters on the reference, not when he accepts the office, but when he commences with the reference by both parties being before him: *Baker* v. *Stephens*, L. R. 2 Q. B. 523. A waiver of irregularity must be an intentional act with knowledge: *Darnley* (*Earl*) v. *London, Chatham and Dover Railway Company*, L. R. 2 H. L. 43. The entertainment of arbitrators or umpire is improper: *Re Hopper*, L. R. 2 Q. B. 367. An umpire must hear all the evidence himself: *Morden* v. *Widdifield*, 6 P. R. 179. The appointment of an umpire is a judicial act and must be done together, yet the signing an appointment previously made is not: *Re Hopper*, L. R. 2 Q. B. 367. As to the meaning of the term "costs to abide the event," see *Langridge* v. *Campbell*, 2 Ex. D. 281; *Garnet* v. *Bradley*, 2 Ex. D. 349, was reversed in H. of L. For further reference on this subject, see Fisher's Digest, 188 to 325, and 9157 to 9171; R. & J. Digest, 114 to 187; Roscoe's N. P. 470 to 473; Arch. & Lush's Pract., title, "Arbitration," 5 L. J. N. S. 225.

(*c*) At Common Law a submission to arbitration was revocable even if the parties had declared in the submission it should not be: Russell on Awards, 140. But not if by order of reference: *Harding* v. *Wickham*, 4 L. T. N. S. 738; 2 J. & Hem. 676, s.c. The application to revoke must be made before award made (*Phipps* v. *Ingram*, 3 Dowl. 669); and by summons to shew cause, and after full opportunity to the opposite party to be heard: *Clarke* v. *Stocken*, 5 Dowl. 32; Russell, 146. The discretion to revoke will be exercised most cautiously and sparingly: *Scott* v. *Van Sandau*, 1 Q. B. 102. In the latter case, Lord Denman says, the revocation of submission "ought to be exercised in the most sparing and cautious manner, lest an agreement to refer, upon which all might reasonably hope for a speedy end of strife, should only open the floodgates for multiplied expenses and interminable delays." See also *Re Wright and the Corporation of the County of Grey*, 8 U. C. L. J. 104. Where one of the parties takes proceedings in another Court for the same cause, it is a ground for the application by the other: *Woodcroft* v. *Jones*, *In re*, 9 Dowl. 538; see also *Wilson* v. *Morrell*, 15 C. B. 720; *Alder* v. *Parke*, 5 Dowl. 16; Russell, 146. An arbitrator's clearly mistaking the law is a good ground for applying: *Faviell* v. *Eastern Counties Railway Co.*, 2 Ex. 344. If one party become insolvent, the other might probably get leave to revoke the submission: *Gaffney* v. *Killen*, 12 Irish C. L. R. App. xxv; but see *Hemsworth* v. *Brian*, 1 C. B. 131. If evidence is taken behind the back of the other, even though an

149. The award of the Arbitrator or Arbitrators or Umpire shall be entered as the judgment in the cause, and shall be as binding and effectual (*d*) as if given by the Judge. C. S. U. C. c. 19, s. 111.

Award to be entered as judgment.

offer was made to rehear the witness, the submission will be revoked: *Drew* v. *Drew*, H. of L. March 8, 1855; *In re Potter and Knapp*, 6 L. J. N. S. 125; *In re Lawson* v. *Hutchinson*, 19 Grant, 84. Corruption in an arbitrator is good cause (*Drew* v. *Leburn*, 2 Macq. H. L. Cas. 1; *Re Grant* v. *Eastwood*, 22 Grant, 563); or gross misconduct (*Ross* v. *The Corporation of the County of Bruce*, 21 C. P. 548; *Malmesbury Railway Co.* v. *Budd*, 2 Ch. D. 113); or that an umpire or third arbitrator was appointed by lot: *European and American Steam Shipping Co.* v. *Crosskey*, 8 C. B. N. S. 397; but see *Re Hopper*, L. R. 2 Q. B. 367. If the Judge should be satisfied that the arbitrator only erred by mistake, and that he would obey the direction of the Judge, the reference would not be revoked: *Hart* v. *Duke*, 9 Jur. N. S. 119; 32 L. J. Q. B. 55. Questions are sometimes not decided, leaving parties to bring up the matter in another way: *Taylor* v. *Shuttleworth*, 8 Dowl 281; *Tayler* v. *Marling*, 2 M. & G. 55. At Common Law, marriage of a female revoked the submission (Russell, 152); but it is submitted it does not do so now in this Province: Rev. Stat. 1166. Where there are two arbitrators and an umpire, the authority of the arbitrators ceases on their disagreement, and that of the umpire only then commences: *Tunno* v. *Bird*, *In re*, 5 B. & Ad. 488. In Division Courts does the death of the arbitrator, or one, if more, revoke the submission? *Quære:* see Russell, 153. Generally the death of the parties to the submission before the award, except under order of reference, revokes the authority of the arbitrator (*Tyler* v. *Jones*, 3 B. & C. 144), unless the submission contains a clause to the contrary (*M'Dougal* v. *Robertson*, 4 Bing. 435); but the better opinion is that where there are several parties on one side, the death of one of them does not vacate the submission (Russell, 155; *In re Hare & Milne*, 6 Bing. N. C. 158); nor does it do so where the duty of the arbitrator is not to make an award, but merely to state a case: *James* v. *Crane*, 3 D. & L. 661. Where an infant had entered into a submission, his death was *held* to have revoked it as against his guardian and trustees: *Bristow* v. *Binns*, 3 D. & R. 184. Equity cannot give any relief in case of death: *Blundell* v. *Brettargh*, 17 Vesey, 232. As to the form of a clause, allowing a delivery of the award after death of either party and its effect, see Russell, 158; *Prior* v. *Hembrow*, 8 M. & W. 873; *Hare and Milne, In re*, 6 Bing. N. C. 158. The executors are bound by such a clause: *Ib.* A probability that the arbitrator will give more than one of the parties considered right is no cause of revocation: *Great Western Railway Co.* v. *Miller*, 12 U. C. R. 654. The submission was revoked where a party appointed one who formerly acted as his Attorney, though not in the suit: *Tully* v. *Chamberlain*, 9 L. J. N. S. 237. Where arbitrators are about to allow improper charges as part of their award, application can be made to revoke: *Carveth* v. *Fortune*, 12 C. P. 564. Submission cannot be revoked after award made: *Phipps* v. *Ingram*, 3 Dowl. 669. Generally, as to the revocation of a submission, see *Thomson* v. *Anderson*, L. R. 9 Eq. 523; *Re Rouse and Meier*, L. R. 6 C. P. 212; *Randell* v. *Thompson*, 1 Q. B. D. 748; *Cooper* v. *Johnson*, 2 B. & Ald. 394; *Tyler* v. *Jones*, 3 B. & C. 144; *Drury, In re*, 38 L. J. Ch. 278; 19 L. T. N. S. 763, s. c.; Rob. & Jos. Digest, 122; Fisher's Digest, 208; sec. 149, and notes; *Law* v. *Garrett*, 8 Ch. D. 26; *Bedwell* v. *Wood*, 2 Q. B. D. 626.

(*d*) The Arbitrator takes the place of the Judge, and if the award is good on its face, the judgment itself cannot be impeached: Russell on Awards, 677, and cases there cited; also R. & J's. Digest, 172. But if the award itself is attacked, the proceedings must go back to that; as to which, see notes to section 150.

Judge may set aside award.

150. The Judge, on application to him within fourteen days after the entry of such award, (*e*) may, if he thinks fit, set aside (*f*) the award, or may, with the consent of both parties, revoke the reference and order another reference to be made in the manner aforesaid. C. S. U. C. c. 19, s. 112.

Arbitrators may also administer oaths.

151. Any of such Arbitrators may administer an oath or affirmation (*g*) to the parties, and to all other persons examined before such arbitrator. C. S. U. C. c. 19, s. 113.

CONFESSIONS OF DEBT.

Clerks and Bailiffs may take confessions.

152. Any Bailiff or Clerk, before or after suit commenced, may take a confession (*h*) or acknowledgment of debt from any debtor or defendant desirous of executing the same,

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(*e*) In the calculation of time the day of entry is excluded : see notes to sec. 107. This refers to the entry by the clerk : see section 37.

(*f*) An award will be set aside where the conduct of the arbitrator is corrupt or irregular : Russell on Awards, 646 ; *Ross* v. *The Corporation of the County of Bruce*, 21 C. P. 548 ; *In re Lawson and Hutchinson*, 19 Grant, 84 ; *Ward* v. *McAlpine*, 25 C. P. 119 ; *Penchen* v. *Lamb*, 25 C. P. 588. Or where there has been fraud or excess of jurisdiction, or the arbitrators making the award admit the mistake : *Re Grant* v. *Eastwood*, 22 Grant, 563 ; *Dinn* v. *Blake*, L. R. 10 C. P. 388. Also where the award is not final (Russell 650), or is uncertain (*Ib.* 652) ; or where the arbitrator has exceeded his authority (*Ib.* 653) ; or where a party is "guilty of fraudulent concealment of matters which he ought to have disclosed ; or if he wilfully mislead or deceive the arbitrator, the award may be set aside :" *Ib.* 654. It is no ground for setting aside an award that a party has been surprised by an unexpected case set up by his opponent on the reference which he believes not to be true, if he did not apply to the arbitrator to postpone making his award, and to give time for inquiry : *Solomon* v. *Solomon*, 4 H. & N. 858 (Amer. Ed.) Perjury or incorrect statement of a witness is no ground for setting aside an award (Russell 656) ; or because it is against evidence : *Tanner* v. *Sewery*, 27 C. P. 53 ; see also Arch. Prac., "Setting aside Award," 12th Ed. 1632 ; Lush's Pract. 1059, and references given in notes to section 147 of this Act. Should the Judge refuse to set aside an award, his decision could not be reviewed : *Mayer* v. *Farmer*, 3 Ex. D. 235. On the subject generally, see Fisher's Digest, 292 ; L. R. Digest, 200 ; R. & J.'s Digest, 158. As to setting aside fence-viewer's award, see *In re Cameron and Kerr*, 25 U. C. R. 533 ; *In re Roberts and Holland*, 7 L. J. N. S. 241 ; *Riddell* v. *McKay*, 13 L. J. N. S. 92 ; R. & J.'s Digest, 1518.

(*g*) As to who may affirm, see Rev. Stat. page 778. For form of affirmation, see Form No. 110 (*d*).

(*h*) When taken before suit commenced, particulars of claim as full as are required for special summons must be shewn by the confession, or attached to it : Rule 131, section 79, and Rule 3. Where some of defendants served with special summons confess and others do not, as to the duty of the Clerk, see Rule 26. And where some served with special summons do not defend and others do, those not defending are taken to have *confessed* the plaintiff's claim : Rule 24. If a defendant served with a special summons does not file a disputing notice, but gives a confession, the plaintiff can elect to take proceedings on

which confession or acknowledgment shall be in writing and witnessed by the Bailiff or Clerk at the time of the taking thereof; and upon the production of such confession or acknowledgment to the Judge, and its being proved by the oath of such Bailiff or Clerk, judgment may be entered thereon. C. S. U. C. c. 19, s. 117.

Affidavit required in such cases.

153. Such oath or affidavit shall state that the party making it has not received, and that he will not receive, anything from the plaintiff or defendant, or any other person, except his lawful fees, for taking such confession or acknowledgment, and that he has no interest (*i*) in the demand sought to be recovered. C. S. U. C. c. 19, s. 118.

COSTS.

Judge may apportion costs.

154. The costs of any action or proceeding (*k*) not otherwise provided for, shall be paid by or apportioned between the parties in such manner as the Judge thinks fit, (*l*) and

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the confession or otherwise: Rule 30. As to the form of a confession after suit, see form 104. There is no form of confession before suit, but the above can easily be adapted. One partner cannot give a confession for the firm without special authority (*Huff* v. *Cameron et al.* 1 P. R. 255; *Hambidge* v. *De La Croue*, 3 C. B. 742); but if the non-executing partner comes to know of it, and allows proceedings to be taken upon it, and delays for eighteen months before applying to set it aside, a judgment upon it will not be disturbed: *Brown* v. *Cinqmars*, 2 P. R. 205. A confession could be given by the Attorney of the defendant (*Richmond* v. *Proctor*, 3 U. C. L. J. 202); but he had better attach his authority to the confession. One of several executors has no power to bind the others by giving a confession: *Commercial Bank of Canada* v. *Wadruff et al.* 21 U. C. R. 602. A plaintiff giving time for a debt may take confession as additional security: *Parker* v. *Roberts*, 3 U. C. R. 114; *Potter* v. *Pickle*, 2 P. R. 391. There should be an affidavit of execution (Form 108); but where judgment is entered on a confession without affidavit, it would not be set aside, but the affidavit would be allowed to be filed afterwards: *Potter* v. *Pickle*, 2 P. R. 391. A confession given by the maker of a note payable immediately is no defence to an action against the endorser: *Bank of Montreal* v. *Douglas*, 17 U. C. R. 208. If one of two defendants dies after confession and before judgment, leave would be given to enter judgment against the survivor: *Nichall* v. *Cartwright*, Tay. 464; see letter at page 313 of 7 U. C. L. J. on Confession; R. & J.'s Digest, 671; Fisher's Digest, 8525.

(*i*) As neither Clerks nor Bailiffs can sue in their own Courts, neither should they have any "interest" in the suits of others.

(*k*) See notes to section 49.

(*l*) It is submitted that the general rule that costs follow the event is the best to observe. Suing without rendering a bill, or otherwise acting vexatiously, would probably be found a good reason for the exception. Although the Judge has full power over costs, he would only exercise it upon some established

in cases where the plaintiff does not appear in person or by some person on his behalf, or appearing does not make proof of his demand to the satisfaction of the Judge, he may award to the defendant such costs and such further sum of money, (*m*) by way of satisfaction for his trouble and attendance, as he thinks proper, to be recovered as provided for in other cases under this Act; and in default of any special direction, the costs shall abide the event of the action, and execution may issue for the recovery thereof in like manner as for any debt adjudged in the Court. C. S. U. C. c. 19, s. 114.

PROCEEDINGS NOT TO BE SET ASIDE FOR MATTER OF FORM.

Judgments not to be reversed for want of form.

155. No order, verdict, judgment, or other proceeding had or made concerning any matter or thing under this Act, shall be quashed or vacated for any matter of form (*n*). C. S. U. C. c. 19, s. 191.

JUDGMENT (*o*) AND EXECUTION.

Where money not paid,

156. In case the Judge makes an order for the payment of money, and in case of default of payment of the whole or

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principle of law or practice: Maxwell on Statutes, 100. In the absence of any special direction, costs abide the event under this section.

(*m*) Since the statute allowing parties to give evidence on their own behalf, the rule has been to tax to them witness fees on their shewing that they attended *expressly* to give evidence on their own behalf, and not to superintend the cause (*Howes* v. *Barber*, 18 Q. B. 588); but should the defendant not be a witness, then the Judge could under this section make him a reasonable allowance "for his trouble and attendance." Such allowance could be made even if he had been a witness: see also notes to the tariff under the head of "Witness Fees."

(*n*) Though an adjudication be informal, it will be upheld if it be a substantial decision of the cause: *Oliphant* v. *Leslie et al.*, 24 U. C. R. 398; see also *Crawford* v. *Beattie*, 39 U. C. R. 28.

(*o*) By judgment is here meant that final judicial determination of a cause which concludes parties and privies to it, and prevents them litigating the subject matter of it either in the Division Court or in any other: *Gibbs* v. *Croikshank*, L. R. 8 C. P. 454; *Flitters* v. *Allfrey*, L. R. 10 C. P. 29; *Austin* v. *Mills*, 9 Ex. 288; *Dover* v. *Child*, 1 Ex. D. 172; *Bullock* v. *Dunlap*, 2 Ex. D. 43; see note (*l*), section 7. So long as a judgment stands, if regularly entered or proceedings duly taken, it estops either party from denying its correctness, or of the execution founded upon it (*Huffer* v. *Allen*, L. R. 2 Ex. 15; *Ventris* v. *Brown et al.* 22 C. P. 345); but if obtained by covin and collusion, it is no bar, and does not affect third parties: *Girdlestone* v. *Brighton Aquarium Co.*, 3 Ex. D.

of any part thereof, the party in whose favour such order has been made, may sue out execution (*p*) against the goods and chattels of the party in default; and thereupon the Clerk, pursuant to order, execution to issue.

137. Where no irreparable wrong will be done to a plaintiff who has obtained judgment by default, lapse of time is no bar to an application to set it aside: *Atwood* v. *Chichester* 3 Q. B. D. 722. No action can be brought in a Superior or County Court on the judgment of a Division Court: *McPherson* v. *Forrester*, 11 U. C. R. 362; *Donnelly et al.* v. *Stewart*, 25 U. C. R. 398. A Division Court judgment can be set-off against a Superior Court judgment: *Robinson* v. *Shields*, 2 L. J. N. S. 45. A judgment can be discharged by proceedings in insolvency followed by an order of discharge, but the name of the judgment creditor must be duly scheduled in the list or supplementary list of creditors, as required by the Insolvent Act: see *King* v. *Smith*, 19 C. P. 319; *Farrell* v. *O'Neill*, 22 C. P. 31; *Palmer* v. *Baker*, 22 C. P. 59; *Cameron* v. *Holland*, 29 U. C. R. 506. If the discharge is obtained by fraud, it is void: *Golloghy* v. *Graham*, 22 C. P. 226; *McLean* v. *McLellan*, 29 U. C. R. 548. A deed of composition under the Insolvent Act is also a discharge, *if duly confirmed* (*Graham* v. *McKerman*, 42 U. C. R. 368), or if the creditor has estopped himself from questioning it: *McMaster et al.* v. *King*, 42 U. C. R. 409; *Campbell* v. *Im Thurn*, 1 C. P. D. 267; *Ex parte Lang, In re Lang*, 5 Ch. D. 971. But if obtained by fraud, it too is void: *Thompson* v. *Rutherford*, 27 U. C. R. 205. As to the effect of deeds of composition generally on judgment and other debts, see *Fowler* v. *Perrin et al.* 16 C. P. 258; *Marten* v. *Brunell et al.* 4 P. R. 229; *Shaw* v. *Massie*, 21 C. P. 266; *Dredge* v. *Watson*, 33 U. C. R. 165; *Allan* v. *Garratt et al.* 30 U. C. R. 165; *In re Lawson et al.* 5 L. J. N. S. 232; *Green* v. *Swan*, 22 C. P. 307; *Davidson* v. *Perry*, 23 C. P. 346; *Buchanan* v. *Smith*, 17 Grant, 208; 18 Grant, 41, s. c.; *Nicholson* v. *Gunn*, 35 U. C. R. 7. If proceedings are taken on a judgment after a discharge in insolvency, or confirmation of deed of composition, the Judge will set aside the execution with costs: *Dickinson* v. *Bunnell*, 19 C. P. 216; *Davidson* v. *Perry*, 23 C. P. 346. The Insolvent Act applies to Division Court judgments: *Patterson* v. *McCarthy*, 35 U. C. R. 14. When a promissory note in the hands of endorsee is not discharged, see *Ex parte Mathewes, In re Angel*, L. R. 10 Ch. 304.

(*p*) The endorsement of execution for a larger amount than is actually due is not *per se* an injury to the plaintiff; it must be shewn that more goods were seized than were necessary or reasonable to satisfy what was really due; and it should be shewn that the acts complained of were done maliciously and without reasonable or probable cause: *Barber* v. *Daniell*, 12 C. P. 68; see also *Saxon* v. *Castle*, 6 A. & E. 652; *Tancred* v. *Leyland*, 16 Q. B. 669; *Churchill* v. *Siggers*, 3 E. & B. 937. But allegation and proof in a similar case that execution was issued wrongfully and maliciously, and without reasonable and probable cause, will support an action for the injury: *Dewar et al.* v. *Carrique*, 14 C. P. 137; *Gilding* v. *Eyre*, 10 C. B. N. S. 592.

"Execution" sometimes means the writ itself, and what is done under it: *McDonald* v. *Cleland*, 6 P. R. 293. As to a Bailiff's duties under an execution, see 2 U. C. L. J. 202, 221. "Levying" on execution sometimes means *seizure and sale*: *Ross* v. *Grange*, 25 U. C. R. 396; *Buchanan et al.* v. *Frank*, 15 C. P. page 198.

Execution should not be issued by the Clerk without an express order from the party entitled to it (4 U. C. L. J. 203 and 251); or, it is submitted, where from a course of business the authority to issue it can reasonably be inferred. Executions should be executed in the order in which the Bailiff receives them (4 U. C. L. J. 251), and the Bailiff should endorse on each the date of receipt (2 U. C. L. J. 203); but we differ from the opinion expressed in the pages of the Law Journal, just referred to, where it is said that, in the event of a number

at the request of the party prosecuting the order, shall issue

of executions coming into the Bailiff's hands at once, he should execute them in the order of the suit number. It is submitted that whether several executions against the same person are delivered into the Bailiff's hands at one time, or he receives them by post, that that execution should be first executed *which the Bailiff first sees.* Seizure should be made and money paid over on all the executions according to their priority: *Huzlitt* v. *Hall*, 24 U. C. R. at page 486; *Rowe* v. *Jarvis*, 13 C. P. 495; *Bank of Montreal* v. *Munro*, 23 U. C. R. 414; *Dennis* v. *Whetham*, L. R. 9 Q. B. 345. There may be a distress for rent without actual seizure: *Cramer* v. *Mott*, L. R. 5 Q. B. 357. A Sheriff went to defendant's house with an execution, and merely produced the warrant, at the same time demanding debt, costs and poundage, which were paid under protest; it was *held* not to amount to a seizure so as to entitle the Sheriff to poundage: *Nash* v. *Dickenson*, L. R. 2 C. P. 252. But in *Bissicks* v. *Bath Colliery Co.*, 3 Ex. D. 174, it was *held* that where a Sheriff's officer in the execution of a warrant of *fi. fa.* went with another man to the debtor's house, shewed him the warrant, and demanded payment, and told him that in default of payment the man must remain in possession and further proceedings would be taken, the defendant then paid the sum demanded in the warrant, which included poundage and officer's fee, that there had been a seizure which entitled the Sheriff to poundage. As to what is an "actual seizure," see *Gladstone* v. *Padwick*, L. R. 6 Ex. 203. Money paid into Court is not liable to seizure under execution while in the hands of the officer of the Court (*Calverly* v. *Smith*, 3 U. C. L. J. 67; 4 U. C. L. J. 177); but it is submitted that a mortgage on real estate is: 5 U. C. L. J. 249. Fixtures in defendant's house cannot be sold under execution (*Winn* v. *Ingilby*, 5 B. & Ald. 625); nor where fixtures have been wrongfully severed by a tenant: *Farrant* v. *Thompson*, 5 B. & Ald. 826. But utensils fixed by the defendant for the purposes of his trade, such as coppers, vats, or the like, can be seized: *Ib.* So also can fixtures which may be moved by the tenant: Arch. Pract. 12th Ed. 655. A Bailiff should not purchase at a sale conducted by him: see section 176, and 10 U. C. L. J. 35. As to the sale and disposal of goods taken under execution, see 3 U. C. L. J. 83, 103, 159 and 160. If a Bailiff should conduct a sale negligently, and either party should suffer damage, he would be liable (*Wright* v. *Child*, L. R. 1 Ex. 358); but actual damage would have to be shewn: *Simson* v. *Farnham*, L. R. 7 Q. B. 175; *Hobson* v. *Thelluson*, L. R. 2 Q. B. 642.

As to the duties of a Bailiff on seizure, see 3 L. C. G. 49.

If the Judge does not give the defendant any time in which to pay the amount ordered, execution can be issued immediately: *Coolidge* v. *The Bank of Montreal*, 6 P. R. 73; *Smith* v. *Smith*, L. R. 9 Ex. 121. An execution should not be issued for the benefit of a stranger to the suit: *Gamble et al.* v. *Bussell*, 5 O. S. 339. An execution cannot issue in the name of a plaintiff's executor without revival (*Proctor* v. *Jarvis*, 15 U. C. R. 187); but, if issued, can be executed after the death of the plaintiff or defendant (*Rolt* v. *Mayor, &c., of Gravesend*, 7 C. B. 777; *Turner* v. *Patterson*, 13 C. P. 412; *Johnston et al.* v. *McKenna*, 3 P. R. 229), even if goods in the hands of the executor: *Smith* v. *Bernie*, 10 C. P. 243. An execution from a Division Court only binds goods from the time of seizure (*Culloden* v. *McDowell*, 17 U. C. R. 359); but as against a writ of *fi. fa.* in the hands of the Sheriff, that execution takes priority which was first in either the Sheriff's or Bailiff's hands, and not by the priority of the seizure: *McDougall* v. *Waddell*, 28 C. P. 191. This shews the necessity of the Bailiff's endorsing not only the day *but the hour* of receipt of execution, for in such cases a fraction of a day would be looked at: *Beekman* v. *Jarvis*, 3 U. C. R. 280; *Converse* v. *Michie*, 16 C. P. 167; see, however, *Whyte* v. *Treadwell*, 17 C. P. 488; *Evans* v. *Jones*, 3 H. & C. 423. Moneys, securities for money, and choses in action, are only bound from the time of actual seizure either by Sheriff or Bailiff: *McDowell*

under the seal of the Court a *fieri facias* to one of the Bailiffs

v. *McDowell*, 10 U. C. L. J. 48. A Bailiff could not seize or sell the equity of redemption in a vessel: *Scott* v. *Carreth et al.*, 20 U. C. R. 430. Under an execution against the chattels of a mortgagor, the Bailiff can seize the *corpus* of the mortgaged goods, so that he may expose them to view, although he can sell only the equity of redemption in them: see *Smith et al.* v. *Cobourg and Peterborough Railway Company*, 3 P. R. 113. But not where goods are *in the possession* of the mortgagee: *Watson* v. *Henderson et al.*, 25 C. P. 562; *Sinair et al.* v. *Fortune*, 18 U. C. R. 547. On an execution against one of two partners, the defendant's interest in the partnership property can be seized; but the right of property or possession of the other partner cannot be interfered with (*Orens* v. *Ball*, 1 App. R. 62, and cases there cited); and the purchaser would take the interest of the execution defendant as tenant in common of the goods: *Eddie* v. *Davidson*, 2 Dougl. 650; *Partridge* v. *McIntosh*, 1 Grant, 50; *Wilson et al.* v. *Vogt*, 24 U. C. R. 635; see also Rob. & Jos. Digest, 1421. Book debts cannot be seized under section 170: *McNaughton* v. *Webster*, 6 U. C. L. J. 17. Money made under an execution at the suit of one man cannot be retained by the Bailiff to meet another execution in his hands *against* the same man: *Sharpe* v. *Leitch*, 2 L. J. N. S. 132. Should farm stock be transferred by *A.* to *B.* on the terms that *A.* should be repaid by a greater specified number of the same kind at a certain time, and before that time an execution is placed in a Bailiff's hands against *B.*, it is submitted that not only would the stock which *B.* got from *A.*, but its increase, be seizable: see *Peers* v. *Carrall*, 19 U. C. R. 229; *The South Australian Insurance Company* v. *Randell*, L. R. 3 P. C. 101. The case put, which is one common in the country, is nothing more than a sale (see report of the last case at page 109; see also *Ex parte White, In re Nevill*, L. R. 6 Ch. 397); but if merely lent this would not be so: *Dillaree* v. *Doyle*, 43 U. C. R. 442. If a person buy an article from a tradesman, and afterwards see another article of the same kind belonging to the tradesman, which he prefers to the one purchased, and which he buys by delivering back the first one and paying an additional sum, but allows the article last purchased to remain an unreasonable time in the possession of the tradesman, it is liable to be seized on an execution against the latter: *Carruthers* v. *Reynolds*, 12 C. P. 596. One who fraudulently removes goods to prevent their seizure is liable to an action therefor: *Young* v. *Buchanan*, 6 C. P. 218; *Turner* v. *Patterson*, 13 C. P. 412. A person purchasing a crop of wheat at a Bailiff's sale might bring trespass against a person injuring or converting it: *Haydon* v. *Crawford*, 3 O. S. 583. It was *held* that a person's attending a Sheriff's sale and bidding on some of the goods did not estop him from suing the Sheriff, claiming the goods as his own: *Lines et al.* v. *Grange*, 12 U. C. R. 209. *Quære:* Would the principle of *Freeman* v. *Cooke*, 2 Ex 654, and *Loucks* v. *McSloy*, 29 C. P. 54, and that class of cases not apply? If in an execution and the endorsements the names of the plaintiffs and defendants are transposed throughout, it is clearly irregular: *Davidson* v. *Grange*, 5 P. R. 258. A sale may be made after the expiry of an execution if seizure took place while it was in force; but if no seizure made during that time, then the sale is void: *Doe Greenshields* v. *Garrow*, 5 U. C. R. 237; *Reynolds* v. *Streeter*, 3 P. R. 315; *Lee* v. *Howes*, 30 U. C. R. 292; *Hall* v. *Goslee et al.*, 15 C. P. 101. A seizure by a Bailiff before his removal from office on an execution then in force, would, it is submitted, sustain a sale by him after he had ceased to be Bailiff: *Doe Miller* v. *Tiffany*, 5 U. C. R. 79. It would be highly improper, if not a contempt of Court, for a Bailiff to make sale of goods after notice of insolvency: *In re Bryant*, 4 Ch. D. 98. There is no warranty of title at a Bailiff's sale (*Chapman* v. *Speller*, 14 Q. B. 621), unless the Bailiff expressly make one. It is different in the case of private parties: *Brown* v. *Cockburn*, 37 U. C. R. 592; *Wilson* v. *Mason*, 38 U. C. R. p. 24; but see *Cundy* v. *Lindsay*, 3 App. Cas. 459. The purchaser gets no better title than the execution debtor

of the Court, who by virtue thereof shall levy by distress

had; and if he had none, neither does the purchaser acquire any. Growing fruit cannot be seized: *Rodwell* v. *Phillips*, 9 M. & W. 505. As to execution generally, see Rob. & Jos. Digest, 1412, 1466; Fisher's Digest, 3828.

Abandonment and priority of execution.—On chattels being seized by the Sheriff, and afterwards, by direction of the plaintiff's Attorney, abandoned, it was *held* that the execution debtor could then sell and give a good title to the goods: *Gould* v. *White*, 4 O. S. 124. A chattel seized by the Sheriff, and lent by him before return of the writ, was *held* no abandonment: *Hamilton* v. *Bouck*, 5 O. S. 664. A Sheriff, having seized goods under an execution, took a bond for the delivery thereof when he required them, and allowed the debtor to remain in possession and carry on his business as before the seizure; and while the debtor so continued in possession, and after the return day of the writ had expired, a second execution at the suit of another creditor was received by the Sheriff; it was *held* that the second writ took precedence of the first: *Castle* v. *Rattan*, 4 C. P. 252. As remarked by Macaulay, C. J., at page 260, in delivering the judgment of the Court, "The Sheriff, in the absence of directions, acts upon his own responsibility; and if he adopts a course which conflicts with the rights of others, he may incur responsibility to the first execution creditor, or to the second; but he has no discretion to bond the goods to the debtor or suffer him to continue the possession or use of the goods and to prosecute his business with them as before, suspending and deferring the execution indefinitely, and until long after its return, without further acting upon it, and at the same time to interpose the expired writ between the writ of another creditor and the goods." After two ineffectual attempts by the Sheriff to sell certain articles, which he considered chattels, he left them where they were; the execution debtor removed and sold them. It was *held* that the seizure had not been abandoned, and that the Sheriff might retake them: *Walton et al.* v. *Jarvis*, 14 U. C. R. 640. Where the plaintiff's Attorney had ordered execution to be stayed, and afterwards telegraphed the Sheriff that he must act as he thought fit, it was *held* that this answer was an abandonment of the stay: *Boulton et al.* v. *Smith*, 17 U. C. R. 400. The Bailiff, having merely made an inventory of the goods seized under a *fi. fa.*, leaving no one in possession, it was *held* that they were not in *custodia legis*, and therefore could not be held against the landlord's claim for rent: *Hart* v. *Reynolds*, 13 C. P. 501. A Sheriff, having seized goods under an execution, and left them in the possession of the execution debtor upon receiving a receipt for the same, with an undertaking to deliver them to the Sheriff when requested so to do, the landlord of the execution debtor having in the meantime seized and sold the goods for rent due him by the debtor, it was *held*, in an action by the Sheriff, that he had not at the time of the distress such a possession of the goods as prevented the landlord from distraining for rent: *McIntyre* v. *Statia et al.*, 4 C. P. 248; see also *Robertson* v. *Fortune*, 9 C. P. 427. Long delay of a writ in a Sheriff's hands does not of itself amount to an abandonment of it, but it is evidence of it: *Mein* v. *Hall*, 13 C. P. 518. Taking an execution by a plaintiff to the Clerk for renewal, would not be an abandonment of it: *Rowe* v. *Jarvis*, 13 C. P. 495; *Mencilly* v. *McKenzie*, 3 E. & A. 209. In an action against a Sheriff for a false return, it appeared that on the day before the plaintiff's writ came in, he received a *fi. fa.* at the suit of one *K.* for more than the value of the debtor's goods, and gave a warrant to his Bailiff, who only went to the debtor's shop and told him of it, because he thought more could be got by allowing him to go on with his business. On the plaintiff's writ he did nothing. The plaintiff's Attorney wrote twice, urging him to act and ruled him, and afterwards he returned the writ *nulla bona*. *K.'s* writ having been previously renewed, the Court being left to draw inferences of fact, it was *held*, as a matter of fact, that the Sheriff never seized; or, as a matter of law, if he did, he had abandoned the seizure: *Foster et al.* v. *Glass*, 26 U. C. R. 277. A Bailiff who

and sale of the goods and chattels of such party, being

has withdrawn from possession of goods after seizure may again seize them if the writ is in force: *Gates* v. *Smith*, 13 C. P. 572. As to the difference between the rights of a subsequent execution creditor, as in *Castle* v. *Ruttan*, and one who purchases from an execution debtor, even after abandonment of the seizure, *but while the execution is in force*, see the remarks of Gwynne, J., at pages 470 and 471 of 19 C. P., in *McGivern* v. *McCausland et al.*; see also 5 U. C. L. J. 250. In that connection it must be borne in mind that a Division Court execution does not bind the goods before seizure (*Culloden* v. *McDowell*, 17 U. C. R. 359), whereas a writ in the Sheriff's hands does. Where a writ was delivered to a Sheriff, with instructions not to levy until another execution came in, it was *held* that a subsequent execution took priority: *Ross et al.* v. *Hamilton*, E. T. 3 Vic. Such a writ is not in a Sheriff's hands *to be executed: Foster et al.* v. *Smith*, 13 U. C. R. 243; *In re Ross*, 3 P. R. 394. If the Bailiff is notified not to proceed to execute a writ, from that moment it loses its priority: *Bank of Montreal* v. *Munro*, 23 U. C. R. 414; see also *Kerr et al.* v. *Kinsey*, 15 C. P. 531; *Trust and Loan Company* v. *Cuthbert*, 13 Grant, 412. A term for years cannot be seized and sold on an execution from a Division Court: *Duggan* v. *Kitson*, 20 U. C. R. 316. A Sheriff cannot seize goods on execution already under the seizure of a Division Court Bailiff: *King* v. *Macdonald*, 15 C. P. 397. The foregoing cases are principally on *fi. fa.'s* in the hands of Sheriffs, but it is submitted that the principles of them have a direct application to Division Court executions in the hands of a Bailiff, always keeping in mind that a Bailiff's right to the goods is by virtue of a *continuing* seizure. If a Bailiff should enforce an execution where he had no authority, he would be liable: *Davis* v. *Moore et al.*, 4 U. C. R. 209. In *Lossing* v. *Jennings*, 9 U. C. R. 406, a Bailiff of a Division Court, having an execution against *J. L.*, went to him and seized a yoke of oxen, which he allowed him to retain on receiving by indorsement on the writ an acknowledgment of the levy, it was *held* that the debtor had put it out of his power to sell the oxen. On an execution against *A.*, money belonging to him in the hands of *B.* may be seized, but it must be shewn to be the *identical money* of *A.*: *Clarke* v. *Easton*, 14 U. C. R. 251. Action against third party for illegal seizure and evidence connecting him with it: see *Slaght* v. *West*, 25 U. C. R. 391; *McClevertie* v. *Massie*, 21 C. P. 516; *Tilt* v. *Jarvis et al.*, 7 C. P. 145; *McLeod* v. *Fortune*, 19 U. C. R. 98; *Kennedy* v. *Patterson et al.*, 22 U. C. R. 556; *Cronshaw* v. *Chapman*, 7 H. & N. 911; *Woollen* v. *Wright*, 1 H. & C. 554; *Stevens* v. *Pennock*, 30 U. C. R. 51.

Exemptions.—The following are the exemption clauses of cap. 66 of the Revised Statutes, and have reference to executions from Division Courts as well as other Courts.

"**2.** The following chattels are hereby declared exempt from seizure under any writ, in respect of which this Province has legislative authority, issued out of any Court whatever in this Province, namely:

1. The bed, bedding and bedsteads in ordinary use by the debtor and his family;

2. The necessary and ordinary wearing apparel of the debtor and his family;

3. One stove and pipes, and one crane and its appendages, and one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one table, six chairs, six knives, six forks, six plates, six teacups, six saucers, one sugar basin, one milk jug, one tea pot, six spoons, all spinning wheels and weaving looms in domestic use, and ten volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use;

4. All necessary fuel, meat, fish, flour and vegetables, actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value the sum of forty dollars;

within the County within which the Court was holden, such

5. One cow, four sheep, two hogs, and food therefor, for thirty days;

6. Tools and implements of, or chattels ordinarily used in, the debtor's occupation to the value of sixty dollars. 23 V. c. 25, s. 4 (1—6). *See* 23 V. c. 25, s. 3.

7. Bees reared and kept in hives to the extent of fifteen hives. 28 V. c. 8, s. 2. *See Rev. Stat.* c. 96, s. 2.

"**3.** The said chattels so exempt from seizure as against a debtor shall, after his death, be exempt from the claims of creditors of the deceased, and the widow shall be entitled to retain the said exempted goods for the benefit of herself and the family of the debtor, or, if there is no widow, the family of the debtor shall be entitled to the said exempted goods; and such goods so exempt as aforesaid shall not be liable to seizure under an attachment against the debtor as an absconding debtor. 40 V. c. 8, s. 27.

"**4.** The debtor or his widow or family, or, in the case of infants, their guardian may select out of any larger number the several chattels exempt from seizure under this Act. 23 V. c. 25, s. 6; 40 V. c. 8, s. 28.

"**5.** Nothing herein contained shall exempt any article enumerated in subdivisions three, four, five, six and seven of the second section of this Act from seizure in satisfaction of a debt contracted for such identical chattel. 23 V. c. 25, s. 5; 28 V. c. 8, s. 2.

"**6.** Notwithstanding anything contained in the four next preceding sections, the various goods and chattels which were, prior to the nineteenth day of May, 1860, liable to seizure in execution for debt, shall, as respects debts contracted before the said day, remain liable to seizure and sale in execution, provided that the writ of execution under which they are seized, has endorsed upon it a certificate, signed by the Judge of the Court out of which the writ issues, certifying that it is for the recovery of a debt contracted before the date above named. 24 V. c. 27, s. 2."

A boat in lawful use by the owner, though not a fisherman by calling, is exempt from seizure under execution: *Daragh* v. *Dunn*, 7 U. C. L. J. 273. The Exemption Act does not bind the Crown, and, as was generally supposed, did not apply to an absconding debtor: *Reg.* v. *Davidson*, 21 U. C. R. 41. But under 40 Vic. c. 8, s. 27 (sec. 3 of the R. S.), absconding debtors' exemptions are not now liable to attachment. If goods exempt are seized and sold, the execution creditor is not entitled to the money, but the execution debtor would be: *Michie* v. *Reynolds*, 24 U. C. R. 303. A horse ordinarily used in the debtor's occupation, not exceeding in value $60, is exempt (*Davidson* v. *Reynolds*, 16 C. P. 140); but if worth more than $60, it is not exempt: *McMartin* v. *Hurlburt et al.* 2 App. R. 146. And what the horse brought at the sale is not the test of value, but what on the whole evidence he might fairly be worth: *Ib.* At the time of the sale the horse was covered by a chattel mortgage, given by the plaintiff to one *M.*; it was *held* that defendants could not set that up: *Ib.* As to exemptions generally, see 7 U. C. L. J. 13, 108, 114, 262 and 281.

Setting aside an execution.—An execution would not be set aside because issued by the Clerk at his own house before office hours: *Rolker et al.* v. *Fuller*, 10 U. C. R. 477. An irregular execution will not be set aside at the instance of a subsequent creditor, a stranger to the execution (*Perrin* v. *Bowes*, 5 U. C. L. J. 138); but if judgment and execution *fraudulent*, they can both be set aside at the instance of a subsequent execution creditor: *Balfour* v. *Ellison et al.* 8 U. C. L. J. 330; see also *Commercial Bank* v. *Wilson*, 3 E. & A. 257, and R. & J. Digest, 1612, *et seq.*; *Girdlestone* v. *Brighton Aquarium Co.*, 3 Ex. D. 137. If previous execution fraudulent, yet it would be Bailiff's duty to seize: *Dennis* v. *Whetham*, L. R. 9 Q. B. 345.

sum of money and costs (*q*) (together with interest thereon from the date of the entry of the judgment) as have been so ordered, and remain due, and shall pay the same over to the said Clerk. C. S. U. C. c. 19, s. 135.

Cross-judgments may be set-off.

157. If there are cross-judgments between the parties, the party only who has obtained judgment for the larger sum shall have execution, and then only for the balance over the smaller judgment, and satisfaction for the remainder and also satisfaction on the judgment for the smaller sum shall be entered; and if both sums are equal, satisfaction shall be entered upon both judgments (*r*). C. S. U. C. c. 19, s. 134.

Writs of *fi. fa.*, where to be executed.

158. Except in cases brought under the sixty-third section of this Act, no writ in the nature of a writ of *fieri facias* or attachment shall be executed out of the limits of

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(*q*) A plaintiff who has recovered a judgment for debt and costs, and has received the debt out of Court, is entitled to have an execution for costs, and a *mandamus* would be granted to the Clerk to compel its issue: *Reg.* v. *Fletcher*, 2 E. & B. 279; *In re Linden and wife* v. *Buchanan*, 29 U. C. R. 1. It was decided in *Lawford* v. *Partridge*, 1 H. & N. 621, that where a County Court Judge had no jurisdiction, he had no power to award costs. The same principle was recognized in *Peacock* v. *The Queen*, 4 C. B. N. S. 264, and *Brown* v. *Shaw*, 1 Ex. D. 425; and in our own Courts, in *Powley* v. *Whitehead*, 16 U. C. R. 589; *Campbell* v. *Davidson*, 19 U. C. R. 222; *Nicholls* v. *Lundy*, 16 C. P. 160; and *In re Kingston Election, Stewart* v. *Macdonald*, 41 U. C. R. at page 313; but was disregarded in *Great Northern Committee* v. *Inett*, 2 Q. B. D. 284, where *Brown* v. *Shaw*, *supra*, was cited in the argument. In the case in 2 Q. B. D. the question was, whether an appellant had complied with the conditions imposed by the Act, allowing a case to be stated by the Justices of the Peace. It was admitted that he had not, but argued that the Court, not being seised of the case, had no jurisdiction, and could not grant costs. Cockburn, C. J., says, "The respondent is entitled to avail himself of this objection, and he is obliged to come here to inform us of the absence of jurisdiction; for if he did not, the objection would not appear, and judgment would be given against him. *As he is obliged to come here by the act of the appellants he is entitled to his costs.* It is clear that to some extent there is a jurisdiction over the subject matter, for the court has jurisdiction to hear and determine whether the appeal will lie or not. I am of opinion that under these circumstances there is jurisdiction to give costs. That being so, it seems to me to make no difference in the practical result whether the respondent comes to inform the Court of the objection by means of a separate application, as in the present case, *or at the hearing.*" It is submitted that the opinion just quoted is that which will ultimately be recognized as law: see also *Lilley* v. *Harvey*, 5 D. & L. 648, as to the duty of the Judge to inquire into the question of jurisdiction.

(*r*) This is simply applying the principle of setting off judgments: see Lush's Pract. 328; Arch. Pract. 12th Ed. 723, 726; Rob. & Jos. Digest, title, "Set-off;" *Throckmorton* v. *Crowley*, L. R. 3 Eq. 196; *Mercer* v. *Graves*, L. R. 7 Q. B. 499; Fisher's Digest, 7771.

the County (*s*) over which the Judge of the Court from which such writ issues has jurisdiction. C. S. U. C. c. 19, s. 136.

If party removes to another County, execution obtainable in such County.

159. In case any party against whom a judgment has been entered up removes to another County without satisfying the judgment, the County Judge of the County to which such party has removed may, upon the production of a copy of the judgment duly certified by the Judge of the County in which the judgment has been entered, order an execution (*t*) for the debt and costs, awarded by the judgment, to issue against such party. C. S. U. C. c. 19, s. 137.

If party, before sale, pays to Clerk or Bailiff of Court out of which execution issued, execution to be superseded.

160. If the party against whom an execution has been awarded, pays or tenders (*u*) to the Clerk or Bailiff (*v*) of the Division Court out of which the execution issued, before an actual sale of his goods and chattels, such sum of money as aforesaid, or such part thereof as the party in whose favour the execution has been awarded agrees to accept in full of his debt, together with the fees to be levied, (*w*) the execution shall thereupon be superseded, and the goods be released and restored to such party. C. S. U. C. c. 19, s. 138

Clerk of any Court in which judgment entered to

161. The Clerk of any Division Court shall, upon the application of any plaintiff or defendant, (or his agent,) having an unsatisfied judgment (*x*) in his favour in such

(*s*) If its execution should be attempted out of the County, the Bailiff would be a trespasser: *Davis* v. *Moore et al.*, 4 U. C. R. 209; *Campbell* v. *Coulthard*, 25 U. C. R. 621; *Dary* v. *Johnson*, 31 U. C. R. 153.

(*t*) The provisions of this section are very seldom resorted to. Proceedings by transcript under section 161 is the usual course.

(*u*) See notes to section 86.

(*v*) The Bailiff would only have authority to receive it if he had an *existing* execution in his hands; 5 U. C. L. J. 82; *Preston* v. *Wilmot*, 23 U. C. R. 348; *Kero* v. *Powell*, 25 C. P. 448.

(*w*) Should the proper fees be tendered and refused, further proceedings by the Bailiff would render him liable as a trespasser: *Bennett* v. *Bayes*, 5 H. & N. 391. As to what are proper fees, see the tariff. It may be said that a return of *nulla bona* does not entitle a Bailiff to mileage; 5 U. C. L. J. 82. There can be no mileage where money is not "made" (5 U. C. L. J. 181); nor can there be poundage unless there is a "sale:" see tariff and notes to last item in schedule of Bailiffs' fees.

(*x*) Where the defendant is under commitment and *actually imprisoned* on judgment summons proceedings, it is submitted that the judgment could not under this section be considered "unsatisfied:" *Jauralde* v. *Parker*, 6 H. & N. 431.

Court, prepare a transcript of the entry of such judgment, and shall send the same to the Clerk of any other Division Court, (*y*) whether in the same or any other County, with a certificate at the foot thereof signed by the Clerk who gives the same, and sealed with the seal of the Court of which he is Clerk, and addressed to the Clerk of the Court to whom it is intended to be delivered, and stating the amount unpaid upon such judgment and the date at which the same was recovered; and the Clerk to whom such certificate (*z*) is addressed shall, on the receipt of such transcript and certificate, enter the transcript in a book to be kept in his office for the purpose, and the amount due on the judgment according to the certificate; and all proceedings may be taken (*a*) for the enforcing and collecting the judgment in such last mentioned Divison Court, by the officers thereof, that could be had or taken for the like purpose upon judgments recovered in any Division Court. C. S. U. C. c. 19, s. 139; 32 V. c. 23, s. 25.

prepare transcript thereof, to transmit to any other Division Court.

162. In case of the death of either or both of the parties to a judgmont in any Division Court, the party in whose favour the judgment has been entered, or his personal representative (*b*) in case of his death, may revive such judgment (*c*) against the other party, or his personal representative in case of his death, and may issue execution thereon in conformity with any Rules which apply to such Division Court in that behalf. C. S. U. C. c. 19, s. 140.

Revival of judgment in case of death of party to judgment.

(*y*) The transcript can now be sent to a Clerk in the same County. Formerly it was not so: see Con. Stat. U. C. cap. 19, sec. 139; 10 U. C. L. J. 35.

(*z*) See Rules 160 to 163 inclusive, and Forms 98 and 100, and 8 U. C. L. J. 67.

(*a*) See *In re Perkins Beach Lead Mining Company*, 7 Ch. D. 371. The Clerk to whom the transcript is sent has no option but to enter it and take proceedings upon it, whether rightly issued or not: 8 U. C. L. J. 67. The Clerk of the home Court cannot move until he gets a return to the transcript, and the Editor of the Law Journal is of opinion that even then it is better to have Judge's order: 6 U. C. L. J. 84; but see 2 L. C. G. 15, and notes to Rule 161.

(*b*) See Rules 155 to 157 inclusive, and Forms therein referred to. It may be revived against an executor *de son tort: Keena* v. *O'Hara*, 16 C. P. 435. That was a revivor before judgment; but it is submitted that the same principle clearly applies. As to the subject generally, see Har. C. L. P. Act, 408, *et seq.*; Arch. Pract. 12th Ed. 1122; Lush's Pract. 59-140; Rob. & Jos. Digest, title, "*Scire facias* and Revivor."

(*c*) The Court has at all times power to look at its own records and to take notice of their contents, although they may not be formally brought before the Court by affidavit: *Craven* v. *Smith*, L. R. 4 Ex. 146.

Execution, when dated and returnable.

163. Every execution shall be dated on the day of its issue, (*d*) and shall be returnable within thirty days (*e*) from the date thereof, but may, from time to time, (*f*) be renewed by the Clerk, at the instance of the execution creditor, (*g*) for ~~thirty days~~ one month from the date of such renewal, in the same manner and with the same effect as like writs from the Courts of Record may be renewed under the provisions of *The Act respecting Writs of Execution.* C. S. U. C. c. 19, s. 141; 32 V. c. 23, s. 24.

Rev. Stat. c. 66.

Judge may order an execution to issue before regular day.

164. In case the Judge is satisfied upon application on oath made to him by the party in whose favour a judgment has been given, or is satisfied by other testimony that such party will be in danger of losing the amount of the judgment, if compelled to wait till the day appointed for the payment thereof before any execution can issue, such Judge may

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(*d*) See notes to section 51.

(*e*) The day of the issue is excluded, and a writ issued on the 24th of April was *held* in force on the 24th of May (*Clarke* v. *Garrett et al.*, 28 C. P. 75); but it is different with a *fi. fa.* in the higher Courts: *Bank of Montreal* v. *Taylor*, 15 C. P. 107. The effect of the decision in *Clarke* v. *Garrett et al.* is, that the first renewal would expire on the 25th of June; and as the same words are used as to renewal as are relative to the original duration of the writ, every renewal, if made on the last day, would make the return-day a day later every month. As to form of renewal, see Rule 158.

(*f*) It may be renewed more than once from the words here used: see *Neilson* v. *Jarvis*, 13 C. P. 176. *An execution cannot be renewed when such writ has been acted upon or levy made: Ib.*, and cases there cited. Clerks and Bailiffs should keep this in mind: see also *Miller* v. *Beaver Mutual F. Ins. Association*, 14 C. P. 399. Nothing can legally be done under an expired writ (*Weston* v. *Thomas*, 6 U. C. L. J. 181; *Gardiner* v. *Juson*, 2 E. & A. 188); and a sale by the defendant of his goods would cut out the execution creditor, or any one claiming under a supposed sale on such writ: *Carroll* v. *Lunn*, 7 C. P. 510; *Buffalo and Lake Huron Railway Company* v. *Brooksbanks*, 16 U. C. R. 337.

(*g*) The too common practice of Clerks renewing executions at the instance of Bailiffs, or of their own mere motion, is entirely unwarranted and of no legal effect. The same view will be found expressed at pages 175, 176 of 5 L. C. G. It is doubtful if an execution creditor could ratify such an act: *Brook* v. *Hook*, L. R. 6 Ex. page 95; *Westloh* v. *Brown*, 43 U. C. R. 402; *Turner* v. *Wilson*, 23 C. P. 87. Certainly not, except done *within* the time for which the renewal was made (*Ainsworth* v. *Creeke*, L. R. 4 C. P. 476); nor perhaps at all; *Taylor* v. *Ainslie*, 19 C. P. 78; *Prince* v. *Lewis*, 21 C P. 63; *Patterson* v. *Fuller*, 32 U. C. R. 240. The authority to the Clerk to *issue* execution would not imply a right to renew it. The unauthorized renewal by the Clerk of an execution, even if such could be ratified, would not affect the rights of other creditors before ratification: *Ainsworth* v. *Creeke*, *supra*.

order (*h*) an execution to issue at such time as he thinks fit. C. S. U. C. c. 19, s. 158.

If execution returned *nulla bona*, parties may obtain transcript.

165. In case an execution is returned *nulla bona*, (*i*) and the sum remaining unsatisfied (*k*) on the judgment under which the execution issued amounts to the sum of forty dollars, the plaintiff or defendant may obtain a transcript

(*h*) It is submitted that, as this is a matter in the *discretion* of the Judge, he can grant the order *ex parte*, but such discretion "must be exercised within the limits to which an honest man competent to the discharge of his office ought to confine himself:" Maxwell on Statutes, 101.

(*i*) If the execution should expire, nothing having been done on it within the thirty days, any supposed return of *nulla bona*, after that time, would not be available under this section: see notes to section 163, and particularly, *Lee* v. *Howes et al.*, 30 U. C. R. 292. Should a seizure be made *within* the thirty days, there could be no renewal of the execution (*Neilson* v. *Jarvis*, 13 C. P. page 183, *per* Draper, C. J.); but if on such seizure part of the money was made, and *nulla bona* returned as to residue, there could be a transcript under this section for such residue, provided it amounted to forty dollars or upwards. If no execution was issued from the Division Court there could not be a sale of the defendant's lands: *Burgess* v. *Tully*, 24 C. P. 549. And if a transcript of judgment is sent from one Court to another, under the 161st section, a return of *nulla bona* to an execution issued from the latter Court would not be sufficient. The execution in the Division Court *must* be issued from and returned to that Court in which judgment was *originally* obtained: *Ib.*, pages 556 and 557. If execution against more than one defendant, the goods of all should be exhausted before a return of *nulla bona*: *Ontario Bank* v. *Kerby*, 16 C. P. 35.

(*k*) This means the whole or any balance remaining unpaid on the judgment, whether debt or debt *and* costs. The costs of recovering the judgment when taxed by the Clerk and entered in procedure book are as much part of the judgment debt as the principal money or damages recovered. It is submitted that under section 7, by which judgments in Division Courts are made to have "the same force and effect as judgments of Courts of Record," that interest on the amount of the judgment can be estimated under this section. It is also submitted that costs of execution are *part* of "the sum remaining unsatisfied on the judgment." The costs of execution are chargeable against the defendant, and he could not *satisfy* the judgment without discharging such costs also. So also would costs of a judgment summons. By section 241, it is declared that the Rules and Forms, when approved off, "shall have the same force and effect as if they had been made and included in this Act." On referring to the form of transcript to the County Court (Form 99), it will be seen that reference is there made to Form 98, in which the "amount due" is made up of the debt and costs of the judgment, "*additional* costs," and additional interest. The additional costs there referred to can only mean such as costs of execution and other authorized proceedings. It would be anomalous that a plaintiff should be obliged to issue an execution before he could transfer his cause to the County Court (*Burgess* v. *Tully*, *supra*), and then that the costs of doing so should not form part of the amount of his unsatisfied judgment. This view is very much strengthened by the fact that the entry to be made by the Clerk of the County Court, under section 166, shall contain the names of the parties, "the amount of the judgment, also the amount remaining unsatisfied thereon," which amount can only be got by the Clerk on reference to the total amount of judgment, interest and subsequent costs appearing on the transcript as unpaid.

of the judgment from the Clerk, under his hand and sealed with the seal (*l*) of the Court, which transcript shall set forth,

1. The proceedings in the cause; (*m*)

2. The date of issuing execution against goods and chattels; and

3. The Bailiff's return of *nulla bona* thereon, as to the whole or a part. C. S. U. C. c. 19, s. 142.

Upon filing transcript in office of County Court Clerk, judgment to be judgment of that Court.

166. Upon filing (*n*) such transcript in the office of the Clerk of the County Court, in the County where such judgment has been obtained, (*o*) or in the County wherein the defendant's or plaintiff's lands are situate, (*p*) the same shall become a judgment (*q*) of such County Court, and the Clerk

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(*l*) See notes to section 6.

(*m*) It was *held*, in *Furr* v. *Robins*, 12 C. P. 35, that there could be no valid judgment in the County Court or sale of lands founded on a transcript which omitted to state the issue and return of an execution in the Division Court. In *Jacomb* v. *Henry*, 13 C. P. 377, the sale of lands was *held* void, because the transcript from the Division Court only contained a certificate, shewing the Court, the names of the parties, that judgment had been recovered, and when, the several amounts of debt and costs, that execution had issued, and was returned on a certain date; but no mention was made of the proceedings *anterior* to the judgment. If the transcript does not shew that the proceedings in the Division Court were commenced by attachment (if such was the case), the whole proceedings on such transcript in the County Court are void: *Hope* v. *Graves*, 14 C. P. 393.

(*n*) The transcript must be "filed" before the proceedings constitute a judgment of the County Court: see *Robson* v. *Waddell*, 24 U. C. R. 574; *Lee et al.* v. *Morrow*, 25 U. C. R. at page 610; *Magrath* v. *Todd*, 26 U. C. R. at page 90; see Rules 160 to 163 inclusive. It should be marked "filed" by the proper officer: *Campbell* v. *Madden*, Dra. R. 2; but see *Reg.* v. *Gould*, Mich. T. 3 Vic.

(*o*) That is in the Court where judgment was originally recovered: *Burgess* v. *Tully et al.* 24 C. P. 549.

(*p*) It is safer to file the transcript with the County Court Clerk of the County where judgment was recovered, because, if it afterwards appeared that the debtor had no lands in the County in which it was filed, the whole proceedings would, within the principle of the cases cited in the notes to section 165, be void. Besides, in the event of requiring to prove a sale of lands, the fact of the defendants having had lands in the County where transcript filed would probably have to be proved: see cases noted under sections 53 and 54.

(*q*) The defendant is liable to be examined as to his estate and effects on a judgment so recovered, and where in such a case he refused to attend for examination a *ca. sa.* against him was upheld, although the amount was under $100: *Kehoe* v. *Brown et al.* 13 C. P. 549. Perhaps in that case an order for commitment would have been the proper remedy: *Wallis* v. *Harper*, 7 U. C. L. J. 72; *Henderson* v. *Dickson*, 19 U. C. R. 592; *Ward* v. *Armstrong*, 4 P. R. 58. Great care should be observed in the preparation of the transcript under these sections,

of such County Court shall file the transcript on the day he receives the same, and enter a memorandum thereof in a book to be by him provided for that purpose, which memorandum shall contain,

1. The names of the plaintiff and defendant;
2. The amount of the judgment;
3. The amount remaining unsatisfied thereon; and
4. The date of filing;

for which services the Clerk of the County Court shall be entitled to demand and receive from the person filing the same the sum of fifty cents. C. S. U. C. c. 19, s. 143.

County Court Clerk's book to be accessible.

167. Such book shall at all reasonable hours be accessible (*r*) to any person desirous of examining the same, upon the payment to the Clerk of ten cents. C. S. U. C. c. 19, s. 144.

Parties may prosecute judgment in County Court.

168. Upon such filing and entry the plaintiff or defendant may, until the judgment has been fully paid and satisfied, pursue the same remedy (*s*) for the recovery thereof or of the balance due thereon, as if the judgment had been originally obtained in the County Court. C. S. U. C. c. 19, s. 145.

The interest of a mortgagor in goods mortgaged may be sold in execution.

169. On any writ, precept or warrant of execution against goods and chattels, the Sheriff or other officer (*t*) to whom the same is directed may seize and sell the interest or equity of redemption (*u*) in any goods or chattels of the party

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in view of the authorities referred to, and every Attorney would consult the best interests of his client by a careful examination of it before filing. It is safer to issue a *fi. fa.* goods in the County Court in analogy to the ordinary course of proceeding in that Court. It was decided in *Kehoe* v. *Brown et al.* 13 C. P. 549, that the transfer to the County Court has not the effect of allowing proceedings against lands merely, but is for all purposes a judgment of that Court; and in that view, it is submitted that the ordinary course of proceedings in the County Court had better be taken. But see 2 L. J. N. S. 53. As to the effect on the Division Court suit, see notes to section 161 and Rule 161.

(*r*) The Clerk would not be obliged to place his books and indexes in the hands of any person making a search, but might do so in his discretion and on his own responsibility: *Re Webster and Registrar of Brant*, 18 U. C. R. 87. Compare *Ross* v. *McLay*, 26 C. P. 190.

(*s*) See 4 U. C. L. J. 275, and notes to sections 165 and 166.

(*t*) This includes a Division Court Bailiff.

(*u*) See notes to sections 156 and 170.

against whom the writ has issued, and such sale shall convey whatever interest the mortgagor had in such goods and chattels at the time of the seizure. C. S. U. C. c. 19, s. 150.

What may be seized under execution against goods and chattels.

170. Every Bailiff or officer having an execution against the goods and chattels of any person, may by virtue thereof seize and take any of the goods and chattels (*v*) of such person, (except those which are by law exempt from seizure,) (*w*) and may also seize and take any money or bank notes, and any cheques, bills of exchange, promissory notes, bonds, specialties or securities for money (*x*) belonging to such person. C. S. U. C. c. 19, s. 151; 23 V. c. 25, s. 2.

(*v*) See notes to section 156.

(*w*) See notes to section 156 for a list of articles exempt; also see Rev. Stat., page 800.

(*x*) This power only applies to moneys set apart and ear-marked: *Wood* v. *Wood*, 4 Q. B. 397. Money seized under an execution is exactly in the same position as money the proceeds of goods sold: *Collingridge* v. *Paxton*, 11 C. B. 683. Cheques are seizable though in the hands of another, *e. g.*, the Accountant-General of the Court of Chancery: *Watts* v. *Jefferyes*, 3 Mac. & G. 422. So also is a policy of life assurance: *Stokoe* v. *Cowan*, 30 L. J. Ch. 882. Any title deed, even if pledged with the debtor for a loan, or a letter or a guarantee for some collateral act, or any other deed or writing, which could not form the foundation of an action by the debtor himself for a specific sum of money, cannot be taken. But it would seem that all instruments containing an unconditional covenant or agreement for payment of a specific sum of money to the execution debtor for his own benefit are within the words "other securities for money," and may be taken: Arch. Pract. 12th Ed. 653. The word "money" here used means specific gold and silver coin, bank or government notes, and not debts due to the defendant: *Harrison* v. *Paynter*, 6 M. & W. 387. A surplus in the Bailiff's hands, after satisfying a former execution, even at the suit of the same plaintiff, cannot be seized as money: *Harrison* v. *Paynter*, *supra*, and *Fieldhouse* v. *Croft*, 4 East. 510; *Sharpe* v. *Leitch*, 2 L. J. N. S. 132. Nor would such money be stayed in the Bailiff's hands to satisfy a present execution: *Willows* v. *Ball*, 2 N. R. 376. Garnishment would be the remedy in that case: *Lockart* v. *Gray*, 2 L. J. N. S. 163. Money in the hands of a third person as trustee for the defendant cannot be seized unless it be the exact pieces of coin or paper of the defendant: *Robinson* v. *Piece*, 7 Dowl. 93; *Wood* v. *Wood*, 4 Q. B. 397. So money deposited in Court in one action cannot, when the defendant is entitled to have it paid out to him, be paid out to an execution creditor in a second action: *France* v. *Campbell*, 9 Dowl. 914; 6 Jur. 105, s. c. It would seem that money in a defendant's pocket no more than clothes on his back can be seized on execution: see *Sunbolf* v. *Alford*, 3 M. & W. 248. Books of account cannot be seized: *McNaughton* v. *Webster*, 6 U. C. L. J. 17. A money bond for the conveyance of land is seizable by a Bailiff: *Reg.* v. *Potter*, 10 C. P. 39. So also is a fire policy after a loss has taken place and money has become payable thereon, even though the amount has not been ascertained: *The Bank of Montreal* v. *McTavish*, 13 Grant, 395. The property mentioned in the latter part of this section is only bound from the seizure: *McDowell* v. *McDowell*, 10 U. C. L. J. 48; see also notes to section 156; Fisher's Digest, 3828; Rob. & Jos. Digest, 1412; Lush's Prac., 595; Arch. Pract. 12th Ed. 652.

171. The Bailiff shall for the benefit of the plaintiff, hold (*y*) any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money so seized or taken as aforesaid, as security for the amount directed to be levied by the execution, or so much thereof as has not been otherwise levied or raised, and the plaintiff, when the time of payment thereof has arrived, may sue (*z*) in the name of the defendant, or in the name of any person in whose name the defendant might have sued, for the recovery of the sum or sums secured or made payable thereby. C. S. U. C. c. 19, s. 152.

Bailiff to hold cheques, notes, &c., seized under execution for benefit of plaintiff.

172. The defendant in the original cause shall not discharge such suit (*a*) in any way without the consent of the plaintiff or of the Judge. C. S. U. C. c. 19, s. 153.

Defendant in original cause not to discharge suit.

(*y*) After the Bailiff has made the seizure, it would be advisable for him carefully to prepare a list of the securities seized, shewing their amounts, dates, when and by whom payable, and to give notices to the different persons liable on them of such seizure. He should also advise the execution creditor of what he has done, so that he might the better determine whether he would proceed on them or not As regards such securities as might not be due, their deposit in the Clerk's safe, or some other safe depository, would be a prudent course for the Bailiff to take. If the execution creditor should not within a reasonable time determine to take proceedings upon those overdue, and the others as they become due, it would be the duty of the Bailiff to hand them back to the debtor, for should he be negligent in that respect, and the debts due upon such securities be barred by the Statute of Limitations, or lost otherwise, the Bailiff and his sureties would undoubtedly be liable. Should the execution creditor's claim and all costs be satisfied out of the proceeds of the securities seized, or discharged in any other manner, it would then also be the duty of the Bailiff to restore such of the securities as remained in his hands to the execution debtor. Bank stock could not be considered "money," or "other securities for money," within the meaning of this and the next preceding section: *Ogle* v. *Knipe*, L. R. 8 Eq. 434. Neither would shares in a building society or other corporation: *Collins* v. *Collins*, L. R. 12 Eq. 455. On this section generally, see 1 U. C. L. J. 181 and 182: *Hopkins* v. *Abbott*. L. R. 19 Eq. 222.

(*z*) As to the notice that should be added to the summons, see Rule 15: Add. on Con. 7th Ed. 313. The action must be brought in the name of the defendant in the original suit, or in the name of any person in whose name the defendant might have sued: see 4 U. C. L. J. 226. If questioned, the proceedings justifying the action might have to be proved: *McDonald* v. *McDonald*, 21 U. C. R. 52. A defendant could not set up matters that occurred subsequently to the seizure and notice: *Dennison* v. *Knox*, 24 U. C. R. 119; *Jeffs* v. *Day*, L. R. 1 Q. B. 372; *Watson* v. *Mid Wales Railway Co.*, L. R. 2 C. P. 593; *Brighton Arcade Co.* v. *Dowling*, L. R. 3 C. P. 175; *Chishom* v. *Provincial Ins. Co.*, 20 C. P. 11; *De Pothonier* v. *De Mattos*, E. B. & E. 461: *Wilson* v. *Gabriel*, 4 B. & S. 243.

(*a*) See notes to section 171. The suit would be subject to all the equities between the execution debtor and the defendant: *In re Natal Investment Co.*, L. R. 3 Ch. 355; *Rodger* v. *The Comptoir D'Escompte De Paris*, L. R. 2 P. C.

The party wishing to enforce must secure costs.

173. The party who desires to enforce payment of any security seized or taken as aforesaid, shall first pay or secure (*b*) all costs that may attend the proceeding; and the moneys realized, or a sufficient part thereof, shall be paid over by the officer receiving the same to apply on the plaintiff's demand, and the overplus, if any, shall be forthwith paid to the defendant in the original suit, under the direction of the Judge. C. S. U. C. c. 19, s. 154.

Overplus.

Bailiff after seizure of goods to endorse date of seizure and give notice of sale.

174. The Bailiff, after seizing (*c*) goods and chattels by virtue of an execution, shall endorse on such execution the date (*d*) of the seizure, and shall immediately, and at least eight days (*e*) before the time appointed for the sale, give public notice by advertisement signed by himself, and put up at three of the most public places (*f*) in the Division where such goods and chattels have been taken, of the time and place within the Division when and where they will be exposed to sale; and the notice shall describe (*g*) the goods and chattels taken. C. S. U. C. c. 19, s. 155.

Goods not to be sold till after eight

175. The goods so taken shall not be sold (*h*) until the expiration of eight days at least next after the seizure thereof,

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393. A discharge given after seizure and notice would be set aside as a fraud: *Sargent* v. *Wedlake*, 11 C. B. 732; *Ex parte Games*, 3 H. & C. 294; *Rawstorne* v. *Gandell*, 15 M. & W. 304.

(*b*) This is declaratory merely: *Auster* v. *Holland*, 3 D. & L. 740; *Spicer* v. *Todd*, 1 Dowl. 306; Lush's Pract., 225.

(*c*) See the notes to section 156, and especially *Gladstone* v. *Padwick*, L. R. 6 Ex. 203.

(*d*) See also notes to section 156.

(*e*) "Clear days:" see notes to section 70.

(*f*) The policy of the law is to realize as much as possible out of a defendant's goods; and for that reason the statute prescribes the most public form of advertisement. Notice for a less time than eight days, or indeed no notice at all would not invalidate a sale honestly conducted otherwise, but would only subject the Bailiff to an action: *Campbell* v. *Coulthard*, 25 U. C. R. 621; *Paterson* v. *Todd*, 24 U. C. R. 296; *McDonald* v. *Cameron*, 13 Grant, 84; *Shultz* v. *Reddick*, 43 U. C. R. 155; *Trent* v. *Hunt*, 9 Ex. 14; see section 230.

(*g*) This notice should be of such a character as would give intending purchasers and others reasonable information of what was to be sold, and of the time and place of sale.

(*h*) If sold before the eight days, the sale would not be void, only irregular: see notes to section 174. The days of seizure and sale are both excluded in the calculation of the "eight days" here mentioned: *McCrea* v. *W. M. F. Ins. Co.*, 26 C. P. p. 437, and notes to section 70.

unless upon the request in writing (*i*) under the hand of the party whose goods have been seized. C. S. U. C. c. 19, s. 156. days have expired after seizure.

176. No Clerk, Bailiff or other officer of any Division Court shall, directly or indirectly, (*k*) purchase any goods (*l*) or chattels at any sale made by any Division Court Bailiff under execution, and every such purchase shall be absolutely void. (*m*) C. S. U. C. c. 19, s. 157. *See also Rev. Stat.* c. 16, s. 27. Bailiff and other officers not to purchase goods seized.

EXAMINATION OF JUDGMENT DEBTORS.

177. (*n*) Any party having an unsatisfied judgment (*o*) or order in any Division Court, for the payment of any debt, damages or costs, (*p*) may procure from the Court wherein the judgment has been obtained, (*q*) if the defendant resides or Judgment debtors may be examined at the instance of their creditors.

(*i*) Should the debtor assent by words or conduct, he would be estopped from saying that the sale was irregular: *Freeman* v. *Cooke*, 2 Ex. 654; *De Bussche* v. *Alt*, 8 Ch. D. 286; Roscoe's N. P. 83; *Carr* v. *L. & N. W. Railway Co.*, L. R. 10 C. P. 307. But a mere submission to the injury, or even a voluntary promise after the sale not to seek redress, would not estop him; some conduct, amounting to release or accord and satisfaction, would have to be shewn: *per* Thesiger, L. J., at page 314 of 8 Ch. D. Acquiescence at the time of or after the alleged wrong is very different in its legal effect: *Ib.*

(*k*) That is either by himself or some secret agent on his behalf.

(*l*) A public officer who has the sale of goods cannot properly perform his duty if interested in their purchase: see *King* v. *England*, 4 B. & S. 782; *Williams* v. *Grey*, 23 C. P. 561.

(*m*) The word "void" here does not mean "voidable merely:" Maxwell on Statutes, 190.

(*n*) This is what is commonly known as the "91st clause." This is not the place to discuss the propriety of retaining it on the statute book. For discussion of that question, and the merits of the examination clauses generally, the reader is referred to 2 U. C. L. J. 121; 3 U. C. L. J. 142, 159 and 178; 5 U. C. L. J. 272; 6 U. C. L. J. 5, 39, 73 and 85; 7 U. C. L. J. 12, 18 and 112; 9 U. C. L. J. 121; and 10 U. C. L. J. 237 and 259. The section was taken originally from the English Statute of 9 & 10 Vic. cap. 95, section 98.

(*o*) See notes to section 165, and Har. C. L. P. Act, 391.

(*p*) In the higher Courts there could not at one time be an examination for costs only: *Herr* v. *Douglass*, 4 P. R. 124; *Walker* v. *Fairbairn*, 6 P. R. 251; *Schneider* v. *Agnew et al.*, 6 P. R. page 340. Now see *McLachlin* v. *Blackburn*, 7 P. R. 287. Under this section there can be an examination for costs only. The debt or damages or costs being more than $100, does not prevent an examination: *Byrne* v. *Knipe*, 5 D. & L. 659.

(*q*) The summons must issue from the Court in which judgment has been obtained if defendant resides therein or within that County; but if he resides in another County, then the suit must be transferred, under the 161st section, to the proper division in that County, and proceedings taken there: see 1 L. C. G. 152. It is not necessary that execution should issue before this proceeding can be resorted to by a judgment creditor: *Peck* v. *McDougall*, 27 U. C. R. 360.

carries on his business within the County in which the Division is situate, or from any Division Court in any other County into which the judgment has been removed under the one hundred and sixty-first section of this Act and within the limits of which Division Court the defendant (*r*) resides or carries on his business, (*s*) a summons (*t*) in the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts, and such summons may be served either personally (*u*) upon the person to whom the same is directed, or by leaving a copy thereof at the house of the party to be served or at his usual or last place of abode, (*v*) or with some grown person there dwelling, (*w*) requiring him to appear at a time and place (*x*)

The words of this section closely resemble the 304th section of the C. L. P. Act; and one would have thought that the necessity for attempting to make the debt by execution would be the necessary preliminary of a judgment summons: *Smith* v. *McGill*, 3 U. C. L. J. 134; Har. C. L. P. Act, 390. The attention of the Court does not appear to have been drawn, in *Peck* v. *McDougall*, to the cases establishing the practice in the Superior Courts, or as being applicable to that case: see, however, section 188. If such a proceeding should be vexatiously taken, it is probable the plaintiff would be visited with the costs of it. Where proceedings in the suit were taken against the wrong man, and judgment summons issued, see *Walley* v. *M'Connell*, 13 Q. B. 903.

(*r*) This does not apply to a corporation, nor can the directors or officers be examined under this section: *Dickson* v. *Neath and Brecon Railway Company*, L. R. 4 Ex. 87. Contrast section 156, cap. 50, Rev. Stat.

(*s*) See notes to sections 62 and 72.

(*t*) A summons under this section and one for the commencement of the action cannot issue together: *Bishop* v. *Holmes*, 4 U. C. L. J. 235; see section 188.

(*u*) See notes to sections 62 and 72, and Rules 85–90.

(*v*) See also notes to sections 62 and 72.

(*w*) See also section 72. It will be observed that the words of this section differ from those of the 72nd. Under this section service would probably be considered good if a copy of summons was simply "left at the house" of the defendant; but it would be advisable for the Bailiff, in all cases where personal service could not be effected, and where there might be some grown up person residing at the defendant's last place of abode, to serve that person. The affidavit should be carefully prepared. It might (being entitled in Court and cause, &c.,) be in these words:

"That I did on the day of , A.D. 187 , serve (*C. D.*) the above-named defendant in this cause with the annexed (or within) summons, by delivering a true copy thereof to and leaving it with (*E. F.*) he (or she) then being a grown person dwelling at the usual (or last) place of abode of the said defendant, at the of ."

If the summons cannot be served a return with the reason *in writing* must be made by the Bailiff: see Rule 90.

(*x*) "There is nothing in either the language used or the context to shew that the examination is to be made in the Judge's chambers at the County Town, and it would be a great hardship to bring parties there for the purpose if a

therein expressed, to answer such things as are therein named, and if the defendant appears in pursuance thereof, he may be examined upon oath touching his estate and effects, and the manner and circumstances under which he contracted the debt or incurred the damages or liability which formed the subject of the action, and as to the means and expectation he then had, and as to the property and means he still has, of discharging the said debt, damages or liability, and as to the disposal he has made of any property. C. S. U. C. c. 19, s. 160.

And witnesses, &c.

178. The person obtaining such summons and all witnesses whom the Judge thinks requisite, (*y*) may be examined upon oath, touching the enquiries authorized to be made as aforesaid. C. S. U. C. c. 19, s. 161.

The examination to be in Judge's chamber.

179. The examination shall be held in the Judge's chamber, (*z*) unless the Judge otherwise directs. C. S. U. C. c. 19, s. 162.

The costs provided for.

180. The costs of such summons and of all proceedings thereon shall be deemed costs in the cause, (*a*) unless the Judge otherwise directs. C. S. U. C. c. 19, s. 163.

Party examined and discharged

181. In case a party has, after his examination, been discharged by the Judge, no further summons (*b*) shall issue

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discretion existed. But it does not. The party is summoned to be and appear at the place where the Court is held, in the division in which it issues; and there is no authority to require him to appear elsewhere, for the order in respect to the matter must be entered by the Clerk in like manner as any other order of the Court:" 9 U. C. L. J. 101.

(*y*) Where the defendant cannot or will not give a full account of his circumstances, other witnesses can be called to shew the facts.

(*z*) Without this provision the examination would have to be held in open Court: *Nagle-Gillman* v. *Christopher*, 4 Ch. D. 173. "The simple object of the enactment is to prevent needless exposure in open Court, and to give authority to hold the examination in private; and the practice in every Court we have knowledge of is to allow the general public to depart after the ordinary business is over, and to make the Court room the Judge's chamber for the time being." 9 U. C. L. J. 101.

(*a*) Costs in the cause mean the costs of the ordinary proceedings in a suit: *Cameron* v. *Campbell*, 1 P. R. p. 173. The costs of examination proceedings are by this section to be "deemed costs in the cause," *unless* the Judge otherwise directs. Where proceedings are taken in a cause vexatiously or wantonly, or without any reasonable prospect of eliciting anything favourable to the creditor, it is submitted that the Judge would exercise a reasonable discretion in refusing costs.

(*b*) That is a summons of the same character.

not to be again summoned, except, &c.

out of the same Division Court at the suit of the same or any other creditor, (*c*) without an affidavit satisfying the Judge upon facts not before the Court upon such examination, that the party had not then made a full disclosure of his estate, effects and debts, or an affidavit satisfying the Judge that since such examination the party has acquired the means of paying (*d*). C. S. U. C. c. 19, s. 164.

Consequence of neglect or refusal to attend.

182. If the party so summoned—

1. Does not attend (*e*) as required by the summons, or allege a sufficient reason (*f*) for not attending; or

2. If he attends and refuses to be sworn or to declare any of the things aforesaid; or

3. If he does not make answer touching the same to the satisfaction of the Judge; (*g*) or

4. If it appears to the Judge, either by the examination of the party or by other evidence, that the party,

(*a*) Obtained credit from the plaintiff or incurred the debt or liability under false pretences, (*h*) or by means of fraud or breach of trust, or

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(*c*) It is no part of the Clerk's duty to know whether or not a summons is in violation of this section. The debtor should bring it to the Judge's notice.

(*d*) These are the only two grounds upon which, if substantiated by affidavit, the Judge would be warranted in granting an order for another summons. The section does not apply to a summons from *another* Division Court, but does to the case of any other creditor in the same Court.

(*e*) The Judge should see from the affidavit of service that the defendant is called on to appear on the summons before proceeding. The affidavit should be duly entitled in the Court and cause under Rule 133. It should also shew that the judgment debtor has been served "ten days *at least* before the day on which the party is required to appear," under Rule 85. By the same rule, service any time before the day appointed for the appearance of the debtor "may be deemed by the Judge to be a good service, if it shall be proved to his satisfaction that such party was about to remove out of the jurisdiction of the Court:" see the English practice, at page 144 of Davis' C. C. Acts.

(*f*) It is submitted that payment of expenses is not a sufficient reason for not attending: contrast section 160, cap. 50, Rev. Stat. Illness, it is submitted, would be: *Re Jacobs*, 1 H. & W. 123; *Boust* v. *Firth*, L. R. 4 C. P. 1; *Robinson* v. *Davison*, L. R. 6 Ex. 269; *Reg.* v. *Wellings*, 3 Q. B. D. 426.

(*g*) As to satisfactory answers, see *Schneider* v. *Agnew et al.*, 6 P. R. 333 *Lemon* v. *Lemon*, 6 P. R. 184.

(*h*) Credit must have been "obtained" or the debt "incurred" by false pretences, and strict legal proof of it must be given: see 3 U. C. L. J. 196. "In ordinary parlance, we speak of obtaining money or property by false pretences

(*b*) Wilfully contracted the debt or liability without having had at the time a reasonable expectation of being able to pay or discharge the same, or

(*c*) Has made or caused to be made any gift, delivery or transfer of any property, or has removed or concealed the same with intent to defraud his creditors or any of them; or

5. If it appears to the satisfaction of the Judge that the party had when summoned, or, since the judgment was obtained against him, has had sufficient means (*i*) and ability to pay the debt or damages, or costs recovered against him, either altogether or by the instalments which the Court in which the judgment was obtained has ordered, and if he has refused or neglected to pay the same at the time ordered, whether before or after the return of the summons, the Judge may, if he thinks fit, order such party to be committed (*k*) to the Common Gaol of the County in which the party so summoned resides or carries on his business, for any period not exceeding forty days. C. S. U. C. c. 19, s. 165.

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as indicating the criminal offence of obtaining the same by false pretences with intent to defraud:" *per* Harrison, C. J., in *Crawford* v. *Beattie*, 39 U. C. R. page 29. As to fraudulent acts justifying commitment, see 4 U. C. L. J. 12, 61; 9 U. C. L. J. 121; *Winks* v. *Holden*, 1 L. J. N. S. 100.

(*i*) This must mean with reference to the necessities of the debtor and his family. Equitable estate can be looked at for the purpose of determining if the debtor has had sufficient means: *Bennett* v. *Powell*, 1 Jur. N. S. 719; 24 L. J. Ch. 736. Where a debtor has parted with his property fraudulently, see *Kidd* v. *O'Connor*, 43 U. C. R. 193.

(*k*) A party ordered to pay a sum recovered against him, and who has made default, and, upon being examined on a judgment summons, shews no sufficient excuse for such default, may be committed to prison forthwith; but if the Judge orders him to pay the money at a future day, *or* in default to be committed, and the party again makes default, he cannot be committed without an opportunity of being heard as to the cause of such default: *Abley* v. *Dale*, 10 C. B. 62; see *Ex parte Kinning*, 4 C. B. 507; *Kinning* v. *Buchanan*, 8 C. B. 271; *Baird* v. *Story*, 23 U. C. R. 624. A commitment on a judgment summons is in the nature of *a limited or qualified execution*, and not of a punishment for contempt: *Dakins, Ex parte*, 16 C. B. 77. In this case the commitment was for contempt in not appearing on judgment summons. Payment of the debt and costs would seem to entitle a defendant in such a case to his discharge from custody: *per* Williams, J., at page 95 of 16 C. B. This appears somewhat inconsistent with *Davies* v. *Fletcher*, 2 E. & B. 271, cited on the argument, but not referred to in the judgment of the Court. A different rule prevails in our higher Courts: *Henderson* v. *Dickson*, 19 U. C. R. 592; *Ward* v. *Armstrong*, 4 P. R. 58. Judgment for debt and costs was given against *B.*, and an order made to pay by instalments. *B.* made default, and a judgment summons was issued, upon which he was examined and committed for seven days, upon the ground that he had the means of

In what cases only the party summoned may be committed for non-attendance: costs allowed him in certain cases.

183. A party failing to attend according to the requirements of any such summons as aforesaid, shall not be liable to be committed to gaol for the default, unless the Judge is satisfied that such non-attendance is wilful, (*l*) or that the party has failed to attend after being ~~twice~~ so summoned; and if at the hearing it appears to the Judge, upon the examination of the party or otherwise, that he ought not to have been so summoned, (*m*) or if at such hearing the judgment

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satisfying the judgment and refused to do so. He was subsequently summoned and committed two several times for forty days, each on the same ground. *Held*, that there was power to commit for a default of the same kind as often as default is committed: *Boyce, In re*, 2 E. & B. 521. A warrant of commitment, stating that "it appeared to the satisfaction of the Judge that the defendant had obtained credit from the plaintiff under false pretences, and had made a gift, delivery or transfer of his property, with intent to defraud his creditors, and thereupon the Judge by a certain order did adjudge, &c," not being in the nature of a conviction, is not bad for stating in the alternative the mode by which the offence was committed: *Purdy, Ex parte*, 9 C. B. 201. Where a defendant does not attend on judgment summons, and a warrant of commitment is issued in consequence, payment made to the plaintiff was *held* not to prevent the execution of the warrant, it being contempt: *Davies* v. *Fletcher*, 2 E. & B. 271; see *Ex parte O'Neill*, 10 C. B. 57; but see *Dakins, Ex parte*, 16 C. B. 77. An order on which a warrant of commitment was founded, that defendant pay the debt at a future given day *or* be imprisoned for thirty days, was *held* bad: *Dews* v. *Riley*, 11 C. B. 434; 4 L. C. G. 65. It follows, from *Abley* v. *Dale*, 10 C. B. 62, and the case just quoted of *Dews* v. *Riley*, that if the Judge postpones the ordering of commitment of a defendant after examination, he must have an opportunity of being again heard: see also *Bullen* v. *Moodie*, 13 C. P. 126; 2 E. & A. 379, s. c.; Maxwell on Statutes, 325; *In re Hicks*, 5 P. R. 88 But if in the presence of the defendant, the Judge orders his commitment, then there is no necessity for any other summons: *Baird* v. *Story*, 23 U. C. R. 624. One who does not reside or carry on business in this Province could not be committed: *Regan* v. *McGreevy*, 5 P. R. 94. An order of commitment upon non-payment cannot be embodied in the original order to pay: *Ex parte Kinning*, 4 C. B. 507: see further, notes to Rule 101. No valid commitment could be made on a judgment summons issued from any Court, except that in whose division the defendant resided or carried on business at the time it was issued (*Houlden* v. *Smith*, 14 Q. B. 841), unless the defendant submitted to the jurisdiction: *Reg.* v. *Smith*, L. R. 1 C. C. 110; *Blake* v. *Beech*, 1 Ex. D. 320. But not if he took no notice of the proceedings: *Hudson* v. *Tooth*, 3 Q. B. D. 46. As to the meaning of the words "resides" or "carries on business," see notes to sections 62 and 71; Maxwell on Statutes, 59, 60; *Thorp* v. *Browne*, L. R. 2 H. L. 220; *Reg.* v. *V. C. of Oxford*, L. R. 7 Q. B. 471.

(*l*) Where it can be clearly proved that a person wilfully refuses to attend on first summons the creditor should not be put to the costs of a second summons. Proof of expressions made use of by the debtor of a determination not to obey the first summons, but to await the second, have been *held* by some Judges to be sufficient reason to warrant an immediate order for commitment.

(*m*) If a creditor, knowing that his debtor has been unfortunate, or if when the summons was issued he knew that the debtor had no means beyond what afforded himself and his family a scanty subsistence, or under other circumstances of a like character, nevertheless has the debtor summoned under the 177th section,

creditor does not appear, the Judge shall award the party summoned a sum of money by way of compensation for his trouble and attendance, to be recovered against the judgment creditor in the same manner as any other judgment of the Court. C. S. U. C. c. 19, s. 166.

Commitment in case of refusal.

184. Wherever any order of commitment as aforesaid has been made, the Clerk of the Court shall issue, under the seal of the Court, a warrant of commitment (*n*) directed to the Bailiff of any Division Court within the County, (*o*) and such Bailiff may by virtue of such warrant take the person (*p*) against whom the order has been made. C. S. U. C. c. 19, s. 167.

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and the Judge makes no order, it is submitted that a wise discretion would be exercised in making a creditor not only pay the debtor for his trouble and attendance under this section, but also bear the costs of the proceedings under section 180.

(*n*) The Clerk should, in issuing the warrant, be careful to see that three calendar months from the date of the entry of the order of commitment in procedure book have not expired: Rule 101; *Hayes* v. *Keene*, 12 C. B. 233. If they have, he would, in the event of the debtor's arrest, be liable as a trespasser: *Lawrenson* v. *Hill*, 10 Irish C. L. R. 177; *Pedley* v. *Davis et al.*, 10 C. B. N. S. 492; but see *Ex parte O'Neill*, 10 C. B. 57. The warrant must, in addition to being under seal, be dated, otherwise the arrest would be illegal: *In re Fletcher*, 1 D. & L. 726; see Forms 93 and 94. As to warrants of commitment generally, see Rob. & Jos. Dig. 1988; Fisher's Digest, 5148.

(*o*) The warrant need not be executed by the Bailiff of the Court from which it issues. The Bailiff of any Court within the County has an equal power to execute it. If executed by the Bailiff of another Court, it should properly be addressed to him.

(*p*) "On receiving a warrant, the officer should see that it has the seal of the Court and the signature of the Clerk; and further, if a commitment for contempt, that it has also the seal and signature of the Judge to it. The arrest may be made at any time of day or night, but must not be made on a Sunday:" 4 U. C. L. J. 62. If the debtor is ordered to be committed any time after examination, and the Bailiff is negligent in executing the warrant, he and his sureties would no doubt be liable: see 4 U. C. L. J. 62. The following is a very good guide to a Bailiff as to his duties in executing the warrant: "The Bailiff will not be justified in breaking open the outer door of a person's dwelling house to execute a warrant, nor indeed in the use of any *force* to effect an entrance, even to the breaking of a latch: 5 Coke, 92. An arrest under such circumstances would be void, and render the Bailiff liable to an action (see *Hodgson* v. *Towning*, 5 Dowl. P. C. 410); but, having once got in, he may break any *inner* door; so he may break open the outer door of a barn, stable, or outhouse. But what has been before said as to executions against goods will apply in this particular to the execution of warrants; and the caution is repeated, that even where force is necessary, a demand for admission should be first made, and all fair means resorted to before force is employed. Although an officer, having reason to believe that a party is in his house, may peaceably enter to arrest him, yet he cannot justify even a peaceable entry into the house of a stranger, except

Constables, &c., to execute warrants.

185. All constables and other peace officers within their respective jurisdictions shall aid in the execution (*q*) of every such warrant, and the gaoler or keeper of the gaol of the County in which such warrant has been issued, shall receive and keep the defendant therein until discharged under the provisions of this Act or otherwise by due course of law. (*r*) C. S. U. C. c. 19, s. 168.

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by proof that the party was actually there: *Cooke* v. *Birt*, 5 Taunt., 765; *Johnson* v. *Leigh*, 6 Taunt., 246. If after being once arrested, the party escape and shelter himself in the house of another, the Bailiff may enter and take him, provided *it be done on fresh pursuit*: Coke, 92. The Bailiff should always keep this in mind, that if a defendant escape from custody through his negligence or want of precaution, he will be liable to plaintiff; it may be, to the whole extent of the claim: 4 U. C. L. J. 62, 63. "To constitute an arrest, the party should, if possible, be touched by the officer; bare words will not [illegible] an arrest without laying hold of the person or otherwise confining him. [illegible] a Bailiff come into a room and tell a party he arrests him and locks the [illegible] is an arrest, for he is in the custody of the Bailiff; or if in any other way the party submit himself by word and action to be in custody, it is an arrest. The Bailiff, whether known as such or not, ought to produce his warrant if required; but should in no case part with the possession of it. If the party snatch or take the warrant, the Bailiff may force it from him, using no unnecessary violence in so doing. As in the case of a constable where resistance is made, the utmost caution and forbearance should be used; but the Bailiff may lawfully use force to overcome resistance—that force not exceeding the necessity of the case, and ceasing the instant resistance ceases. Whenever difficulty is apprehended in effecting an arrest, the Bailiff may call any constable or peace officer to his assistance, as constables and peace officers within their respective jurisdictions will be bound to aid the Bailiff to make an arrest. It would seem that where the Bailiff uses proper precaution, and acts with reasonable firmness, he is not liable in case of a rescue being made. When an arrest is made, the party arrested should be at once brought to gaol, unless indeed he pay the amount mentioned in the warrant, with the costs; and there seems no objection to the Bailiff taking it from him, although perhaps in strictness he would not be warranted in doing so. No more force or restraint should be imposed on the prisoner than is necessary to prevent his escape, and no delay should be made in placing the party in gaol. The warrant is left with the gaoler. The Bailiff should obtain a memorandum from the gaoler of his having received the warrant and the party named therein from the hands of the Bailiff. As in other cases, the Bailiff must make return to the Clerk of what he has done under the warrant:" 4 U. C. L. J. 83; see also notes to section 182. As to the indorsement on the warrant by the Bailiff after arrest, see Rule 103. *Quære:* Should a Judge, if in doubt as to the validity of a commitment on application to discharge the debtor, presume in favor of liberty and discharge him? see *In re Beebe*, 3 P. R. 270.

(*q*) A refusal to "aid in the execution" of a warrant of commitment would be a misdemeanour: *Reg.* v. *Sherlock*, L. R. 1 C. C. 20.

(*r*) If the gaoler should keep the debtor in prison longer than the law allows, according to the facts appearing on the face of the warrant, he would be liable (*Moone* v. *Rose*, L. R. 4 Q. B. 486); and if the debtor should escape, the gaoler would also be liable (*Alsept* v. *Eyles*, 2 H. Bl. 108), even though he escape through a relaxation of the prison rules on account of the debtor's ill health:

When debtor in custody shall be discharged.

186. Any person imprisoned under this Act, who has satisfied the debt or demand, or any instalment thereof payable, and the costs remaining due at the time of the order of imprisonment being made, together with the costs of obtaining such order, (*s*) and all subsequent costs, shall, upon the certificate of such satisfaction, signed by the Clerk of the Court, (*t*) or by leave of the Judge of the Court in which the order of imprisonment was made, be discharged out of custody. C. S. U. C. c. 19, s. 169.

Judge may make order and may alter and modify the same.

187. The Judge before whom such summons is heard may, if he thinks fit, rescind or alter any order for payment previously made against any defendant so summoned before him, and may make any further or other order, (*u*) either for the payment of the whole of the debt or damages recovered and costs forthwith, or by any instalments, or in any other manner that he thinks reasonable and just. C. S. U. C. c. 19, s. 170.

Parties may be examined, when.

188. In case the defendant in any suit brought in a Division Court has been personally served with the summons to appear, or personally appears at the trial, and judgment is

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Haines v. *East India Co.*, 11 Moore P. C. C. 39. As to the damages in a case against any officer or gaoler for an escape, see *MacRae* v. *Clarke*, L. R. 1 C. P. 403.

(*s*) Should the whole amount of the debt be payable under any order, then it and the costs would have to be paid before the debtor would be entitled to a discharge, or if one or more instalments overdue, then so much and costs. The gaoler can tell the amount to be paid from looking at the face of the warrant and the endorsement of the Bailiff on it under Rule 103. The gaoler should not receive the debtor without this endorsement, otherwise he would not know the costs of arrest and conveying to gaol if the debtor wanted to discharge himself. The amount of these costs need not appear on the face of the warrant: *Moffat* v. *Barnard*, 24 U. C. R. 498. After imprisonment the Bailiff could not receive the amount of debt and costs: *Arnott* v. *Bradly*, 23 C. P. 1.

(*t*) The gaoler would be bound to liberate the defendant on the certificate of the Clerk or on an order of the Judge, either of which the gaoler should retain as his security. In the case of a discharge by the order of the Judge on payment of the default, as remarked by Jervis, C. J., in the case of *Ex parte Dakins*, 16 C. B. at page 93, "When the money is paid, the Judge becomes a mere ministerial officer to order the discharge. He has no discretion. The prisoner is entitled to the order as a matter of course."

(*u*) This section is substantially taken from the English Statute 9 & 10 Vic. cap. 95, sec. 100; see also 12 & 13 Vic. of England, cap. 101, sec. 1. Power is here given to the Judge, on the hearing of a judgment summons, if he thinks fit, to rescind or alter any order for payment previously made against the defen-

given against him, the Judge, at the hearing of the cause or at any adjournment thereof, may examine the defendant and the plaintiff (*v*) and any other person touching the several things hereinbefore mentioned, and may commit the defendant to prison, and make an order in like manner as he might have done in case the plaintiff had obtained a summons for that purpose after judgment. C. S. U. C. c. 19, s. 171.

[*C. S. U. C. c.* 19, *s.* 172, *is as follows:*—

Party committed not to be discharged for insolvency.

172. No protection order or certificate granted by any Court of Bankruptcy, or for the relief of insolvent debtors, shall be available to discharge any defendant (*w*) from any order of commitment as aforesaid. 13, 14 V. c. 53, s. 95, *the end.*]

Debt not to be extinguished.

189. No imprisonment under this Act shall extinguish the debt or other cause of action on which a judgment has been obtained, or protect the defendant from being summoned anew and imprisoned for any new fraud or other default (*x*) rendering him liable to be imprisoned under this Act, or deprive the plaintiff of any right to take out execution (*y*) against the defendant. C. S. U. C. c. 19, s. 173.

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dant. The words "previously made" used in this section, it is submitted, have reference to any order that may have been made under the 107th section, or on any previous judgment summons: see Davis' C. C. Acts, 146.

(*v*) This is seldom resorted to. It can only be done where the defendant has been "personally served" with the summons, or "personally appears." Should a defendant have the means of payment of a debt, and the Judge were satisfied that he would leave the country before a judgment summons could be heard, he would probably act upon this section. The Judge, however, can under this section make any order he has authority to make on a judgment summons: see notes to section 187.

(*w*) A discharge under the Insolvent Act does not prevent a party from being committed on a judgment summons (*In re Mackay et al.* v. *Goodson*, 27 U. C. R. 263); but where all a debtor's property has passed to an assignee in insolvency, it is submitted that the circumstances should be very exceptional to warrant an order for commitment.

(*x*) The Judge can commit for as many defaults in payment as the facts warrant. There should be a fresh adjudication every time: *In re Boyce*, 2 E. & B. 521; see notes to section 182.

(*y*) It is submitted that the reason of the case last cited, and especially of the judgments of Coleridge, and Erle, and Crompton, J. J., at pages 528 and 529, is, that a fresh execution cannot be issued *during the imprisonment* of the debtor: see also *Ex parte Dakins*, 16 C. B. pp. 93 and 95; Arch. Pract. 12th Ed. 604.

ABSCONDING DEBTORS. (z)

Absconding debtors.

190. In case any person, being indebted (*a*) in a sum not exceeding one hundred dollars, nor less than four dollars, for any debt or damages arising upon any contract, express or implied, or upon any judgment,

1. Absconds (*b*) from this Province, leaving personal pro-

(z) Where a statute authorizes proceedings to be taken against the property of any person without the prerequisite of a judgment or other judicial determination, the provisions of that statute should, in regard to such proceedings, be carefully observed. The proceeding by attachment is summary in its character, and frequently unjust in its consequences. It is mostly resorted to before judgment, and in such cases is, therefore, devoid of the character of a duly established claim. The debtor might have, and frequently has, a substantial defence to the action. Doubtful claims are frequently withheld from suit, and their payment only attempted to be enforced by attachment, when it is supposed such means will best accomplish that purpose. This proceeding is sometimes resorted to as a measure of coercion, and taken at a time and under such circumstances as are most likely to produce the desired result. Advantage is frequently taken of a man's circumstances, and that too at a time when he finds it better to submit to wrong and injustice than to suffer a more serious loss by delay and inconvenience. The proceeding is summary in its nature and exceptional in character. The party taking it should therefore be held to a strict exercise of the rights conferred by the statute, and the due observance of all its requirements: *Fletcher* v. *Calthrop*, 6 Q. B. page 891, *per* Denman, C. J.; *Royal Canadian Bank* v. *Matheson*, 6 L. J. N. S. page 11, *per* Galt, J.; *Kraemer* v. *Gless*, 10 C. P. page 475; *Reg.* v. *Ellis*, 6 Q. B. page 506; Maxwell on Statutes, 237, 238 and 257. Where the form of affidavit and enacting clause differ, the latter must govern: *Boyle* v. *Ward*, 11 U. C. R. 416; *Higgins* v. *Brady*, 10 U. C. L. J. 268. As to the affidavit see 9 U. C. L. J. 136, 137. If there should be no personal property there could be no attachment (see 9 U. C. L. J. 332), and if an attachment was issued, and no property seized under it, the proceedings to judgment would have to be taken as if no attachment had issued. The 203rd section presupposes seizure under attachment.

(*a*) That is whenever there is a cause of action for an amount not exceeding $100, nor less than $4, as "debt or damages arising upon any contract, express or implied, or upon any judgment," this proceeding may be resorted to. Unlike sections 79 and 124 this clause is not confined to *liquidated* demands, but applies also to claims of an unliquidated character, *provided* they arise in the manner pointed out by the statute. A claim in trespass or trover or for any other actionable wrong would not be within the section. Proceedings could be taken on a judgment, no matter for what cause obtained. A claim for damages in any action when reduced to judgment would become a "debt" under this clause: see *Jones* v. *Thompson*, E. B. & E. 63; *Dresser* v. *Johns*, 6 C. B. N. S. 429. It is submitted that the word "judgment" here used should not be confined to the judgment of any particular Division Court, and that judgments of the Superior or County Courts would also be within its provisions, but that judgments of any Court but that out of which an attachment issued would, however, have to be sued for and recovered upon as any other debt of a like nature.

(*b*) A debtor could "abscond" from this Province to Quebec within the meaning of this section. One who might be in Ontario on a temporary sojourn could not be said to be *absconding* "from this Province" on returning to his

perty liable to seizure (*c*) under execution for debt in any County in Ontario.

2. Attempts to remove (*d*) such personal property, either out of Ontario or from one County to another therein.

3. Keeps concealed (*e*) in any County to avoid service of process;

and in case any creditor (*f*) of such person, his servant or agent (*g*) makes and produces an affidavit or affirmation to the purport of the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts, and in

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home: *McPhadden* v. *Bacon*, 9 L. J. N. S. 226; *Clements* v. *Kirby*, 7 P. R. 103. The person must "have personal property liable to seizure under execution" before he can be considered an "absconding debtor" within the meaning of this Act. To "abscond" merely is not sufficient: *Higgins* v. *Brady*, 10 U. C. L. J. 268; *Wakefield* v. *Bruce*, 5 P. R. 77.

(*c*) The general impression seems to have been (founded on the remarks of Robinson, C. J., in *Reg.* v. *Davidson*, 21 U. C. R. 41,) that there was no exemption of any part of the goods of an absconding debtor: but see now Rev. Stat. cap. 66, s. 3; also see notes to sections 156 and 171.

(*d*) The *intention* of removing personal property would not be sufficient; there must be distinct evidence of an *attempt* at removal: *Sharp* v. *Matthews*, 5 P. R. 10; *Hood* v. *Cronkite* 29 U. C. R. 98; *Reg.* v. *Collins*, L. & C. 471; *Reg.* v. *Johnson*, 34 L. J. M. C. 24; *Ex parte Coates, In re Skelton*, 5 Ch. D. 979; 6 L. C. G. 17.

(*e*) This must in every case be a question of fact, and proper inquiries should be made before making the affidavit: see notes to sections 131 and 134. The inference must be that the concealment is for the purpose of avoiding the service of process. If the facts should shew any other object or intention, the affidavit could not properly be made. A person might be said to be keeping concealed if he remained in his own house, and at his request his presence there was denied by his servants or others, or if being there, he, knowing the object of a process-server, refused him admission.

(*f*) The word "creditor here used must be read in connection with the words "for any debt or damages arising upon any contract, express or implied, or upon any judgment," in the first part of the section, and cannot be confined to persons having liquidated demands merely.

(*g*) The affidavit can be made by one who has express or implied authority to make it. The word "servant" cannot be held to apply to every servant, domestic or otherwise, but to one who, from the nature of his employment, would in this way have an express or implied authority to protect the interests of his master: see *Reg.* v. *Cummings*, 4 U. C. L. J. 182. If the person making the affidavit had not authority to do so, it is submitted that his unauthorized act could not be ratified: *Ainsworth* v. *Creeke*, L. R. 4 C. P. 476. "An important branch of the duties of Clerks is preparing affidavits for and uing out *warrants of attachment*. It is presumed that Clerks will be applied to, except in cases of pressing emergency, where it may be indispensable to resort to Justices of the Peace; indeed, as a general rule, parties have no guarantee for the regularity of the proceeding unless they employ an officer instructed in and familiar with the requirements of law; and as Magistrates seldom trouble themselves with such matters, and are not entitled to make any charge for

case the said affidavit or affirmation be filed (*h*) with the Clerk of any Division Court in Ontario, then such Clerk upon the application of such creditor, his servant or agent, shall issue a warrant under the hand and seal of such Clerk, (*i*) in the form prescribed by such General Rules or Orders, directed to the Bailiff of the Division Court within whose Division the same is issued, or to any Constable (*k*) of the County, com-

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drawing the affidavit and suing out the attachment, it is not probable their services will be sought save where the defendant's property would be lost unless instant action was taken, and the Clerk's office happens to be at a distance. The right to seize a party's property on the plaintiff's affidavit, or his agent's, unsupported by other testimony of the debt and state of facts giving right to attach, though a salutary provision of the law, is liable to abuse; and being an *ex parte* proceeding, the rules regulating the right must be strictly observed:" 1 U. C. L. J. 21. For forms of affidavit and attachment, see Rule 35 and Forms 11 and 12. The statement of cause of action must be specially set out (*Ib.*), and for such statement in issuing attachment see 1 U. C. L. J. 21 and 41. Should the affidavit be "for money lent and goods sold and delivered," without shewing either that the money was lent, or that the goods were sold and delivered by the creditor to the debtor, it would be insufficient: *Handley* v. *Franchi*, L. R. 2 Ex. 34. For requisites of affidavits, see also Rob. & Jos. Digest, 3, and cases there cited; Arch. Pract. 12th Ed. 751, title, "Bailable Proceedings, Statement of cause of Action." The defendant could waive an irregularity in the affidavit, such as the omission to allege that the proceedings were not taken from any vexatious or malicious motive: *Barrow* v. *Capreol*, 2 U. C. L. J. 210. An affidavit for attachment which contains more than any one of the three alternatives of the statute is bad, and an attachment issued upon it would perhaps render all parties, except the Bailiff, liable as trespassers (*Quackenbush* v. *Snider*, 13 C. P. 196); so also would they be liable if the warrant were issued without any affidavit: *Caudle* v. *Seymour*, 1 Q. B. 889; *Gray* v. *McCarty*, 22 U. C. R. 568. It would not render the affidavit bad where made before suit commenced to entitle it in the Court: *Hart* v. *Ruttan*, 23 C. P. 613; *Wakefield* v. *Bruce*, 5 P. R. 77; see also *Higgins* v. *Brady*, 10 U. C. L. J. 268. As to who may "affirm," see Rev. Stat. cap. 62, sections 12 and 13.

(*h*) In *Moore* v. *Gidley*, 32 U. C. R. 233, it was *held*, in an action against a Justice of the Peace for trespass in issuing a warrant of attachment, that the transmission of the affidavit to the D. C. Clerk was not a necessary condition of his having jurisdiction. A written application to the Clerk for an attachment is not necessary, as is required under Rule 7, for a judgment summons, nor does the creditor appear to be restricted to proceeding in any particular Court as he is under section 62: see 1 L. C. G. 54.

(*i*) It will be observed that the warrant must be under the hand and seal *of the Clerk*, and not under the seal of the Court, as in section 156, in respect to executions: see Rule 9. Rule 35 and Form 12 appear to indicate that where the Clerk issues the attachment it should be under the seal of the Court. The statute and Form being at variance, the former should govern: *Boyle* v. *Ward*, 11 U. C. R. 416. Probably the Clerk could adopt the Court seal as his own: *Ontario Salt Company* v. *Merchants' Salt Company*, 18 Grant, 551; Rob. & Jos. Digest, 3463.

(*k*) As to the appointment of such officers, see Rev. Stat. cap. 82. "Any Constable" has power to execute the warrant: see *Delany* v. *Moore*, 9 U. C. R. 294; Rob. & Jos. Digest, 695; Fisher's Digest, 6610.

manding such Bailiff or Constable to attach, seize, take (*l*) and safely keep all the personal estate and effects of the absconding, removing or concealed person within such County, liable to seizure under execution for debt, (*m*) or a sufficient portion thereof to secure the sum mentioned in the warrant, with the costs of the action, and to return the warrant forthwith to the Court (*n*) or ' which the same issued. C. S. U. C. c. 19, s. 199; 40 V. , *Sched.* A (70).

(*l*) See notes to sections 156 and 170.

(*m*) See also notes to section 156. In an action for seizing goods under Division Court attachment it was proved that a few days before the seizure the goods had been sold by auction under the direction of one of the plaintiffs, who executed a bill of sale to the vendee, witnessed by the auctioneer. *Held*, that this plaintiff could not afterwards be permitted to set up that the sale was void because fraudulent as against the plaintiff's creditors, and to maintain trespass for seizing the same goods as if they were his own: *McPhatter* v. *Leslie*, 23 U. C. R. 573. Should the Bailiff or Constable seize more than might be necessary "to secure the sum mentioned in the warrant, with the costs of the action," he (together with the sureties, in the case of the Bailiff,) would be liable for an excessive distress; see *Piggott* v. *Birtles*, 1 M. & W. page 449; Addison on Torts, 2nd Ed. 14; 9 U. C. L. J. 318.

(*n*) Where there has been no proceeding by summons, and the warrant issued by a Justice of the Peace, it is submitted that the warr t should be returned to the Clerk of the Court within whose division the affi' was made or taken: see section 191, and 1 L. C. G. 54. If the warrant chment should be improperly issued, the Judge would have, independent, ny statutory enactment, a common law power to set it aside: *Jackson* v. *Randall*, 24 C. P. 87. A writ of execution from a Superior or County Court, would, on the authority of *Francis* v. *Brown*, 11 U. C. R. 558, entitle the Sheriff under it to seize goods then in the possession of a Division Court Clerk under attachment; but it is submitted, after a careful perusal of the authori' s here cited, and especially the judgment of Draper, C. J., at page 565 of 11 U. C. R.; of Hagarty, J., in *Fisher* v. *Sulley*, 3 U. C. L. J. 89; of Draper, J., in *Potter* v. *Carroll*, 9 C. P. at page 448, and looking at the object and scope of the Division Court Act, that an execution *from a Division Court*, at the suit of another creditor, does not take priority of the attachment and authorize a seizure of such goods on the execution to the prejudice of the attaching creditor. The principle of *Francis* v. *Brown* is, that the Legislature did not by the Division Court Act expressly take from an execution creditor in a Superior Court the rights against a debtor's goods which his writ gave him. No such reason, it is submitted, can be found for giving an execution priority over an attachment where both issue from the Division Court, and where neither one has precedence of the other. The goods are, it is to be observed, in the custody of the law, and cannot, it is submitted, during such time be again seized under Division Court process: *King* v. *Macdonald*, 15 C. P. 397; see also *Carrall* v. *Potter*, 19 U. C. R. 346; *Daniel* v. *Fitzell*, 17 U. C. R. 369; *Putnam* v. *Price*, 1 L. C. G. 77; *Paton* v. *Schram*, 1 L. C. G. 93; 2 U. C. L. J. 172; 2 L. C. G. 49 and 63; *Nicol* v. *Ewin*, 7 P. R. 331. By the attachment the creditor obtains a lien on the goods seized to the extent of his claim, which the 195th section preserves to him until his execution issues, and then gives him, as against Division Court creditors, priority of execution: see *Tate* v. *Cor. of Toronto*, 3 P. R. 181; *Caron* v. *Graham*, 18 U. C. R. 315.

When Justice of the Peace may issue attachments, &c.

191. Any County Judge, or a Justice of the Peace for the County, (*o*) may take the affidavit in the last preceding section mentioned, and upon the same being filed (*p*) with such Judge or Justice, the Judge or Justice may issue a

(*o*) From the notes to the previous section it will be seen the danger that Justices of the Peace run in issuing warrants of attachment; their safest course is to allow the Clerks of the Court to perform a duty which properly belongs to them. It is only in cases of necessity that a Justice of the Peace should grant the warrant. The author cannot better express his views on this matter than in the following language: "Under the Division Courts Act, the creditor has a choice in cases of attachment to apply to any Magistrate, or to the Clerk of the Court, to issue the warrant. The divisions are so small throughout the country, and the Clerk's office is usually so near a creditor's residence, generally in the same or an adjoining township, that rarely is there any cogent necessity for applying to a Magistrate rather than the Clerk; and the saving of a few miles against the risk of error is rather heavy odds for a plaintiff to take. Applying to a Clerk, he comes to an officer experienced in the work—one who has all the forms before him, and whose friendly word of caution will often save a plaintiff from getting himself into difficulty. It is not so when he applies to a Magistrate, who is not and cannot be expected to be familiar with the Division Court procedure. The propriety, therefore, of employing the Clerk seems obvious enough. Let no suitor be persuaded by a Magistrate to come to him on such a business; and perhaps it may somewhat damp ardour in this particular if we mention the fact that a Magistrate is not entitled to any fee under the statute for doing the work:" 9 U. C. L. J. page 318.

"The simplicity so necessary to the working of Division Courts has, in some cases, had the effect of allowing thoughtless or unscrupulous persons to work injuries, which are not so likely to occur in Courts of higher jurisdiction. In the higher Courts, to which we refer, the preliminary steps must come before the Judge; whereas in Division Courts many important measures are taken under the supervision of the Clerks only, or even indeed before a Justice of the Peace. Of course, when process is issued by the Clerks, there is a strong element of safety, and almost a certainty that the proceedings will be regular in form; but, in the case of Justices no such security exists, as the records of the Courts plainly show. Our attention has been called more especially to the issuing of writs of attachment, as well at the instance of thoughtless persons, who do not sufficiently consider the step they are about to take, as by unscrupulous creditors, who use the ready machinery of the Court as an instrument to terrify those with whom they have to deal into submitting to such terms as they may think proper to impose. The Board of County Judges, in preparing their forms, have studied to provide that all the requisites of the statute should be complied with, and have made it necessary that the party seeking to have the writ issued should swear positively to the fact and nature of the indebtedness, and that the debtor has absconded, or has *attempted* to remove his property out of the Province or County, or that the debtor keeps concealed with intent to defraud the creditor of his debt; and the creditor must also swear that he does not act from a vexatious or malicious motive. Now, if the requirements of the statute are carefully considered, and the affidavit carefully read over before swearing, much of the evil that has arisen would be avoided; of course this would not deter persons who were so disposed from wilfully using the writ as, we might almost say, an instrument of torture:" 6 L. C. G. 17; see also 3 U. C. L. J. 61.

(*p*) It is submitted that the *filing* by the Justice is a necessary condition to the proper issue of the warrant: *Magrath* v. *Todd*, 26 U. C. R. at page 90; *Lee et al.* v. *Morrow*, 25 U. C. R. 610; *Westbrook* v. *Calaghan*, 12 C. P. 616;

warrant under his hand and seal in the form prescribed as aforesaid, and such Judge or Justice shall forthwith transmit the affidavit to the Clerk of the Division Court within whose Division the same was made or taken, to be by him filed and kept among the papers in the cause. C. S. U. C. c. 19, s. 200.

Bailiff or Constable to seize and make inventory.

192. Upon receipt of such warrant by the Bailiff or Constable, and upon being paid his lawful fees, including the fees (*q*) of appraisement, such Bailiff or Constable shall forthwith execute (*r*) the warrant, and make a true inventory of all the estate and effects which he seizes and takes by virtue thereof, and shall within twenty-four hours after seizure, call to his aid two freeholders, (*s*) who being first sworn by him to appraise the personal estate and effects so seized, shall then appraise the same and forthwith return the inventory attached to such appraisement to the Clerk

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Reg. v. *Shaw*, 23 U. C. R. 616 ; *Meyers and Wonnacott, In re*, 23 U. C. R. 611. It was *held*, however, in *Moore* v. *Gidley*, 32 U. C. R. 233, that the omission by the Justice of the Peace to transmit the affidavit to the D. C. Clerk did not render him liable as a trespasser, though the neglect to do so might render him liable for a breach of duty.

(*q*) As to the fees of appraisers, see section 47 and Form 3.

(*r*) That is within a reasonable time : Maxwell on Statutes, 311 ; and note (*y*) to section 18.

(*s*) See note (*f*) to section 27.

The duties of Bailiffs and appraisers are well expressed, and the forms to be used will be found in the following extracts :

"Bailiffs' duties in respect to attachment do not need the same full notice as those of Clerks. We will refer to them briefly, and give the necessary forms under the statute, which are not contained in the schedule of forms prepared by the Commissioners. If the warrant of attachment be placed in the bailiff's hands by the party or a magistrate, he should take care to have all his lawful fees, as well as the fees for appraisement, paid to him before he undertakes to act, for having once begun, he must go on with the proceeding ; but where the warrant is sued out of his own or some other Court, he may be sure the Clerk will have the fees secured to him. Also, enquiry should be made by the Bailiff as to the property intended to be seized, and, if perishable, it will be proper for him to require security under the 70th (now 205th) section of the Act before he seizes ; but in general, on receipt of a warrant directed to him, the bailiff is forthwith to execute the same ; that is to say, he is to proceed with all diligence to seize such personal estate and effects of the debtor as may be taken under the ordinary writ of execution, or a sufficient portion thereof to *secure* the sum mentioned in the warrant, with costs. A difficulty may occur with respect to other creditors coming in afterwards, and it is not easy to lay down any rule as to the amount of property the bailiff should attach. If he has knowledge of other creditors coming in, it would seem proper to seize enough to cover the claims of all ; but in any case let the bailiff take ample property to cover, at a forced sale, the debt and costs in the case in which he acts. It may be that an enlarged meaning ought, in construction, be given to the word *secure*, as used

of the Court in which the warrant is made returnable. (*t*) C. S. U. C. c. 19, s. 201.

193. In any case commenced by attachment, in a Division Court, the proceedings may be conducted to judgment and execution in the Division Court of the Division within which the warrant of attachment issued. (*u*) C. S. U. C. c. 19, s. 202. Proceedings may be continued in Court out of which attachment issued.

194. Where proceedings have been commenced in any case before (*v*) the issue of an attachment, such proceedings Proceedings commenced before

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in the 64th (now 190th) section; but we will not pursue this point at present, as it opens several nice questions. Having seized, the Bailiff's first duty is to make an inventory of the property, which may be in the following form:

An Inventory of goods and chattels (property and effects) by me this day seized and taken, in the Township of , by virtue of a warrant of attachment issued by *T. L.*, Clerk of the Division Court of the County of , (*or* as the case may be), on behalf of *A. B.*, for the sum of , against the personal estate and effects of *C. D.*: that is to say, one lumber waggon, one plough, &c., (stating all the articles seized).

Dated this day of A.D. 18 .

B. F.

Bailiff of the Division Court County .

The inventory made, the Bailiff, within twenty-four hours thereafter, calls to his aid two freeholders, and swears them to appraise the property seized: 1 U. C. L. J. 22 and F. 120. This form of oath will be found at Form 121.

A memorandum thereof should be then endorsed on the inventory as follows:

On the day of A.D. 18 , *T. T.* of and *N. N.* of were sworn by me well and truly to appraise the goods, chattels, property and effects mentioned in this inventory.

B. F.

Bailiff.

The freeholders then examine the property as pointed out to them by the Bailiff, and, having valued the same, their appraisement should be endorsed on the inventory: 1. U. C. L. J. 22. The form of this endorsement will be found at Form 122. The appraisers must be sworn *before* they make the appraisement: *Kenny* v. *May*, 1 M. & Rob. 56. If the Bailiff should sell without an appraisement, he would be liable to an action, but the sale would not be void: *Lyon* v. *Weldon*, 2 Bing. 334; *Campbell* v. *Coulthard*, 25 U. C. R. 621. The Bailiff could not be an appraiser (*Westwood* v. *Cowne*, 1 Stark, 172); nor the attaching creditor: *Andrews* v. *Russell*, Bull. N. P. 81.

(*t*) This, it is submitted, means to the Clerk of the Court within whose Division the affidavit for attachment was made or taken whether by himself or a Justice of the Peace: see section 191.

(*u*) Reading this section in connection with section 191, it will be seen that the Legislature presupposes the affidavit to be "made or taken," and the warrant of attachment to be issued, within the same Division. Should the affidavit be taken in one division, and the warrant issued in another, there would be some inconvenience about the custody of the papers.

(*v*) The proceeding by attachment is in this case supplementary to the action previously commenced.

attachment to continue.

may be continued to judgment and execution in the Division Court within which the proceedings were commenced. C. S. U. C. c. 19, s. 203.

Property attached may be sold under execution.

195. The property seized (*w*) upon any warrant of attachment shall be liable to seizure and sale under the execution to be issued upon the judgment, or in case such property was perishable, (*x*) and has been sold, the proceeds thereof shall be applied in satisfaction of the judgment. C. S. U. C. c. 19, s. 204.

Plaintiff not to divide cause of action.

196. No plaintiff shall divide (*y*) any cause of action into two or more suits for the purpose of bringing the same within the provisions of the preceding sections, but any plaintiff having a cause of action above the value of one hundred dollars, and not exceeding two hundred dollars, for which an attachment might be issued if the same were not above the value of one hundred dollars, may abandon the excess, (*z*) and upon proving his case, (*a*) may recover to an amount not exceeding one hundred dollars, and the judgment of the Court in such case shall be in full discharge of all demands in respect of such cause of action, and the entry of judgment (*b*) therein shall be made accordingly. C. S. U. C. c. 19, s. 205.

If several attachments issued.

197. In case several attachments issue against any party then subject to the provisions contained in the sixteenth

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(*w*) As to the seizure and sale of chattels on execution, see notes to sections 156, 170, 171 and 192. When replevin is maintainable for goods seized under attachment, see *Arnold* v. *Higgins*, 11 U. C. R. 191; but also see *Caron* v. *Graham*, 18 U. C. R. 315.

(*x*) See notes to section 204.

(*y*) See note (*h*) to section 59.

(*z*) "Where the excess is abandoned, it must be done in the first instance on the claim:" Rule 8 and notes thereto; *In re Higginbotham* v. *Moore*, 21 U. C. R. 326.

(*a*) It is submitted that if personal service of the summons, and of detailed particulars of the plaintiff's claim were made, that the Judge might in his discretion give judgment without further proof: see sections 82, 202 and 203, and notes. Other attaching creditors might defend the action under Rule 36. If the defendant be not personally served, the trial could not take place until a month after the seizure under the attachment: Rule 25.

(*b*) No form is given for the minute of judgment, but it can easily be drawn up from the facts of the case.

section (*c*) of *The Act respecting Absconding Debtors*, the proceeds of the goods and chattels attached shall not be paid over to the attaching creditor or creditors according to priority, (*d*) but shall be rateably distributed (*e*) among such of the creditors suing out such attachments as obtain judgment against the debtor, in proportion to the amount really due upon such judgments; and no distribution shall take place until reasonable time, in the opinion of the Judge, has been allowed to the several creditors to proceed to judgment. (*f*) C. S. U. C. c. 19, s. 206. Rev. Stat c. 68, s. 16.

198. Where the goods and chattels are insufficient to satisfy the claims of all the attaching creditors, no such creditor shall be allowed to share unless he sued out his attachment, and within one month next after (*g*) the issue of the first attachment, gave notice thereof to the Clerk (*h*) of the Court out of which the first attachment issued, (*i*) or in which it was made returnable. (*k*) C. S. U. C. c. 19, s. 207. If goods insufficient.

199. All the property seized under the provisions of the preceding sections shall be forthwith (*l*) handed over to the Clerk to take charge of goods attached.

(*c*) See Rev. Stat. 829.

(*d*) See notes to section 190 and 7 U. C. L. J. 313. When Division Court attachment is superseded, see Rev. Stat. 829.

(*e*) Like the policy of bankrupt and insolvent laws *equal distribution* among attaching creditors is what the Legislature had here in view and have prescribed; but if (as is generally the case) the goods attached prove insufficient to satisfy the claims of *all* attaching creditors, then, under section 198, only those would participate who sued out attachments, *and* within one month after the issue of the first attachment gave notice thereof to the Clerk of the Court out of which such first attachment issued, or in which it was made returnable.

(*f*) See notes to section 196 and Rules 35 and 36.

(*g*) A calendar month is here meant, and the day on which the first attachment issued would not be reckoned as part of the time: see notes to section 107.

(*h*) As the section does not say that the notice must be in writing, it need not be: *Rex* v. *Justices of Surrey*, 5 B. & Ald. page 539; *Reg.* v. *Nichol et al.*, 40 U. C. R. 76. If the Clerk were made aware of an attachment in any other way, it is submitted it would be sufficient notice to him: *Lanark and Drummond Plank Road Company* v. *Bothwell*, 2 U. C. L. J. 229; but see 5 L. J. N. S. 114. For precaution the notice had better be given in writing, although it is submitted that Q. B. and C. P. Rule 131 would not apply here.

(*i*) That is when issued by a Clerk of a Court.

(*k*) See latter parts of sections 192 and 193 and notes thereto.

(*l*) That is within a reasonable time: Maxwell on Statutes, 311, and note (*y*) to section 18.

× Repealed and section 16 of act of 1886 substituted

custody and possession of the Clerk of the Court out of which the warrant of attachment issued, or into which it was made returnable, (*m*) and such Clerk shall take the same into his charge and keeping, (*n*) and shall be allowed all necessary disbursements for keeping the same. C. S. U. C. c. 19, s. 208.

On what terms goods attached may be restored.

200. In case any person against whose estate or effects any such attachment has issued, or any person on his behalf, at any time prior to the recovery of judgment in the cause, executes and tenders to the creditor who sued out the attachment, and files in the Court to which the attachment has been returned, a bond with good and sufficient sureties, (*o*)

(*m*) See notes to sections 191 and 192.

(*n*) Neither trespass, trover, nor replevin would be maintainable against the Clerk for the goods. As remarked by Robinson, C. J., in *Caron* v. *Graham*, 18 U. C. R. at page 318, "that the statutes having made it the duty of the Clerk to receive from the Bailiff such goods as he had seized, no action of trespass or of trover could have been sustained against the Clerk for doing what the Legislature had made it his plain duty to do, and the Replevin Act * * only gives the remedy by replevin in those additional cases where trespass or trover would have lain for an unlawful capture or an unlawful detention:" see also Rob. & Jos. Digest, 3299. The Clerk would, it is submitted, be subject to the ordinary responsibilities of a depositary. He would be bound to take the ordinary care of things accepted by him to keep which a reasonably prudent man takes of his own property of a like description: *Giblin* v. *McMullen*, L. R. 2 P. C. 317. He would be liable to make compensation to the owner if the goods were stolen, damaged or lost by reason of his gross negligence (as to which see L. R. 2 P. C. 336) in the keeping of them, but he would not be responsible for slight neglect or ordinary casualties: *Coggs* v. *Barnard*, 1 Smith's L. C. 177. "What is and what is not gross negligence amounting to a breach of trust is often a mixed question of law and fact, but more generally a pure question of fact. It must be judged of by the actual state of society, the general usages of life, and the dangers peculiar to the times, as well as by the apparent nature and value of the subject matter of the bailment, and the degree of care it seems to require:" Addison on Contracts, 7th Ed. 653: *Rooth* v. *Wilson*, 1 B. & Ald. 60. "If the subject matter of the bailment is a perishable commodity, the bailee is bound to bestow such an amount of labour and vigilance for its preservation as would ordinarily be bestowed by a prudent owner:" Addison on Contracts, 654. Should ordinary prudence require a Clerk to insure such goods as might be placed in his possession under this section, if his own, then if the insurance premium were tendered him, with a request to effect insurance, and he could do so, it is submitted his neglect in that respect would be within the principle above expressed, and render him liable if they were destroyed by fire. He would not be bound to do so out of his own money. The Clerk should store or deposit the goods in some reasonably safe place, and if the approval of the attaching creditor could be got thereto, so much the better.

(*o*) One person would be sufficient if unquestionably good for the amount (Interpretation Act, section 8, sub-section 18, Rev. Stat. 5); but it is usual to have at least two. As to form of bond, see Form 105.

to be approved of by the Judge or Clerk, (*p*) binding the obligors, jointly and severally, in double the amount claimed, with condition that the debtor (naming him) will, in the event of the claim being proved and judgment recovered thereon, as in other cases where proceedings have been commenced against the person, pay the same, or the value of the property so taken and seized, (*q*) to the claimant or claimants, or produce such property whenever thereunto required, (*r*) to satisfy such judgment, such Clerk may supersede the attachment, and the property attached shall then be restored. C. S. U. C. c. 19, s. 209.

If the debtor does not appear.

201. If within one month from (*s*) the seizure as aforesaid, the party against whom the attachment issued, or some one on his behalf, does not appear and give such bond, execution may issue as soon (*t*) as judgment has been obtained upon the claim or claims, and the property seized upon the attachment, or enough thereof to satisfy the judgment and costs, may be sold (*u*) for the satisfaction thereof, according to law, or if the property has been previously sold as perishable (*v*) under the provisions hereinafter made, enough of

(*p*) Properly this should only be done after notice to the opposite party. The rights given to the creditor by attachment should not be taken away without an opportunity of his shewing cause against it, if so advised: Maxwell on Statutes, 325; *Thorburn* v. *Barnes*, L. R. 2 C. P. 384; see note (*o*) to section 36.

(*q*) The obligors would only be liable for the lesser sum, whichever it might be. If an action had to be brought on the bond, the plaintiff could not reasonably claim more than the value of the goods as estimated by the appraisers. As to actions on bonds, see Roscoe's N. P. 709; Rob. & Jos. Digest, 598; Fisher's Digest, 1335; Add. on Con., title, "Bonds."

(*r*) A seizure by a landlord of the goods attached as a distress for rent would be no answer to an action on the bond (*Rapelje* v. *Finch*, 14 U. C. R. 249); nor would it be a performance of the condition, under such circumstances, to say to the obligee that he might go and take the goods out of the possession of the landlord at his peril: s. c., 14 U. C. R. 468.

(*s*) This would be *exclusive* of the day of the seizure: *Young* v. *Higgon*, 6 M. & W. page 53; *McCrae* v. *Waterloo Mutual Fire Insurance Company*, 26 C. P. page 437.

(*t*) In order to prevent expense, the Legislature probably made this provision as to execution issuing "as soon as the judgment" was "obtained." It is submitted that the Judge could not, in such a case as this section contemplates, postpone the issuing of execution, and that section 108 would not apply.

(*u*) See notes to sections 174, 175 and 176.

(*v*) See notes to section 204.

the proceeds thereof may be applied to satisfy the judgment and costs. C. S. U. C. c. 19, s. 210.

If summoned personally.

202. Where the property of any person has been seized (*w*) under any warrant of attachment as aforesaid, and a summons had been personally served (*x*) on such person before seizure, then the trial of the cause (*y*) shall be proceeded with as if no such warrant of attachment had been issued, and after judgment execution shall forthwith issue, unless otherwise ordered (*z*) by the Judge. C. S. U. C. c. 19, s. 211.

Proceedings against debtors where process not previously served.

Rev. Stat. c. 68, ss. 14 & 16.

203. Subject to the provisions contained in the fourteenth and sixteenth sections (*a*) of *The Act respecting Absconding Debtors*, in order to proceed in the recovery of any debt due (*b*) by the person against whose property an attachment issues, where process has not been previously served, (*c*) the same may be served either personally (*d*) or by leaving a copy at the last place of abode, (*e*) trade or dealing of the defendant, with any person there dwelling, or by leaving the same at the said dwelling, if no person be there found; and in every case, all subsequent proceedings shall be conducted according to the usual course of practice (*f*) in the Division Courts; and if it appears to the satisfaction of the Judge on the trial, upon affidavit, or other sufficient proof, that the creditor who sued out an attachment had not reasonable or probable cause (*g*) for taking such proceedings,

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(*w*) See notes to sections 156 and 170.

(*x*) See notes to section 72 as to personal service. It is to be observed that this section only makes provision where service is made *before* seizure.

(*y*) Contrast Rule 35.

(*z*) Contrast the language employed in section 201 as to the issuing of execution.

(*a*) See Rev. Stat. 828, 829.

(*b*) See notes to section 190, as to what would be a "debt due" under this section.

(*c*) See notes to sections 72 and 79.

(*d*) See notes to section 72.

(*e*) As to what would be a person's "last place of abode, trade or dealing," see notes to sections 62 and 177.

(*f*) See notes to section 202.

(*g*) If a man act *bona fide* on the honest belief of the truth of statements made to him by others apparently respectable, and whom he believes to be credible persons, he is justified in acting on such statements, if he believe there is

the Judge shall order (*h*) that no costs (*i*) be allowed to such creditor or plaintiff, and no costs in such case shall be recovered in the cause. C. S. U. C. c. 19, s. 212.

Perishable goods, how disposed of.

204. Subject to the provisions contained in the fourteenth and sixteenth sections of *The Act respecting Absconding Debtors*, (*k*) in case any horses, cattle, sheep or other perishable goods (*l*) have been taken upon an attachment, the ~~Clerk~~ of the Court who has the custody or keeping thereof (the same having been first appraised, in the manner in the one hundred and ninety-second section of this Act mentioned), may at the request of the plaintiff (*m*) who sued out the warrant of attachment, expose and sell the same at public auction, to the highest bidder, giving at least eight days' (*n*) notice at the office of the ~~Clerk~~ of the said Court, and at two other public places within his Division, of the time and place of such sale, if the articles seized will admit of being so long kept, otherwise he may sell the same at his discretion. (*o*) C. S. U. C. c. 19, s. 213.

Rev. Stat. c. 68, ss. 14 and 16.

Bailiff ×

Bailiff ×

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reasonable and probable cause for so doing: *Chatfield* v. *Comeford*, 4 F. & F. 1008; *Walker* v. *S. E. Railway Company*, L. R. 5 C. P. 640; *Lister* v. *Perryman*, L. R. 4 H. L. 521; *Bank of B. N. A.* v. *Strong*, 1 App. Cas. 307.

(*h*) Imperative on the Judge.

(*i*) This is a penalty which the Judge may impose for the improper issue of an attachment. It would not affect a right of action against the attaching creditor for improperly issuing the attachment.

(*k*) See Rev. Stat. 828, 829.

(*l*) It is submitted that the words "perishable goods" here used should not be read as signifying property of the same kind or like description as is mentioned in the preceding words; but would include fruit, vegetables, or other chattel property of a perishable nature: Maxwell on Stat. 297; *Cork and Bandon Railway Co.* v. *Goode*, 13 C. B. 836. Willes, J., said, in *Fenwick* v. *Schmalz*, L. R. 3 C. P., at page 315, in reference to the construction to be placed on a statute, "that if the particular words exhaust a whole genus, the general word must refer to some larger genus."

(*m*) The "request" is a necessary condition of the sale, as remarked by Coleridge, J., in *Reg.* v. *Ellis*, 6 Q. B., page 506, that "the inflexible rule attaches that under a special power parties must act strictly on the conditions under which it is given:" see also Maxwell on Stat. 334, and 6 U. C. L. J. 249, 250. For his own protection the Clerk had better take the "request" in writing.

(*n*) This means eight *clear days:* see note (*c*) to section 70; *Norton* v. *Salisbury* (*Town Clerk*), 4 C. B. 32. Any informality in the conduct of the sale would not invalidate it, though it might probably subject the Clerk to an action if damages were sustained in consequence: *Campbell* v. *Coulthard*, 25 U. C. R. 621.

(*o*) "The portion of the section which says that the Clerk may sell at his discretion, taken in connection with what has gone before, would seem to mean

× See Clause 15 — act 7 / 1886

Creditor to give bond to indemnify the officer, and to be filed.

205. It shall not be compulsory (*p*) upon the Bailiff or Constable to seize, or upon the ~~Clerk~~ to sell such perishable goods, until the party who sued out the warrant of attachment has given a bond to the defendant therein, with good and sufficient sureties (*q*) in double the amount (*r*) of the appraised value of such goods, conditioned that the party directing such seizure and sale will repay the value thereof, together with all costs and damages incurred in consequence of such seizure and sale, in case judgment be not obtained for the party who sued out such attachment, and the bond shall be filed with the papers in the cause. C. S. U. C. c. 19, s. 214.

Residue, how disposed of.

206. The residue, (*s*) after satisfying such judgments as aforesaid, with the costs thereupon, shall be delivered to the defendant, or to his agent, or to any person in whose custody the goods were found, whereupon the responsibility of the

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that the Clerk may use his discretion in selling or not; but the correct reading of the section is, we think, that the Clerk may, '*at his discretion*,' sell the articles on a shorter notice than eight days; that is, if the articles are perishable, and will not admit of being kept until the expiration of the usual notice of eight days, they may be sold on such shorter notice as the Clerk in his discretion may consider advisable to be given. The length of time to be, of course, regulated by the exigency of each particular case." 6 U. C. L. J. 250. It is to be observed that it is the Clerk, and not the Bailiff, who conducts the sale under this section. Care should be taken that notice of sale is duly given according to law: see notes to section 174.

(*p*) "The statute expressly provides that the Bailiff need not seize, or the Clerk take charge of the property for which a writ of attachment has issued, unless a satisfactory bond is given by the attaching creditor. If either of these officers neglect to obtain this bond, or to see that it is given, we apprehend it will be at his own risk. The Bailiff who seizes should, in the first instance, where the goods are perishable, demand and obtain a bond from the plaintiff; but if he neglects to do so, the Clerk might, we think, certainly refuse to receive them until this proper precaution is adopted for the safety of both." 6 U.C.L.J. 250.

(*q*) See section 8, sub-section 18, of the Interpretation Act. One surety, if good, would be "sufficient:" *Ib.*

(*r*) It is submitted that if the bond should not be in double the amount, it would still be a voluntary obligation, good at Common Law: *Stansfeld* v. *Hellawell*; 7 Ex. 373. For form of this bond, see Form 125.

(*s*) The Clerk should not sell any more of the perishable property than is necessary for the purpose of satisfying the claim or claims and costs. Where the sale takes place before judgment, as it does in most cases, the exact sum cannot be determined; and in such cases the Clerk will have to approximate the full amount. The Clerk, after realizing sufficient to pay all judgments that have been or may be obtained on attachment proceedings, is bound by this section to restore the residue of the goods. Should the Clerk be derelict in his duty in this respect, and damage ensue, he would be liable.

Clerk, as respects such property, shall cease. C. S. U. C. c. 19, s. 215.

Bond may be sued in the Division Court.

207. Any bond given in the course of any proceeding under this Act, may be sued in any (*t*) Division Court of the County wherein the same was executed, and proceedings may be thereupon carried on to judgment and execution in such Court, notwithstanding the penalty contained in such bond may exceed the sum of one hundred dollars. (*u*) C. S. U. C. c. 19, s. 216.

Judge may deliver up bond.

208. Every such bond shall be delivered up to the party entitled to the same, by the order (*v*) and at the discretion of the Judge of such Court, to be enforced or cancelled, as the case may require. C. S. U. C. c. 19, s. 217.

CLAIMS OF LANDLORDS AND OTHERS IN RESPECT TO GOODS SEIZED.

Interpretation of the words "Landlord,"

209. In the next six sections, the word "landlord" shall include the person entitled to the immediate reversion of the land, or, if the property be held in joint tenancy, coparcenary or tenancy in common, (*w*) shall include any one of the persons entitled to such reversion; and

"Agent."

The word "agent" shall mean any person usually employed by the landlord in the letting of lands or in the collection of the rents thereof, or specially authorized to act in any particular matter by writing under the hand of such landlord. C. S. U. C. c. 19, s. 174.

(*t*) An action under this section would not be governed by section 62.

(*u*) Analogous to subsection 3 of section 19, Rev. Stat. cap. 43.

(*v*) The Clerk should retain the bond until the Judge orders it to be delivered up to the party entitled to it, which would be done on application being made for that purpose. The right to the bond will depend upon the fact whether judgment has been given for or against the attaching creditor on the claim for which he attached: see condition of bond in Form 125.

(*w*) For the information of the lay reader, it may be said that the "immediate reversion" is the interest in the realty which the owner takes immediately on the determination of the lease. "Joint tenancy" is a unity of possession, unity of interest, unity of title, and unity of time of the commencement of a title in land. "Coparcenary" is where two or more persons together form an heir and "tenancy in common," is a unity of possession, but a distinct and several title to the shares, and such shares not by any means necessarily equal: Williams on Real Prop.

Claims of landlords, &c., to goods seized in execution,

210. In case a claim (*x*) be made to or in respect of any goods or chattels, property or security, taken in execution or attached (*y*) under the process of any Division Court, or

(*x*) The claim must be of such a nature as may be followed by an action (*Isaac* v. *Spilsbury*, 10 Bing. 3) by the party making the claim: *Roach* v. *Wright*, 8 M. & W. 157. An action need not be commenced before taking interpleader proceedings: *Green* v. *Brown*, 3 Dowl. 337. At one time the claim had to be of a legal nature (*Sturgess* v. *Claude*, 1 Dowl. 505; *Hurst* v. *Sheldon*, 13 C. B. N. S. 750); but that is not law now. The Court will look at the equitable as as well as the legal rights of the claimant: *Rusden* v. *Pope*, L. R. 3 Ex. 269; *Bank of Ireland* v. *Perry*, L. R. 7 Ex. 14; *Duncan* v. *Cashin*, L. R. 10 C. P. 554; *Engelbach* v. *Nixon*, L. R. 10 C. P. 645; *McIntosh* v. *McIntosh*, 18 Grant, 58. The claim must be made by a third party. A claim of lien is within the statute (*Ford* v. *Baynton*, 1 Dowl. 357), or other special claim to the goods: *Muckleston* v. *Smith*, 17 C. P. 401. So also if the goods are seized in the possession of a stranger: *Allen* v. *Gibbon*, 2 Dowl. 292. Under this Act, if the Bailiff sells the goods, he cannot interplead for the proceeds (*Reid* v. *McDonald*, 26 C. P. 147); or where he has exercised a discretion in the matter (*Crump* v. *Day*, 4 C. B. 760; *Boswell* v. *Pettigrew*, 7 P. R. 393); or where the goods were claimed by a third party after the Bailiff withdrew from the seizure it was *held* he could not interplead (*Holton* v. *Gantrip*, 3 M. & W. 145); nor where the goods were under distress for rent (*Haythorn* v. *Bush*, 2 Dowl. 641); nor where he has seized under one execution, and the question is, whether that writ should have precedence over another: *Day* v. *Wildock*, 1 Dowl. 523. If the Bailiff should be placed in circumstances which gave him an interest on either side, he could not interplead (*Duddin* v. *Long*, 3 Dowl. 139; 1 Bing. N.C. 299, s. c.; *Ostler* v. *Bower*, 4 Dowl. 605); nor where he has brought about the claim (*Cox* v. *Balne*, 2 D. & L. 718); nor where the Bailiff has been guilty of neglect, and in consequence incurred a liability: *Brackenbury* v. *Lauric*, 3 Dowl. 180; *Miller* v. *Nolan*, 1 L. J. N. S. 327. The Crown cannot be a claimant: *McGee* v. *Baines*, 3 U. C. L. J. 151. Where the goods have passed to assignee in insolvency, see *O'Callaghan* v. *Cowan et al.*, 41 U. C. R. 272. The Bailiff should apply as soon as possible (*Cook* v. *Allen*, 2 Dowl. 11); but if the claim is clearly bad, he should not apply, and would probably be made pay the costs: *Bishop* v. *Hinxman*, 2 Dowl. 166. If, having seized goods in execution which are claimed by another party, he delivers up part of the goods, the title to them being the same as the others, he "in fact colludes with the party to whom he delivers them up," and disentitles himself to relief: *Braine* v. *Hunt*, 2 Dowl. 391. The Bailiff is not bound to accept an indemnity (*Levy* v *Champneys*, 2 Dowl. 454); but if he accepts one he will not be relieved by interpleader: *Ostler* v. *Bower*, 4 Dowl. 605. The Bailiff is entitled to interpleader unless he has acted dishonestly, or his conduct has prejudiced either of the parties: *Holt* v. *Frost*, 3 H. & N. 821. In the case of an execution against one personally, he may, *as executor*, make claim to the goods, and such is the subject of interpleader: *Fenwick* v. *Laycock*, 2 Q. B. 108. The interpleader summons must be taken out before money is paid over to the creditor, though the Bailiff had notice before: *Anderson* v. *Calloway*, 1 C. & M. 182. Where a Sheriff neglected to appraise goods according to the terms of interpleader order, see *Black* v. *Reynolds*, 43 U. C. R. 398. As to claims under bills of sale and chattel mortgages, see R. & J. Digest, 573, *et seq.*; *Mackenzie* v. *Davidson*, 27 C. P. 188; *McMartin* v. *Moore*, 27 C. P. 397; *Fitzgerald et al.* v. *Johnston et al.*, 41 U. C. R. 440; *Barber* v. *Maughan*, 42 U. C. R. 134; *O'Donohoe* v. *Wilson*, 42 U. C. R. 329; *Samuel* v. *Coulter*, 28 C. P. 240; *Banker* v. *Emmany et al.*, 28 C. P. 438; 14 L. J. N. S. 223; *Bertram et al.* v. *Pendry*, 27 C. P. 371.

(*y*) See notes to sections 156–170 and 171, as to what property is the subject of seizure, and when seizure can be considered made. In chapter 54, sec. 10, of

in respect of the proceeds or value thereof, (*z*) by any landlord for rent, (*a*) or by any person not being the party (*b*) against whom such process issued, then, subject to the provisions of *The Act respecting Absconding Debtors*, (*c*) the Clerk of the Court, upon application of the officer (*d*) charged

how to be adjusted.

Rev. Stat. c. 68.

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the Revised Statutes, the Sheriff is allowed to interplead on property "taken or intended to be taken:" see *Lea* v. *Rossi*, 11 Ex. 13. It is not so in the Division Court.

(*z*) This is analogous to money in the Sheriff's hands about which interpleader can be had (*Scott* v. *Lewis*, 2 C. M. & R. 289; *Hall* v. *Kissock*, 11 U. C. R. 9; *Booth* v. *The Preston and Berlin Railway Company*, 6 U. C. L. J. 57); but under this section there can only be an interpleader "in respect of the proceeds or value" where a claim is made to the same; and should the claim be made *to the goods*, there could be no interpleader as to the proceeds: *Reid* v. *McDonald*, 26 C. P. 147; see also *McArthur* v. *Cool et al.*, 19 U. C. R. 476; *Watson* v. *Henderson et al.*, 6 P. R. 299. As to claim under insolvency proceedings, see *O'Callaghan* v. *Cowan*, 41 U. C. R. 272; *McEdwards* v. *Palmer*, 28 C. P. 132, and cases cited; *McEdwards* v. *McLean*, 43 U. C. R. 454; *Snider* v. *Bank of Toronto*, 5 L. J. N. S. 100; *Burns* v. *Steel*, 2 L. J. N. S. 189.

(*a*) Should the Bailiff, for instance, have reason to believe that a landlord's claim for rent was merely fictitious, or that no rent was due, or in any such case, then it would be his duty to interplead.

(*b*) It must virtually be a third party: *Fenwick* v. *Laycock*, 2 Q. B. 108; 3 U. C. L. J. 197-214; 4 U. C. L. J. 12-38.

(*c*) Revised Statutes, cap. 68.

(*d*) "The Clerk ought not, without the application of the Bailiff, to have issued the summons" (*per* Draper, J., in *Reg.* v. *Doty*, 13 U. C. R. page 400); but if both parties appear, that objection would be waived: *Ib.*

When interpleader process is issued, the effect is to arrest all proceedings in any action that may have been commenced against the Bailiffs connected with the claim, for it is enacted that "thereupon any action brought in any of Her Majesty's Superior Courts of Record in Toronto, or in any local or inferior Court in respect of such claim, shall be stayed." Every Bailiff deeming it necessary to seek the protection of an interpleader should act promptly in the suing out a summons. He has in certain cases the choice of two Courts in which to proceed—the Court from which the execution issued, or the Court holden for the division in which he makes the seizure—when it happens that the seizure is made in another division. The application to the Clerk should be in writing, and care should be taken to obtain the correct name and address of the claimant. The goods claimed should also be specified, and the reasonable value set down to guide the Clerk in rating the fees, and for the information of the Court. The date of the seizure should also be named. The following, or a form to the like effect, would answer:

Bailiff's application for Interpleader Summons.

In the Division Court, County of .

Between *A. B.*, Plaintiff,

and

C. D., Defendant.

By virtue of a writ of execution (*or* "attachment") in this cause, dated the day of , 18 , from this Court, I did on the day of , 18 , seize and take in execution (*specify goods, chattels, &c.*,

with the execution of such process, may, whether before or after the action has been brought against such officer, issue a summons (*e*) calling before the Court out of which such process issued, or before the Court holden for the Division (*f*) in which the seizure under such process was made, as well the party who issued such process as the party making such claim, and thereupon any action which has been brought in any of Her Majesty's Superior Courts of Record, or in a local or inferior Court in respect of such claim, shall be stayed. (*g*)

When actions in the Superior Courts respecting the subject matter may be stayed.

Costs.

2. The Court in which such action has been brought, or any Judge thereof, on proof of the issue of such summons, and that the goods and chattels or property or security were so taken in execution or upon attachment, may order the party bringing such action to pay the costs of all proceed-

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claimed) as the property of the defendant, the following goods and chattels, viz., one horse and cow, &c., the whole about the value of pounds (now dollars). *E. F.* of the township of , &c., now claims the same as his property. You will therefore be pleased to issue an interpleader summons to the plaintiff and to the said *E. F.* according to the statute in that behalf.

To Clerk of the Division Court, County .

Dated, &c. 4 U. C. L. J. 38. Bailiff."

(*e*) The issue in such a case is, whether the goods taken under the attachment were *at the time of the seizure* the property of the claimant, as against the creditor: *Doyle* v. *Lasher*, 16 C. P. 263. The execution creditor is not liable for seizure of the goods: *Walker* v. *Olding*, 1 H. & C. 621; *Tinkler* v. *Hilder*, 4 Ex. 187.

(*f*) Should a Bailiff be called on to enforce an execution from another Division Court in the same County, and a claim made to the goods, he could issue summons from his own Court; and the same rule would apply if a Bailiff went out of his own division to make a seizure. The claim must be adjudicated upon in the Court from which the summons issued: *Washington* v. *Webb*, 16 U. C. R. 232.

(*g*) The regularity of the proceedings in the Division Court will not be inquired into on an application to stay proceedings: *Finlayson* v. *Howard*, 1 P. R. 224. Application should be made in the Court in which the action is brought: *Washington* v. *Webb*, 16 U. C. R. 232. An action of replevin for the same goods about which an interpleader issue was tried will be stayed: *Caron* v. *Graham*, 18 U. C. R. 315. The application for stay proceedings can only be made *before the adjudication* on the interpleader summons; if made after, application will be refused, and the defendant can only plead the adjudication: *Schanschorne* v. *Traske*, 30 U. C. R. 543; *Harmer* v. *Cowan*, 23 U. C. R. 479. As to the stay of proceedings generally, see *Carpenter* v. *Pearce*, 27 L. J. Ex. 143; *Walker* v. *Olding*, 1 H. & C. 621; *Abbott* v. *Richards*, 15 M. & W. 194; *Winter* v. *Bartholomew*, 11 Ex. 704; *Hollier* v. *Laurie*, 3 C. B. 334; *Jessop* v. *Crawley*, 15 Q. B. 212; *Cater* v. *Chignell*, 15 Q. B. 217; *Best* v. *Hayes*, 1 H. & C. 718; *Tanner* v. *European Bank (Limited)*, L. R. 1 Ex. 261; *Mercer* v. *Stanbury*, 2 H. & N. 155 n; *Booth* v. *The Preston and Berlin Railway Co.*, 6 U. C. L. J. 57.

ings had upon such action after the issue of such summons out of the Division Court.

County Judge to adjudicate upon the claim.

3. The County Judge having jurisdiction (*h*) in such Division Court shall adjudicate upon the claim, (*i*) and make such order between the parties in respect thereof, and of the costs (*k*) of the proceedings, as to him seems fit, and such order shall be enforced in like manner as an order made in any suit brought in such Division Court, and shall be final and conclusive between the parties, except that upon the application of either the attaching or execution creditor, or the claimant, within fourteen days after the trial, the Judge may grant a new trial (*l*) upon good grounds shewn, as in other cases under this Act, upon such terms as he thinks reasonable, and may in the meantime stay proceedings. C. S. U. C. c. 19, s. 175; 32 V. c. 23, s. 26; 40 V. c. 7, *Sched.* A (71).

Provisions in relation to rents due to landlords.

211. So much of the Act passed in the eighth year of the reign of Queen Anne, entitled "*An Act for the better security of Rents and to prevent Frauds committed by Tenants*," as relates to the liability of goods taken by virtue of any execution, shall not be deemed to apply to goods taken

8 Anne, c. 14.

(*h*) Should the summons not properly be issuable from the Court from which it was issued, the Judge would have no jurisdiction: see notes to sections 19 and 53; but see *Haldan* v. *Beatty*, 43 U. C. R. 614.

(*i*) The Judge must try an interpleader issue without the aid of a jury (*Munsie* v. *McKinley et al.*, 15 C. P. 50); and the question of title to land does not oust his jurisdiction in such a case: *Ib.* His decision is final (*Keane* v. *Stedman*, 10 C. P. 435), even though informally expressed (*Oliphant* v. *Leslie et al.*, 24 U. C. R. 398); but there must be an *adjudication: Challiner* v. *Burgess*, 2 U. C. L. J. 137; see *Death* v. *Harrison*, L. R. 6 Ex. 15. An interpleader issue cannot be removed by *certiorari: Russell* v. *Williams*, 8 U. C. L. J. 277.

(*k*) Independently of the Judge's order, there is no duty east on the execution creditor to pay the costs of interpleader proceedings: *Bloor* v. *Huston*, 15 C. B. 275, *per* Jervis, C. J. And a Superior Court has no power to interfere with County Judge's discretion as to costs: *Churchward* v. *Coleman*, L. R. 2 Q. B. 18. Costs follow the result almost as a matter of course: *Bellhouse* v. *Gunn*, 20 U. C. R. 555; *Wilson* v. *Wilson*, 7 P. R. 407.

(*l*) The law was formerly that a new trial could not be granted in interpleader cases (*Reg.* v. *Doty*, 13 U. C. R. 398); but now it is grantable as in other cases; as to which see notes to sections 107 and 210, and R. 142. On the general question of Interpleader, see Rev. Stat. 741, *et seq.*; Rob. & Jos. Digest, 1892; Fisher's Digest, 4970; Arch. & Lush's Pract., "Interpleader;" Roscoe's N. P. 1252.

in execution (*m*) under the process of any Division Court, but the landlord of any tenement (*n*) in which any such goods are so taken may, by writing under his hand or under

(*m*) The Statute of Anne only applies to seizure *under execution:* Woodfall's L. & T. cap. 10, s. 7. This section has no greater application. It applies only "to goods taken *in execution*;" and only when such goods are the property of the tenant. Should the goods of a stranger be taken, the landlord would have no right to give notice to the Bailiff under this section: *Beard* v. *Knight*, 8 E. & B. 865; *Foulger* v. *Taylor*, 5 H. & N. 202; *White* v. *Binstead*, 13 C. B. 304. It is submitted that goods seized under an attachment against an absconding debtor are not, under this section, subject to a landlord's claim for rent, it not being an "*execution.*" The statute would apply to an execution for costs of defence: *Henchett* v. *Kimpson*, 2 Wils. 140.

(*n*) A "tenement" is defined to be "property held by a tenant:" Wharton, 733. The notice cannot be given unless there is an *existing tenancy* at a fixed rent; and if the tenancy should be determined or has expired the notice could not be given: *Cook* v. *Cook*, Andrew, 219; *Riseley* v. *Ryle*, 10 M. & W. 101; and *Riseley* v. *Ryle*, 11 M. & W. 16. A *mere* agreement for a lease under which no rent has been paid would not be sufficient: *Ib.*; see *Hand* v. *Hall*, 2 Ex. D. 355. Nor does the statute apply if the lease has been legally determined by a notice to quit or by entry or ejectment for a forfeiture: *Hodgson* v. *Gascoigne*, 5 B. & Ald. 88. It applies to forehand rents payable in advance (*Harrison* v. *Barry*, 7 Price, 690; *Duck* v. *Braddyll*, McCle. 217); and even when reserved in a mortgage by way of further security for interest: *Yates* v. *Ratledge*, 5 H. & N. 249. The statute would apply to cases of lessee and undertenant of apartments: *Thurgood* v. *Richardson*, 7 Bing. 428. The landlord can only claim rent which was *due* at the time of the seizure, and not what accrued afterwards: *Hoskins* v. *Knight*, 1 M. & S. 245; *Reynolds* v. *Barford*, 7 M. & G. 449; *Tomlinson* v. *Jarvis*, 11 U. C. R. 60; *Vance* v. *Ruttan*, 12 U. C. R. 632. And this is also the law as to growing crops: *Congreve* v. *Evetts*, 10 Ex. 298; *Wharton* v. *Naylor*, 12 Q. B. 673. It is to be observed that the words of the section are "any rent in arrear *then due.*" The Statute of Anne was construed liberally, and in favour of the landlord: *Henchett* v. *Kimpson*, 2 Wils. 141. We see no reason for construing this section in any different spirit. This provision would not apply to a case where the landlord was himself the execution creditor: *Taylor* v. *Langton*, 6 Bing. 536. Where the execution creditor pays the landlord the rent after seizure, the Bailiff holds the proceeds of sale for the repayment to the creditor of the rent paid *and* the amount of the execution: *Lockart* v. *Gray*, 2 L. J. N. S. 163. Under the Statute of Anne it is not necessary to give notice "in writing" to the Sheriff (*Brown* v. *Ruttan*, 7 U. C. R. 97; *Sharpe* v. *Fortune*, 9 C. P. 523; *Tomlinson* v. *Jarvis*, 11 U. C. R. 60; *City of Kingston* v. *Shaw*, 6 U. C. L. J. 280; *Corporation of Kingston* v. *Shaw*, 20 U. C. R. 223); but under this statute *written* notice is rendered necessary. The landlord could not distrain the goods for rent after seizure by the Bailiff: *Sharpe* v *Fortune*, *supra*; *Craig* v. *Craig*, 13 L. J. N. S. 326. The fact of a landlord having joined in a bond that the goods distrained should be forthcoming for sale upon a *fi. fa.* was *held* not to prejudice his claim for rent (*Brown* v. *Ruttan*, 7 U. C. R. 97); nor would the landlord's having distrained and afterwards abandoned the distress, nor even his having bid at the sale of the goods, prejudice such claim for rent: *Ib.* In *Vance* v. *Ruttan*, 12 U. C. R. 632, the facts were, that premises had been let for a year at a rental of £75, to be paid on the first of May; and it was agreed that if the tenant should leave before the first of May, the rent was to become payable immediately. The tenant left on the Saturday before the first of May, and on Monday the goods were seized under execution; it was *held* that the landlord

the hand of his agent, stating the terms of holding (*o*) and the rent payable for the same, and delivered to the Bailiff making the levy, claim any rent in arrear then due to him, not exceeding the rent of four weeks when the tenement has been let by the week, and not exceeding the rent accruing due in two terms of payment where the tenement has

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was entitled to his rent. Should a Bailiff, acting in good faith for all concerned, agree to pay for having grain threshed for the purpose of its better sale, the expenses of such threshing would be allowed him: *Galbraith* v. *Fortune*, 10 C. P. 109. Should a Bailiff merely make an inventory of goods seized, leaving no one in possession of them, they would not be in the custody of the law so as to prevent the landlord claiming for the rent due at the time the execution was subsequently attempted to be enforced: *Hart* v. *Reynolds*, 13 C. P. 501. Where at the time an execution was placed in the Sheriff's hands there was a claim for unpaid rent, it was *held* that the Sheriff could not delay the seizure until the execution creditor first paid off the rent. His proper course was to seize, but he was not compelled to sell until the rent was paid; and if the execution creditor would not pay it, he might withdraw from possession. In this case the Sheriff abstained from seizure on receiving notice of the rent being due, of which the execution creditor was aware when he issued the *fi. fa.*; and, before he seized, certain crops were removed, sufficient to pay the plaintiff's claim; it was *held* that the Sheriff was liable: *Locke* v. *McConkey*, 26 C. P. 475. The same principle would apply in the case of a Bailiff. Should a Bailiff realize the amount of an execution, he could not justify the retention of the money on the ground that the landlord had made a claim to the whole of it for rent, which he had not been able to prove the truth of: *Hall* v. *Budden*, 7 L. T. N. S. 721. If a Bailiff receives notice of a claim for rent to a greater sum than the value of the goods seized, he should withdraw from the seizure and return the execution *nulla bona*: *Foster* v. *Hilton*, 1 Dowl. 35; *Cocker* v. *Musgrove*, 9 Q. B. 223 235. When the Bailiff has received notice of rent due he should endeavour to secure legal evidence on that point, and, if possible, inspect the lease, or make inquiry about the terms of holding: *Augustien* v. *Challis*, 1 Ex. 279, *per* Pollock, C. B., at page 280. He should also forthwith give a copy of the notice to the execution creditor or his Attorney, so that, if so advised, he might question the landlord's claim under section 210, or otherwise. Although goods seized by a Bailiff could not be distrained in his custody, still such goods must be removed within a reasonable time after the sale in order to protect the rights of the purchaser against a distress for rent: *Hughes* v. *Towers*, 16 C. P. 287.

(*o*) The terms should be particularly set out, so that the Bailiff may receive such reasonable information as will enable him to decide upon what course to pursue: *Tomlinson* v. *Jarvis*, 11 U. C. R. 60. If the Bailiff should disregard the notice, he would be liable: *Galbraith* v. *Fortune*, 9 C. P. 211; *Robertson* v. *Fortune*, 9 C. P. 427. The "writing" is by the statute required to contain particulars; and in that respect this section differs from the Statute of Anne: *Sharpe* v. *Fortune*, 9 C. P. 523. The form of landlord's claim for rent will be found at Form 20. It must be *in writing*, under the hand of the landlord or his agent. Care should be taken in drawing up the notice, and the Bailiff should have nothing to do with it; otherwise, in the event of dispute, he might have no right to an interpleader: *Cox* v. *Balne*, 2 D. & L. 718. The notice should be given before the sale, so that the Bailiff might sell for the rent as well, under the 212th section: see *Arnitt* v. *Garnett*, 3 B. & Ald. 440. As to the claim of the landlord generally, see 6 U. C. L. J. 228, 261; 7 U. C. L. J. 13, 14.

been let for any other term less than a year, and not exceeding in any case the rent accruing due in one year. C. S. U. C. c. 19, s. 176.

How the Bailiff is to proceed.

212. In case of any such claim being so made, the Bailiff making the levy shall distrain (*p*) as well for the amount of the rent claimed, and the costs of such additional distress, as for the amount of money and costs for which the warrant of execution has issued, and shall not sell the same, or any part thereof, until after the end of eight days at least next following after such distress made. C. S. U. C. c. 19, s. 177.

Fees of Bailiff in such cases.

Rev. Stat. c. 65.

213. For every additional distress (*q*) for rent in arrear, the Bailiff of the Court shall be entitled to have as the costs of the distress, instead of the fees (*r*) allowed by this Act, the fees allowed by *The Act respecting Distresses for small Rents and Penalties.* (*s*) C. S. U. C. c. 19, s. 178.

If replevin made.

214. If any replevin is made of the goods distrained, (*t*) so much of the goods taken under the warrant of execution

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(*p*) The Bailiff cannot distrain for the rent upon the goods of a stranger, any more than he can seize such property on the execution: *Beard* v. *Knight*, 8 E. & B. 865; *Foulger* v. *Taylor*, 5 H. & N. 202. The Bailiff can be sued by the landlord for the money which he makes for rent, as money had and received (*Lockart* v. *Gray*, 2 L. J. N. S. 163); and it would be garnishable in the Bailiff's hands in a suit against the landlord: *Ib.* As to mode of distress for rent by a landlord in ordinary cases, see Woodfall's L. & T. cap. 10, sec. 4; 7 L. J. N. S. 258. But under these sections of the Division Courts Act, the formalities which are necessary in a landlord's case do not seem to be required of a Bailiff. The claim for rent appears to be enforceable as if it were an *additional amount* payable on the execution, and for the making of such additional sum a separate allowance for costs is made. On the subject of distress generally, see R. & J.'s Digest, 2010; Fisher's Digest, 3122; *Lehain* v. *Philpott*, L. R. 10 Ex. 242; *Anglehart* v. *Rathier*, 27 C. P. 97; 7 L. J. N. S. 258; *Locke* v. *McConkey*, 26 C. P. 475.

(*q*) The "additional distress" here referred to means that which is necessary for the Bailiff to make in order to realize the amount of the rent over and above the moneys to be made on the execution.

(*r*) These fees are as follows:

"Levying distresses under eighty dollars	$1 00
Man keeping possession, per diem	0 75
Appraisement, whether by one appraiser or more—*two cents in the dollar on the value of the goods;*	
If any printed advertisement, not to exceed in all	1 00
Catalogues, sale and commission, and delivery of goods—*five cents in the dollar on the net produce of the sale.*" Rev. Stat. page 798.	

(*s*) Rev. Stat. cap. 65.

(*t*) It will be observed that under section 212 the action of the Bailiff under the execution is called a "levy," and his proceeding towards realizing the rent

shall be sold as will satisfy the money and costs for which the said warrant issued, and the costs of the sale, and the surplus of such sale and the goods so distrained, shall be returned as in other cases of distress for rent and replevin thereof. C. S. U. C. c. 19, s. 179.

When landlord's claim to rent is to be first paid.

215. No execution creditor under this Act shall have his debt satisfied out of the proceeds of such execution and distress, or of such execution only, where the tenant replevies, until the landlord who conforms to the provisions of this Act has been paid the rent in arrear (*u*) for the periods hereinbefore mentioned. C. S. U. C. c. 19, s. 180.

Costs not recoverable in any action on Division Court judgment without order.

216. No costs shall be recoverable in any suit brought in any Court (*v*) for the recovery of any sum awarded by judgment in a Division Court without the order of the Judge of the Court in which such suit is brought, on sufficient cause shewn. C. S. U. C. c. 19, s. 115. *See also Rev. Stat.* c. 50, s. 344.

OFFENCES AND PENALTIES.

Forging Seal or Process.

[Section 181 of C. S. U. C. c. 19, is as follows:

181. Every person who forges (*w*) the seal or any process of the Forgery of

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a "distress." The replevin spoken of in this section refers to the goods distrained as the "additional distress" for rent. At Common Law a tenant had a right to replevy as for an illegal distress his goods distrained for rent, and this section preserves to him that right: see notes to section 56. For a full exposition of the law of replevin for illegal distress for rent, see Woodfall's L. & T. cap. XXI.; R. & J.'s Digest, 3296; Fisher's Digest, 7408.

(*u*) This section is somewhat obscure. If a landlord should give notice to the Bailiff of rent in arrear, and the Bailiff should make the additional distress therefor, when in reality no rent was in arrear, and the tenant replevies the goods distrained, and succeeds in the action, it cannot be the meaning of the section that the landlord's claim for rent is nevertheless to be satisfied out of the proceeds of the execution. It is submitted that the meaning is, that if at the time of the seizure by the Bailiff *rent is in arrear*, and the landlord conforms to the Act by giving proper notice that he is to be first paid his rent out of the proceeds of the goods, no matter what becomes of the replevin. There will be considerable difficulty in the practical application of this clause of the statute, and its meaning must be left to judicial determination in cases as they arise. It is made a condition of the landlord's being first paid that he "conforms" to the provisions of the statute.

(*v*) As no action can be brought in a Superior or County Court on a judgment of a Division Court (*McPherson* v. *Forrester*, 11 U. C. R. 362; *Donnelly et al.* v. *Stewart*, 25 U. C. R. 398), this section has reference only to actions in Division Courts on judgments of those Courts. As to the analogous section of the C. L. P. Act, see Rev. Stat., page 683; Har. C. L. P. Act, 425 and 426.

(*w*) See Roscoe's Crim. Ev. 8th Ed. 528 and 557; 7 U. C. L. J. 229.

seal, process, &c.

Court, or who serves or enforces any such forged process, knowing the same to be forged, or delivers or causes to be delivered to any person any paper falsely purporting to be a copy of a process of the Court, knowing the same to be false, or who knowingly acts or professes to act under any false colour of process of the Court, shall be guilty of felony. 13, 14 V. c. 53, s. 86.]

CONTEMPT OF COURT. (*x*)

Contempt of Court.

217. If any person wilfully insults (*y*) the Judge or acting Judge or any officer of any Division Court during

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(*x*) Every Court of Record has an inherent power to punish for contempt: *Ex parte Pater*, 5 B. & S. 299; *Ex parte Lees and the Judge of the County of Carleton*, 24 C. P. 214. The statute here confers a power on the Judge of a Division Court which would belong to a Court of Record as one of its inherent attributes. In *Carus Wilson's* case, 7 Q. B., page 1015, Lord Denman, C. J., says: "But here it appears that a contempt was supposed to have been committed. That is, a case in which it becomes the unfortunate duty of a Court to act as both party and judge, and to decide whether it has been treated with contempt. We cannot decide upon the face of this return (to *habeas corpus*) that they have come to a wrong conclusion. A Court may be insulted by the most innocent words, uttered in a peculiar manner and tone. The words here might or might not be contemptuous, according to the manner in which they were spoken, and that is what we must look to. If the words might be contemptuously spoken, that was an ample occasion for the decision of the Royal Court (of Jersey) with which no other Court can meddle. Every Court in such a case has to form its own judgment." At page 1017 of the same report, Williams, J., says: "It is quite obvious that contempt may be shewn either by language or manner. We can imagine language which might be perfectly proper if uttered in a temperate manner, but might be grossly improper if uttered in a different manner. No one not present can be a competent judge of this." Speaking of the prisoner's conduct in that case, Wightman, J., says, at page 1018: "It seems to me that it might be contemptuous as being highly disrespectful, although the words themselves are not necessarily so." In the case of *In re the Judge of the Division Court of Toronto*, 23 U. C. R. 376, Draper, C. J., is reported, at page 378, as saying: "The power of punishing contempts by fine is given by statute to the Judge of a Division Court, and such a power, though like any other power by which a man becomes as it were a judge in his own cause, and can exercise his authority without any direct control, and perhaps without any responsibility, it is dangerous as open to abuse, is nevertheless found indispensable. Contempts are perhaps the most undefinable of offences, for they may consist in looks and demeanour, as well as in positive acts and expressions; and though our statute uses the word 'wilfully insults,' it does not appear to me to change the application or extent of the power given." Again, at page 379, the same learned Judge says: "It is more easy to feel than describe how an advocate may exhaust the patience and wear the temper of any Judge by continually keeping on the verge of what he well knows to be forbidden ground, and by occasionally overstepping the line after oft-repeated check and caution from the Bench, in the ardour, real or affected, of his zeal for his client. When such conduct is long persevered in, it produces almost inevitably in the Judge's mind a sense that it requires scrupulous watching in order that the advocate may, if possible, be restrained within proper limits; or, if he will exceed them, may, if necessary, be promptly punished; and thus it may well happen that the Judge may pronounce the advocate to be

his sitting or attendance in Court, or interrupts the proceedings (*z*) of the Court, any Bailiff or officer of the Court may, by order of the Judge, take the offender into custody, (*a*) and the Judge may impose upon the offender a fine not exceeding twenty dollars, and in default of immediate payment (*b*) thereof, the Judge may by warrant under his hand and seal (*c*) commit the offender to the Common Gaol of the County for any period not exceeding one month, unless such fine and costs, with the expense attending the commitment, are sooner paid. C. S. U. C. c. 19, s. 182.

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in contempt, where a bystander, who knew nothing beyond the immediate occurrence, might deem the decision harsh or even unwarrantable." *In Ex parte Pater*, 5 B. & S., at page 312, Blackburn, J., says: "I agree that when we are considering a question of contempt, we ought to see whether the inferior Court had reasonable grounds for adjudging that a contempt had been committed; but we must bear in mind that the Court is the Judge whether it has been treated with contempt, as Lord Denman said in the case of *Carus Wilson*, 7 Q. B., 984-1015, for, looking to the nature of the contempt, it may consist in the peculiar manner and tone with which words are spoken." The power conferred on the Judge by this section is confined to contempts committed *in Court*, and he would have no power to proceed against a person for a contempt committed out of Court: *Reg.* v. *Lefroy*, L. R. 8, Q. B. 134; see also 4 U. C. L. J. 243, and 4 U. C. L. J. 259; 11 L. J. N. S. 156, on the general question of contempt of Court. Should the Judge act on this section, the penalty can be imposed and enforced instantly: *Watt* v. *Ligertwood*, L. R. 2 Scotch App. 361; see also *Baird* v. *Story*, 23 U. C. R. 624. In the case of *In re Pollard*, L. R. 2 P. C. 106, the Judicial Committee *held* that where the Court did not impose the fine on the committing of the contempt, but delayed it, and then on a subsequent day imposed the penalty, without an opportunity of the party's answering the charge, such proceeding was illegal. As to letters written reflecting on a Judge, see *In re Wallace*, L. R. 1 P. C. 283; *In re Ramsay*, L. R. 3 P. C. 427.

(*y*) See 23 U. C. R. 376; *Smith* v. *Barnham*, 1 Ex. D. 419; 15 L. J. N. S. 73.

(*z*) Anything unseemly said or done by any person which would interfere with the conduct of the business of the Court, or that would be highly indecorous, might be the subject of a penalty under this clause.

(*a*) Power is here given to the Judge to order the person to be taken into custody, so that he might be brought before him to answer for his misconduct. The limit of the fine is twenty dollars, and no greater sum could be imposed.

(*b*) The word "immediate" here does not mean "instantly." A reasonable time would be allowed the delinquent for payment of the money: *Toms* v. *Wilson*, 4 B. & S. 455; *Forsdike* v. *Stone*, L. R. 3 C. P. 607; *Massey* v. *Sladen*, L. R. 4 Ex. 13; Maxwell on Stat., 311; *In re Sillence*, 7 Ch. D. 238. As remarked by Cockburn, C. J., at page 453 of 4 B & S., "he might require time to get it from his desk, or to go across the street, or to his banker's for it."

(*c*) The plain words of the section require this commitment to be under the hand and seal of the Judge: see also 3 L. C. G. 14. It differs in that respect from a commitment under the 182nd section: see Rules 101, 102 and 103, and Form 96; *Ex parte Heymann, In re Heymann*, L. R. 7 Ch. 488; *Ex parte Waters, In re Waters*, L. R. 18 Eq. 701.

Resisting Officers. (*d*)

[*Section* 184 *of* C. S. U. C. c. 19, *is as follows:*—

If Bailiff assaulted.

184. If any officer or Bailiff (or his deputy or assistant) be assaulted while in the execution of his duty, or if any rescue be made or attempted to be made of any property seized under a process of the Court, the person so offending shall be liable to a fine not exceeding twenty dollars, to be recovered by order of the Court, or before a Justice of the Peace of the County or City, and to be imprisoned for any term not exceeding three months, and the Bailiff of the Court, or any peace officer, may in any such case take the offender into custody (with or without warrant) and bring him before such Court or Justice accordingly. 13-14 V. c. 53, s. 100].

Misconduct of Clerks, Bailiffs, &c.

Misconduct of Clerks and Bailiffs.

218. If any Bailiff or officer, acting under colour or pretence (*e*) of process of the Court, is guilty of extortion (*f*) or misconduct, or does not duly pay or account for all money levied or received by him by virtue of his office, the Judge, at any sitting of the Court, if a party aggrieved thinks fit to complain to him in writing, (*g*) may inquire into the matter in a summary way, and for that purpose he may summon and enforce the attendance of all necessary parties and witnesses, and may make such order thereupon for the repayment of any money extorted, or for the due payment of any money so levied or received, and for the payment of any such damages and costs to the parties aggrieved, as he thinks just; and in default of payment of the money so ordered to be paid by such Bailiff or officer within the time in such order specified for the payment thereof, the Judge may, by warrant under his hand and seal, cause such sum to be levied by distress and sale of the goods of the offender,

(*d*) See *Reg.* v. *Sherlock*, L. R. 1 C. C. 20; *Reg.* v. *Marsden*, L. R. 1 C. C. 131; Roscoe's Crim. Ev. 8th Ed. 257; 9 U. C. L. J. 289 & 317.

(*e*) This is intended to cover a case where a Bailiff had not any process of the Court, but *assumed* to act as if he had: see 7 U. C. L. J. 229, 230 and 260.

(*f*) Extortion is defined to be "any oppression under colour of right:" Wharton 292.

(*g*) The complaint must be made in writing *by the party aggrieved* (and not by a stranger), and inquired into at some Court sittings. The Bailiff and his witnesses, if any, must have an opportunity of being present: 4 U. C. L. J. 132; *Osgood* v. *Nelson*, L. R. 5 H. L. 636; Maxwell on Statutes, 325; section 36, note (*o*).

together with the reasonable charges of such distress and sale, and in default of such distress (or summarily in the first instance) may commit *(h)* the offender to the Common Gaol of the County for any period not exceeding three months. C. S. U. C. c. 19, s. 185.

Extortion.

Extortion.

219. If any Clerk, Bailiff or other officer exacts or takes (*i*) any fee or reward other than the fees appointed and allowed by law for or on account of anything done by virtue of his office, or on any account relative to the execution of this Act, he shall, upon proof thereof before the Court, be forever incapable of being employed in a Division Court in any office of profit or emolument, and shall also be liable in damages to the party aggrieved. C. S. U. C. c. 19, s. 186.

Negligence of Bailiffs.

If Bailiffs neglect their duty in relation to execution.

220. In case any Bailiff employed to levy an execution against goods and chattels, by neglect, connivance or omission, loses the opportunity of so doing, then upon complaint of the party thereby aggrieved, and upon proof by the oath of a credible witness of the fact alleged to the satisfaction of the Court, the Judge shall order (*k*) the Bailiff to pay such damages as it appears the plaintiff has sustained, not exceeding the sum for which the execution issued, and the Bailiff shall be liable thereto; and upon demand (*l*) made thereof and on his refusal to satisfy the same, payment shall be enforced by such means (*m*) as are provided for

(*h*) See Paley on Convictions, cap. II. (2), sections 1 to 4 inclusive; *Reg.* v. *Black*, 43 U. C. R. 180.

(*i*) The clause is a penal one, and must be construed strictly (Maxwell on Statutes, 239, *et seq.*; 4 U. C. L. J. 132); and the officer should have full opportunity of defending himself: Maxwell on Stat. 325; see Fisher's Digest, 6191; and notes to section 218.

(*k*) See notes to section 218.

(*l*) This would be a necessary preliminary of execution: *Davidson and the Chairman of Q. S. Waterloo*, 24 U. C. R. 66; *Trustees of School Section No. 3 of the Township of Caledon* v. *The Corporation of the Township of Caledon*, 12 C. P. 301; *Bamford* v. *Clewes*, L. R. 3 Q. B. 729; see also 10 U. C. L. J. 236.

(*m*) That is by execution, as pointed out by section 156, and, in default of the money being made in that way, by the same means otherwise as could be resorted to against an ordinary debtor.

enforcing judgments recovered in the Court. C. S. U. C. c. 19, s. 147.

Action against Bailiff and sureties for neglect of Bailiff in returning execution.

221. If any Bailiff neglects to return any execution within three days after the return day thereof (*n*), or makes a false return thereto, the party who sued out such writ may maintain an action in any Court having competent jurisdiction against such Bailiff and his sureties on the covenant entered into by them, and shall recover therein the amount for which the execution issued, with interest thereon from the date of the judgment, or such less sum as in the opinion of the Judge or jury (*o*) the plaintiff under the circumstances is justly entitled to recover. C. S. U. C. c. 19, s. 148.

Execution may issue instanter, and if Bailiff has removed, his sureties nevertheless liable.

222. If a judgment is obtained in such suit against the Bailiff and his sureties, execution shall immediately (*p*) issue thereon, and in case of the departure or removal of such Bailiff from the limits of the County, the action may be commenced and carried on against his sureties alone, or against any one or more of them. (*q*) C. S. U. C. c. 19, s. 149.

FINES, HOW ENFORCED.

Fines, how enforced by Division Courts.

223. In case a Division Court imposes any fine under authority of this Act, the same may be enforced upon the

(*n*) In this case the time would be reckoned thus: if the last of the 30 days during which an execution was in force should, for instance, be the 30th of September, the return to it should be made not later than the 3rd of the next month. Should the Bailiff's sureties be changed between the time he received the execution and when he made default in returning it, the sureties when default made would be those liable: Dicey on Parties to Action, 229, *et seq.*: 8 U. C. L. J. 35. If a seizure should be made within the thirty days, the execution would be partly executed, and the Bailiff could go on and complete it after that time: see notes to section 156. Such a case could not be called a *neglect* to return an execution within this section. If the Bailiff neglects to return any process or execution in proper time, he forfeits his fees on it: see section 52, note (*o*).

(*o*) This leaves it to the Judge or jury to award damages commensurate to the loss: see *Macrae* v. *Clarke*, L. R. 1 C. P. 403. It would rest upon the Bailiff to free himself of the liability which the first alternative of this section has imposed on him.

(*p*) No time should, nor probably could, be given the defendants in such a case, without the plaintiff's consent to it.

(*q*) Two of the sureties could alone be sued together under this section, in the event of the removal of the Bailiff from the County. Without the aid of the statute this could not be done: see notes to section 53.

order of the Judge, in like manner as a judgment (*r*) for any sum adjudged therein, and shall be accounted for (*s*) as herein provided. C. S. U. C. c. 19, s. 187.

How enforced by Justices of the Peace.

224. In all cases in which by this Act any penalty or forfeiture is made recoverable (*t*) before a Justice of the Peace, such Justice may, with or without information (*u*) in writing, summon before him the party complained against, and thereupon hear and determine the matter of such complaint, and on proof of the offence convict the offender, (*v*) and adjudge him to pay the penalty or forfeiture incurred, and proceed to recover the same. C. S. U. C. c. 19, s. 188.

Form of conviction.

225. In all cases where a conviction is had for any offence committed against this Act, the form of conviction (*w*) may be in the words or to the effect following, that is to say:—

Be it remembered, that on this day of in the year of our Lord , A. B. is convicted before one (*or* two, *as the case may be*) of Her Majesty's Justices of the Peace for the County of (*or* before , a County Judge of the County of), acting under *The Division Courts Act*, of having (*note the offence*); and I, (*or* we) , the said do adjudge the said to forfeit and pay for the same the sum of , or to be committed to the Common Gaol of the County of for the space of .

Given under hand and seal, the day and year aforesaid.

C. S. U. C. c. 19, s. 189.

PROTECTION (*x*) OF PERSONS ACTING UNDER WARRANTS, ETC.

Demand of perusal and

226. No action shall be brought against the Bailiff of a

(*r*) See notes to sections 156, 170 and 171.

(*s*) See section 52, note (*o*.) All fines must be paid over to the County Crown Attorney under section 234.

(*t*) This has reference to summary convictions: see section 46.

(*u*) There must, however, be an information of one kind or the other to warrant the proceedings (*Caudle* v. *Seymour*, 1 Q. B. 889; *Appleton* v. *Lepper*, 20 C. P. 138; *Connors* v. *Darling*, 23 U. C. R. 550; *Stoness* v. *Lake*, 40 U. C. R. 320; *Crawford* v. *Beattie*, 39 U. C. R. 13), unless the defendant waives it: *Reg.* v. *Shaw*, 12 L. T. N. S. 470; *Blake* v. *Beech*, 1 Ex. D. 320.

(*v*) The Justice must observe the same regularity of proceeding as would be required of him on the trial of any other offence punishable on summary conviction.

(*w*) If the conviction follows the form here given, it will be sufficient: *In re Wilson and the Quarter Sessions of Huron and Bruce*, 23 U. C. R. 301.

(*x*) In the two following sections the Legislature has protected the Bailiff against actions for anything done in pursuance of a warrant *good on the face of*

copy of warrant to be made before action.

Division Court, or against any person (*y*) acting by his order and in his aid, for anything done in obedience to any warrant under the hand of the Clerk and seal of the Court until a written demand, (*z*) signed (*a*) by the person intending to bring the action, of the perusal, and a copy of such warrant has by such person, his Attorney or agent, been served upon (*b*) or left at the residence (*c*) of such Bailiff, and the perusal and copy have been neglected or refused for the space of six days after such demand. (*d*) C. S. U. C. c. 19, s. 195.

Bailiff entitled to verdict on production of warrant.

227. In case, after such demand and compliance therewith by shewing the warrant to and permitting a copy thereof to be taken by the person demanding the same, an action is brought against such Bailiff or other person who acted in his aid for any such cause without making the Clerk of the Court who signed or sealed the warrant a defendant, then on producing or proving such warrant (*e*) at the

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it, provided he complies with the demand made upon him for a perusal and copy of it: see 9 U. C. L. J. 317, 318; *Price* v. *Messenger*, 2 B. & P. 158; *Pearson* v. *Ruttan et al.*, 15 C. P. 79.

(*y*) See *Pulley* v. *Davis*, 10 C. B. N. S. 492. The person must be acting under the authority of the Bailiff, and in his aid: *Postlethwaite* v. *Gibson*, 3 Esp. 226; *Clarke* v. *Davey*, 4 Moore, 465.

(*z*) The demand should be made out in duplicate and signed by the party himself: *Toms* v. *Cuming*, 7 M. & G. 88, 92. The party by his conduct may dispense with the perusal: *Atkins* v. *Kilby*, 11 A. & E. 777. It would be unnecessary to make a demand where no action would lie against the Clerk: *Storch* v. *Clarke*, 4 B. & Ad. 113. If the warrant commands the Bailiff to seize the goods of *A.*, and he seizes those of *B.*, no demand is necessary (*Parton* v. *Williams*, 3 B. & Ald. 330); or if he acts beyond his jurisdiction: *Gladwell* v. *Blake*, 1 C. M. & R. 636; see also *Stewart* v. *Cowan et al.*, 40 U. C. R. 346.

(*a*) His name could be signed by any person in his presence: *Blades* v. *Lawrence*, L. R. 9 Q. B. 374. As to the signature to a notice of appeal against a voter, see *Cuming* v. *Toms*, 7 M. & G. 29, 88.

(*b*) See notes to section 72.

(*c*) See *Clark* v. *Woods*, 2 Ex. 395; see notes to section 72.

(*d*) The demand [illegible] not specify any time, and if a different time is mentioned it does not vitiate: *Collins* v. *Rose*, 5 M. & W. 194. It refers to actions of trespass and case only (*Lyons* v. *Golding*, 3 C. & P. 586); and not to assumpsit, replevin, or the like: Bull. N. P. 24; *Gay* v. *Matthews*, 4 B. & S. 425.

(*e*) The production or proof of the warrant is necessary to free the Bailiff from responsibility: see *Peppercorn* v. *Hofman*, 9 M. & W. 618; *Kalar* v. *Cornwall*, 8 U. C. R. 168. And the fact that it was at the time of the demand with the gaoler is no answer: *Arnott* v. *Bradly*, 23 C. P. 1.

trial, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction or other irregularity in or appearing by the warrant. C. S. U. C. c. 19, s. 196.

If Clerk and Bailiff joint defendants, Bailiff entitled to verdict on producing warrant, and what costs plaintiff's entitled to.

228. If an action is brought jointly against such Clerk and Bailiff, or the person who acted in his aid, then on proof of the warrant (*f*) the jury shall find for the Bailiff or the person who so acted, notwithstanding such defect or irregularity as aforesaid; and if a verdict is given against the Clerk, the plaintiff shall recover his costs against him, to be taxed by the proper officer in such manner as to include the costs which the plaintiff is liable to pay to the defendant for whom a verdict has been found. C. S. U. C. c. 19, s. 197.

Defendant may plead general issue.

229. In any such action the defendant may plead the general issue, (*g*) and give the special matter in evidence at any trial to be had thereon. C. S. U. C. c. 19, s. 198.

GENERAL PROVISIONS WITH REGARD TO ACTIONS FOR THINGS DONE UNDER THIS ACT.

Distress not to be deemed unlawful or persons making it trespassers by reason of defect in proceedings.

230. No levy or distress for any sum of money to be levied by virtue of this Act shall be deemed unlawful, or the person making the same be deemed a trespasser, on account of any defect or want of form (*h*) in the information, summons, conviction, warrant, precept or other proceeding relating thereto, nor shall the person distraining be deemed a trespasser from the beginning, (*i*) on account of any irregularity afterwards committed by him; but the person

Not to be trespassers *ab initio*.

(*f*) See the notes to the two next previous sections. Should a judgment be given against the Clerk and for the Bailiff, the Clerk would be liable to pay the plaintiff the Bailiff's costs against him; but they must be taxed in the manner pointed out by the section.

(*g*) See *Dews* v. *Riley*, 11 C. B. 434; Rob. & Jos. Digest, 2793; Chitty's Precedents in Pleading, 301, 302; Har. C. L. P. Act, 730; Bullen & Leake, title, "General Issue," 1 L. C. G. 6.

(*h*) The tendency of modern legislation is in favour of preventing any formal defect, defeating the ends of justice, or subjecting a person who acts honestly to an action for damages: *Crawford* v. *Beattie*, 39 U. C. R. 13, and cases there cited. This section bears a close resemblance to section 19 of the English Act of 11 Geo. 2, cap. 19, in respect to an action for an irregular and illegal distress for rent.

(*i*) As to what constitutes a trespass "from the beginning," see *Nash* v. *Lucas*, L. R. 2 Q. B. 590; *Anglehart* v. *Rathier et al.*, 27 C. P. 97; Mayne on Damages, 376, 3rd Ed.; Roscoe's N. P. 13th Ed. 870.

aggrieved by such irregularity may recover full satisfaction for the special damage. (*k*) C. S. U. C. c. 19, s. 192.

Limitations of actions for things done under this Act.

231. Any action or prosecution against any person for anything done in pursuance of this Act (*l*) shall be commenced within six months after (*m*) the fact was committed, and shall be laid and tried in the County where the fact was committed, and notice in writing of such action and of the cause thereof (*n*) shall be given to the defendant one month

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(*k*) Special damages *must* be proved, and if not, the plaintiff could not recover even nominal damages, and the verdict or judgment should be for the defendant: *Lucas* v. *Tarleton*, 3 H. & N. 116; *Rodgers* v. *Parker*, 18 C. B. 112; see also *Fell* v. *Whittaker*, L. R. 7 Q. B. 120; *Shultz* v. *Reddick*, 43 U. C. R. 155. Special damages must be claimed, otherwise they are not recoverable: Mayne on Damages, cap. 17.

(*l*) A Bailiff is entitled to notice of action if he honestly intended to put the law in motion, and honestly believed he was acting in pursuance of the statute: *Hermann* v. *Seneschal*, 13 C. B. N. S. 392; *Selmes* v. *Judge*, L. R. 6 Q. B. 724; *Roberts* v. *Orchard*, 2 H. & C. 769; *Leete* v. *Hart*, L. R. 3 C. P. 322. But the *bona fides* of his act should, if required, be left to a jury: *Neill* v. *McMillan*, 25 U. C. R. 485; *Stewart* v. *Cowan et al*, 40 U. C. R. 346. Some facts, therefore, must exist such as might give rise to an honest belief, but it is not necessary that the belief should be reasonable: *Chamberlain* v. *King*, L. R. 6 C. P. 474; *Jolliffe* v. *Wallasey Local Board*, L. R. 9 C. P. 62; *Griffith* v. *Taylor*, 2 C. P. D. 194; *Smith* v. *West Derby Local Board*, 3 C. P. D. 423; *Davis* v. *Moore*, 4 U. C. R. 209; *Dale* v. *Cool et al*, 4 C. P. 460; *Dale* v. *Cool*, 6 C. P. 544; *Anderson* v. *Grace et al*. 17 U. C. R. 96; *Ross* v. *McLay*, 40 U. C. R. 83 & 87; *Pearson* v. *Ruttan et al*. 15 C. P. 79; *Joule* v. *Taylor*, 7 Ex. 58. A Bailiff is entitled to notice of action even if indemnified (*Lough* v. *Coleman*, 29 U. C. R. 367); or if, having an execution against the goods of *A*, takes the goods of *B*: *Burling* v. *Harley*, 3 H. & N. 271; *Dale* v. *Cool*, 4 C. P. 460. If a person is not duly appointed a Bailiff, he is not entitled to notice of action: *Tarrant* v. *Baker*, 14 C. B. 199. A party who sets proceedings in motion is not entitled to notice of action; it is only intended to protect officers who carry them out: *Polk* v. *Kenney*, 11 U. C. R. 350; *Dollery* v. *Whaley et al*. 8 U. C. L. J. 239.

(*m*) The day both of delivering the notice and that of bringing the action must be excluded: *Young* v. *Higgon*, 6 M. & W. 49. An action against the Bailiff and his sureties for excessive seizure and exacting more than he was entitled to, *held* notice of action was necessary: *Pearson* v. *Ruttan et al*. 15 C. P. 79.

(*n*) The notice of action must state the time and place of trespass complained of: *Moore* v. *Gidley*, 32 U. C. R. 233; *Oliphant* v. *Leslie et al*. 24 U. C. R. 398. The notice need not have the name, &c., of the plaintiff or his Attorney indorsed: *McPhatter et al*. v. *Leslie et al*. 23 U. C. R. 573. In an action against a Bailiff for seizing goods exempt, it was *held* that it was not necessary to endorse on the notice of action the name and abode of the plaintiff (*McMartin* v. *Hurlburt et al*, 2 App. R. 146), and that a compliance with this section, and not with chapter 73 of the Revised Statutes, is all that is required: *Ib.*; see also *Stephens* v. *Stapleton*, 40 U. C. R. 353. Further, as to notice of action, see R. & J.'s Digest, 34; Fisher's Digest, 43; Roscoe's N. P., 13th Ed., 1178; 10 U. C. L. J. 150-203. Reasonable certainty in the notice is all that is required: *Langford* v. *Kirkpatrick et al*. 2 App. R. 513.

at least (*o*) before the commencement of the action. C. S. U. C. c. 19, s. 193.

Defendant may tender amends and plead the general issue, &c.

232. If tender of sufficient amends (*p*) is made before action brought, or if the defendant, after action brought, pays a sufficient sum of money into Court with costs, the plaintiff shall not recover, and in any such action the defendant may plead the general issue, and give any special matter in evidence under that plea. C. S. U. C. c. 19, s. 194. *And see the Act to protect Justices of the Peace and other officers from Vexatious Actions. Rev. Stat.* c. 73.

Plaintiff not to have costs where verdict not over ten dollars without certificate.

233. In case any suit is brought in any of Her Majesty's Superior or other Courts of Record in respect of any grievances committed by any Clerk, Bailiff or officer of a Division Court, (*q*) under colour or pretence (*r*) of the process of such Court, and the jury upon the trial find no greater damages for the plaintiff than ten dollars, the plaintiff shall not have costs (*s*) unless the Judge certifies in Court upon the back of the record, that the action was fit to be brought in such Court of Record. C. S. U. C. c. 19, s. 116. *See also Rev. Stat. c.* 50, *s.* 351.

DISPOSAL OF FINES.

Fines, how disposed of.

234. The moneys arising from (*t*) any penalty, forfeiture or fine imposed by this Act, not directed to be otherwise

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(*o*) Notice of action was given on the 28th of April, and the action was commenced on the 29th of May following. *Held* that one calendar month's notice of action had been given: *Freeman* v. *Read*, 4 B. & S. 174. The notice need not be served by the party, his Attorney or agent in person, but may be served by any other literate person; for instance, the Attorney's clerk: *Morgan* v. *Leach*, 10 M. & W. 558; *Caming* v. *Toms*, 7 M. & G. 29.

(*p*) See notes to section 86 and the five next succeeding sections: 2 U. C. L. J. 22; Bullen & Leake, titles, "Tender of Amends," and "County Courts:" Chitty's Pract. 3rd Ed. 692-757.

(*q*) This section only applies to "officers" of the Courts: *Palk* v. *Kenney et al.*, 11 U. C. R. 350; *Dollery* v. *Whaley et al.* 8 U. C. L. J. 239.

(*r*) This must mean under such a state of facts as would give rise to a *reasonable* pretence that the act done was under colour of process: see *Chamberlain* v. *King*, L. R. 6 C. P. 474; *Neill* v. *McMillan*, 25 U. C. R. 485; *Stewart* v. *Cowan et al.*, 40 U. C. R. 346.

(*s*) See Rev. Stat. cap. 50, s. 345, *et seq.*, and Har. C. L. P. Act, 426, and following pages. It is to be observed that this section only applies to actions brought *in Courts of Record*: see notes to section 7.

(*t*) See sections 97, 116, 119 and 217.

applied, shall be paid to the Clerk of the Court which imposed the same, and shall be paid by him to the County Crown Attorney of the County to be by him paid over to the Provincial Treasurer, and shall form part of the Consolidated Revenue Fund. C. S. U. C. c. 19, s. 190.

DISPOSAL OF MONEYS PAID INTO COURT.

Unclaimed moneys to be paid over to County Crown Attorney.

235. All sums of money which have been paid into Court to the use of any suitor thereof, and which have remained unclaimed for the period of six years after the same were paid into Court or to the officers thereof, and all sums of money when this Act takes effect or afterwards in the hands of the Clerk or Bailiff, paid into Court, or to the officers thereof, to the use of any suitor, shall, if unclaimed for the period of six years (*u*) after the same were so paid, form part of the Consolidated Revenue Fund, and be paid over by the Clerk or officer holding the same to the County Crown Attorney of his County, to be by him paid over to the Treasurer of the Province, and no person shall be entitled to claim any sum which has remained unclaimed for six years. C. S. U. C. c. 19, s. 45.

Claims of persons under disability not to be prejudiced.

236. No time during which the person entitled to claim such sum was an infant or of unsound mind, or out of the Province, (*v*) shall be taken into account in estimating the six years. C. S. U. C. c. 19, s. 46.

GENERAL RULES AND ORDERS.

Board of Judges to frame rules continued.

237. The existing Board of County Judges with authority to make Rules relating to Division Courts shall continue until superseded or revoked by the Lieutenant-Governor; and all Rules and Forms heretofore made relating to Division Courts and in force when this Act takes effect shall, so far as applicable, remain in force until otherwise ordered under the provisions of this Act. C. S. U. C. c. 19, ss. 1, 62, 70.

(*u*) See section 43.

(*v*) The time would cease to run while any of these disabilities continued, and commence again when removed: contrast *Penny* v. *Brice*, 18 C. B. N. S. 393.

The Lieutenant-Governor may appoint five County Judges to frame rules, &c.

238. The Lieutenant-Governor may from time to time appoint and authorize five of the County Judges, who shall be styled "The Board of County Judges," to frame General Rules and Forms concerning the practice and proceedings of the Division Courts, and the execution of the process of such Courts, with power also to frame Rules and Orders in relation to the provisions of this Act, or of any future Act respecting such Courts, as to which doubts have arisen or may arise, or as to which there have been or may be conflicting decisions in any of such Courts. C. S. U. C. c. 19, s. 63; 32 V. c. 23, ss. 21 & 22; 27–8 V. c. 27, s. 3.

Retired Judge may be appointed

2. The Lieutenant-Governor may appoint any retired County Judge to be one of the members of the said Board. 40 V. c. 8, s. 13.

Rules respecting Clerks and Bailiffs.

3. The said Board may also from time to time make Rules for the guidance of Clerks and Bailiffs, and in relation to the duties and services to be performed, and to the fees to be received by them; and may also substitute other fees in lieu of fees payable to Clerks and Bailiffs under any Rule, Order or Statute. 32 V. c. 23, s. 22; 37 V. c. 7, s. 91.

Amendment of rules.

4. The said Board may from time to time alter or amend any Rules or Orders made for the Division Courts, and may for any Division Court Division, embracing a City or part of a City, establish a lower tariff of fees from that established for County Division Courts. 27–8 V. c. 21 s. 3; 32 V. c. 23, ss. 21 & 22; 40 V. c. 7, *Sched.* A (72).

Board to certify rules to the Chief Justice of the Q. B. to be laid before the Judges.

239. The Board of County Judges or any three of them, shall, under their hands, certify to the Chief Justice of the Court of Queen's Bench all Rules and Forms made after this Act takes effect, and the said Chief Justice shall submit the same to the Judges of the Superior Courts of Law, or to any four of them. C. S. U. C. c. 19, s. 64.

Such rules to be approved of by the Judges;

240. The Judges of the Superior Courts of Law (of whom the said Chief Justice, or the Chief Justice of the Court of Common Pleas, shall be one) may approve of, disallow, or amend any such Rules or Forms. C. S. U. C. c. 19, s. 65.

And have force of a statute.

241. The Rules and Forms so approved of shall have the same force and effect (*w*) as if they had been made and included in this Act. C. S. U. C. c. 19, s. 66.

The Judges to transmit copies to the Lt.-Governor, &c.

242. The Judges who make any Rules and Forms approved of as aforesaid shall forward copies thereof to the Lieutenant-Governor, and the Lieutenant-Governor shall lay the same before the Legislative Assembly. C. S. U. C. c. 19, s. 67.

Expenses of provided for.

243. The Lieutenant-Governor may, by warrant, direct the Provincial Treasurer to pay, out of the Consolidated Revenue Fund, the contingent expenses connected with the framing, approval and printing of such Rules. C. S. U. C. c. 19, s. 68.

Practice of the Superior Courts to be followed in unprovided cases.

244. In any case not expressly provided for by this Act, or by existing Rules, or by Rules made under this Act, the County Judges may, (*x*) in their discretion, adopt and apply the general principles of practice (*y*) in the Superior Court of Common Law to actions and proceedings in the Division Courts. C. S. U. C. c. 19, s. 69.

(*w*) The Rules have only this effect when made *strictly within* the power delegated to "the Board of County Judges," under the 238th section: Maxwell on Statutes, 265; *Drummond* v. *Drummond*, L. R. 2 Ch. 32; *Wethercfield* v. *Nelson*, L. R. 4 C. P. 571; *Attorney-General* v. *Sillem*, 2 H. & C. 1024, Am. Ed. As to the power of the Court of General Sessions to make rules, providing how and when appeals shall be heard, see *Reg.* v. *Pawlett*, L. R. 8 Q. B. 491; *Rex* v. *Staffordshire*, 4 A. & E. 842. Generally, see *Hall* v. *Hill*, 2 E. & A. p. 577; *Re Lincoln Election*, 2 App. R. 336, *et seq.*, *per* Moss, C. J. A.

(*x*) It is submitted that the words here used are to be read as indicating a practice to be observed by the Judge whenever the circumstances of a case require it: *Macdougall* v. *Paterson*, 11 C. B. 755; *Swift* v. *Jones*, 6 U. C. L. J. 63; *Allman et ux.* v. *Kensel*, 3 P. R. 110; *Reg.* v. *Tithe Commissioners*, 14 Q. B. 474; Maxwell on Statutes, 219; *The Supervisors* v. *United States*, 4 Wallace, 446.

(*y*) The author refrains from offering any opinion on the meaning of the language here employed, further than as expressed in the foregoing notes. It must be left to future decisions to determine what principles of practice in the Superior Courts can be invoked by a Judge in a Division Court case. The danger of attempting to lay down any general rule is exemplified by the case of *In re Willing* v. *Elliott*, referred to at page 1106 of R. & J.'s Digest, in which it was *held* that the clauses of the Administration of Justice Act, authorizing the examination of defendants before judgment, had no application to Division Courts.

SCHEDULE.

(Section 27.)

COVENANT BY CLERK OR BAILIFF.

Know all men by these presents, that we, J. B., Clerk (*or* Bailiff, *as the case may be*) of the Division Court, in the County (*or* United Counties) of , S. S., of , in the said County of (*Esquire*), and P. M., of , in the said County of (*Gentleman*) , do hereby jointly and severally for ourselves, and for each of our heirs, executors and administrators, covenant and promise that J. B., Clerk (*or* Bailiff) of the said Division Court shall duly pay over to such person or persons entitled to the same, all such moneys as he shall receive by virtue of the said office of Clerk (*or* Bailiff), and shall and will well and faithfully do and perform the duties imposed upon him as such Clerk (*or* Bailiff) by law, and shall not misconduct himself in the said office to the damage of any person being a party in any legal proceeding: nevertheless, it is hereby declared that no greater sum shall be recovered under this covenant against the several parties hereto than as follows, that is to say:

Against the said J. B. in the whole,	— dollars.
Against the said S. S.	— dollars.
Against the said P. M	— dollars.

In witness whereof, we have to these presents set our hands and seals, this day of , in the year of Our Lord one thousand eight hundred and .

Signed, sealed and delivered, }
in the presence of }

C. S. U. C. c. 19; Form A.

PROVINCE OF ONTARIO.

By the Division Courts Act, it is enacted that the Governor may appoint and authorize five of the County Judges from time to time, to frame General Rules and Forms concerning the practice and proceedings of the said Division Courts, and the execution of the process of such Courts, and with power also to frame rules and orders in relation to any of the provisions of the said Act, or of any future Act respecting such Courts, as to which doubts have arisen or may arise, or as to which there have been or may be conflicting decisions in any of such Courts; that the County Judges so appointed, or any three of them, shall, under their hands, certify to the Chief Justice of Upper Canada all rules and forms by them made, and that the Chief Justice shall submit the same to the Judges of the Superior Courts of Common Law, at Toronto, or to any four of them, and that the Judges of the Superior Courts (of whom the Chief Justice, or the Chief Justice of the Court of Common Pleas shall be one), may approve of, disallow, or amend any such rules or forms, and that the rules and forms so approved of shall have the same force and effect as if they had been made and included in the said Division Courts Act.

And whereas by the Act of the Legislature of this Province, passed in the 32nd year of Her Majesty's reign, intituled "An Act to amend the Acts respecting Division Courts," it is enacted that the County Judges so to be appointed as aforesaid, shall be styled "The Board of County Judges," and shall have authority from time to time, in addition to their present powers, to make rules also for the guidance of Clerks and Bailiffs, and in relation to the duties and services to be performed, and to the fees to be received by them; and that the said Board may, from time to time, alter or amend any rules or orders made for said Courts.

And whereas the Lieutenant-Governor of this Province, in exercise of the power so given to him, on the 24th day of March last, appointed James Robert Gowan, Stephen James Jones, David John Hughes, James Daniell, and James Smith, five of the County Judges

of this Province, to frame new general rules and forms concerning the practice and proceedings of the Division Courts and the execution of the process of such Courts, and also to frame new rules and orders in relation to the Division Courts Act, and any subsequent Act or Acts respecti g such Courts, as to which doubts have arisen or may arise, or as to which there have been or may be conflicting decisions in any of such Courts, and also to make rules for the guidance of Clerks and Bailiffs, and in relation to the duties and services to be performed, and the fees to be received by them.

Now, in pursuance of the powers vested in us, we, the said James Robert Gowan, Stephen James Jones, David John Hughes, James Daniell, and James Smith, have framed the following rules, orders, and forms for use in the said Courts, and to be in force until otherwise ordered as aforesaid, and we do certify the same to the Honorable the Chief Justice of Upper Canada accordingly.

Toronto, 1869.

RULES.

TIME OF OPERATION.

1. The Rules of Practice and the Forms now in use in the several Division Courts shall, on and from the second day of August, A.D. 1869, cease to be used, and in lieu thereof, the following shall, on and from such day, be the Rules, Orders and Forms in force and used in said Courts. But any action, process, order, judgment, or proceeding, pending, existing, or in force in any Division Court at that time, shall not be thereby affected, but shall continue and remain, and so far as necessary, be proceeded with under these rules and forms, if applicable, or otherwise under the rules and forms hitherto in use, or as the Judge may direct.

INTERPRETATION.

2. In construing these Rules and Forms, unless otherwise declared or indicated by the context, the following words shall have the several meanings hereby assigned them over and above their

several ordinary meanings, viz.:—(1st) The words "the Act" shall mean the Division Courts Act (Consolidated Statutes of Upper Canada, chapter 19); and the words "the Act of 1869" shall mean the 32nd Vic. cap. 23, "An Act to amend the Acts respecting Division Courts;" (2) The word "party" shall mean a party to a suit or proceeding; (3) The word "person" shall mean any person, whether a party to a suit or proceeding or not; (4) The words "person" or "party" shall include, and be understood to mean a body politic or corporate, as well as an individual; (5) The word "executor" shall be held to embrace and mean "of the last will and testament," and extend to parties acting as such of their own wrong; (6) The word "administrator" shall be held to embrace and express "of the goods and chattels, rights and credits, which were, &c.;" (7) Every word importing the singular number shall, where necessary, be understood to mean several persons or things, as well as one person or thing; (8) Every word importing the masculine gender shall, where necessary, be understood to mean a female as well as a male; (9) The word "sworn," and the words "on oath," shall be understood to mean affirmed or on oath *viva voce*, or by affidavit or affirmation; (10) The words "Home Court" and "Home Division" shall mean respectively the Court and Division from which process originally issued; (11) The words "Foreign Court" and "Foreign Division" shall mean respectively the Court and Division into which process is issued from another Court; (12) The words "Judge" and "Clerk" respectively shall be taken to extend and be applied to the Junior, Deputy, or Acting Judge, or Deputy Clerk (as the case may be or require); (13) The words "Plaintiff" and "Defendant" respectively shall be mutually transposed, where necessary, for the proper application and construction of any of these Rules or the Forms herewith, or for giving effect thereto; (14) The word "County" shall include any two or more Counties united for judicial purposes; (15) The words "the claim" shall mean the demand or the subject matter for which any suit or proceeding is brought or instituted in a Division Court; (16) The word "process" shall mean any summons, writ or warrant issued under the seal of the Court, or Judge's summons or order; (17) In any form or proceeding, the words "United Counties" shall be introduced according to law, and circumstances rendering the same necessary.

CLAIM AND PARTICULARS.

3. Every claim (*a*) should shew the names in full, (*b*) and the present or last known places of abode (*c*) of the parties, and must be written in a legible manner, and delivered to the Clerk, at his office; provided that if the plaintiff is unacquainted with the defendant's christian name, the defendant may be described by his surname, or by his surname and the initials of his christian name, or by such name as he is generally known by; and the defendant may be so described in the process, and the same may be taken to be as valid as if the true christian name and surname had been stated therein; and all subsequent proceedings thereon may be taken in conformity with such description; or, when the defendant's true name is discovered, the proceedings may be amended accordingly, (*d*) on such terms as the Judge thinks fit.

4. The claim shall, in every case admitting thereof, shew the particulars in detail (*e*); and, in other cases, shall contain a statement of the particulars of the claim, or the facts constituting the cause of action, in ordinary and concise language, and the sum or sums of

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(*a*) See sections 68 and 69 and notes, and notes to rule 80.

(*b*) The christian and surname of the plaintiff, or of each of the plaintiffs, if more than one should be inserted in the summons: Arch. Pract. 12th Ed., 187; *Walker & Co.* v. *Parkins*, 2 D. & L. 982. The summons should, in general, set forth the true christian and surname of the defendant in full. He may be sued by any name or names he may have acquired by usage or reputation, and this applies both to his christian and surname: Arch. Pract. 186; *Williams* v. *Bryant*, 5 M. & W. 447; *Browne et al* v. *Smith*, 1 P. R. 347; *The Corporation of the Township of Beverley* v. *Barlow et al*, 10 C. P. 178; *Reg* v. *Worthenbury (Inhabitants)* 7 Q. B. 555; *Price* v. *Harwood*, 3 Camp. 108; *Borthwick* v. *Ravenscroft*, 5 M. & W. 31.

(*c*) "A reasonable degree of certainty in the description of the defendant's residence, &c., should be used and will suffice. . . . . The insertion of the supposed residence will suffice": Arch. Pract. 186, 187. A defendant described as of "Clapham, in the County of Surrey," was held sufficient: *Toulmin* v. *Bowditch*, 11 Jur. 455. A description of either plaintiff or defendant by local municipality and county would be sufficient: See Har. C. L. P. Act, p. 3 and notes. The omission of the place of abode would be an irregularity merely that could be waived: *Ross* v. *Gandell*, 7 C. B. 766, or amended under the general powers of amendment.

(*d*) See Rule 118: *Worden* v. *Date Patent Steel Company*, 6 P. R. 276; Fisher's Digest, 5882; Har. C. L. P. Act, 48 to 50, and 307 to 320 inclusive.

(*e*) This should be particularly observed for, if not so shewn, the plaintiff would probably be compelled to amend on terms, and in cases where the action is commenced by special summons there could be no judgment by default unless "the particulars of the plaintiff's claim with reasonable certainty *and detail* had been served on the defendant: section 79; nor by default at the

money claimed in respect thereto: (the Forms 15 to 21 are given by way of illustration). But in all cases, the Judge, in his discretion, and on such terms as he thinks fit, may adjourn the hearing for a statement of particulars or further particulars.

5. Where a plaintiff sues a defendant, under the provisions of the Act 27 and 28 Vic., Cap 27 (*f*), the claim shall contain the following statement: "And the plaintiff enters this suit, and claims to have it tried and determined in this Court, because the place of sitting thereof is the nearest to the defendant's residence."

6. In all actions in Division Courts against officers and their sureties (under the 25th (*g*) and subsequent sections of the Act) on the officer's *Security Covenant*, the particulars of the claim shall be according to the Form 18. The process and subsequent proceedings to be the same as in ordinary cases.

7. Where a party, having an unsatisfied judgment, desires to proceed under the 160th (*h*) and subsequent sections of the Act, he shall enter with the Clerk a minute in writing according to the Form 27, or to the like effect, which shall be numbered in the order in which it shall be received; and, if he proceeds in a Division Court, other than the one in which the judgment was entered, he shall, with the minute, deliver to the Clerk a transcript of the judgment; and thereupon a summons (Form 28) bearing the number of the minute shall issue.

8. Where the excess is abandoned, it must be done, in the first instance, on the claim. (*i*)

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trial unless such has been done: see section 82. As to particulars on the account stated see Bullen & Leake, 3rd Ed. 44, and title "Account stated:" *Re Laycock* v. *Pickles*, 4 B. & S. 497; *Sparling* v. *Savage*, 25 U. C. R. 259; *Toms et al* v. *Sills*, 29 U. C. R. 497; *Buck* v. *Hurst et al.*, L. R. 1 C. P. 297.

(*f*) Now section 63.

(*g*) Now section 27.

(*h*) Now the 177th section.

(*i*) The Judge has no power to amend particulars of claim so as to bring the case within the jurisdiction: see notes to section 196. The rule must have been originally framed to get over the difficulty occasioned by the decision of *Isaac* v. *Wyld*, 7 Ex. 163. The excess must be abandoned by the plaintiff on his claim. He cannot wait until the hearing and then do it: *In re Mackenzie and Ryan*, 6 P. R. 323; *Winger* v. *Sibbald et al.*, 2 App. Rep. 610; Fisher's Digest, 2137. See, however, *Fitzsimmons* v. *McIntyre*, 5 P. R. 119; and *In re Stoplale* v. *Wilson*, 8 P. R. 5.

PROCESS.

9. All first process issued under the seal of the Court shall be signed by the Clerk, dated the day on which the claim is entered, (*j*) and numbered to correspond with the claim on which it issues, and, with the exception of Warrants of Attachment, duly stamped. (*k*)

10. The first process (*l*) issued in a suit under the seal of the Court shall for all purposes be held to be the commencement of the action.

11. The first process for the recovery of a debt or money demand, (*m*) or for a tort or other personal action, (*n*) may be a summons and called "Ordinary summons" (Form 22).

12. In actions for the recovery of a debt or money demand, (*o*) where the particulars of the plaintiff's claim are given with reasonable certainty and detail (under the Act of 1869,) the first process may be a summons, and called "*Special Summons*," and may be in the Form 23 set forth in the Schedule; and the Warning No. 1 therein shall stand in lieu of the Form A in the Schedule in the last mentioned Act.

13. In actions of Replevin, (*p*) the first process shall be a writ of Replevin and Summons, called "Summons in Replevin" (Form 24).

14. An alias or pluries (*q*) process shall be dated on the day on which it actually issues.

15. Where the plaintiff sues under the 152nd section (*r*) of the Act, the proceeding shall be by "Ordinary Summons," or "Special Summons," but in addition to the notice or notices and warnings on the original summons to appear there shall be added the following: "The defendant is informed and cautioned that I, ——— K———

(*j*) See notes to section 68.

(*k*) See notes to section 6.

(*l*) See sections 6 and 36, and notes thereto.

(*m*) See notes to section 79.

(*n*) See sec. 54, subsection 1 and section 68.

(*o*) See notes to section 79.

(*p*) See section 56 and notes, and the Replevin Act there copied (Rev. Stat. 732.)

(*q*) An alias is the second writ, and a pluries writ is any writ after the second: Wharton 38 and 587, 7 U. C. L. J. 178.

(*r*) Now the 171st section. See the notes to that section.

(insert the name of the beneficial plaintiff) only has power to discharge this suit, the subject matter thereof having been seized under execution."

16. Leave to issue a summons or process under the 72nd section (*s*) of the Act may be granted at any time by the Judge, on production of an affidavit (Forms 8 or 9), or upon oath to the same effect, at any sittings of the Court in which the action is to be brought: and where a summons issues by leave of the Judge, no written order for such leave shall be necessary, but it shall be sufficient to insert in the summons "Issued by leave of the Judge."

17. Where there are more defendants than one, and they reside in different counties, concurrent summonses (*t*) may issue for the service of the defendants residing out of the County in which the action is brought, but the costs only of the summons actually served shall be allowed on taxation, unless the Judge directs otherwise; and such concurrent summons shall correspond with the original, and be marked in the margin "concurrent summons."

SPECIAL SUMMONS.

18. Every "*Special Summons*" shall be returnable on the eleventh day after (*u*) the day of service thereof upon the defendant, in case the defendant, or one of the defendants, resides in the County in which the action is brought; in case none of the defendants reside in the County, but one of them resides in an adjoining County, the Special Summons shall be returnable on the sixteenth day after the day of such service; and in case none of the defendants reside in the County within which the action is brought, nor in an adjoining County, the Special Summons shall be returnable on the twenty-first day after the day of such service upon the defendants.

19. In case a "*Special Summons*" shall not be served in time to make the notice of the sittings of the Court at the foot of "Warning No. 2" available for the information of the defendant, the Bailiff shall return the same forthwith (*v*) to the Clerk who issued the sum-

(*s*) Now the 64th section.

(*t*) In analogy, see Rev. Stat. cap. 50, section 26, *et seq.*; Har. C. L. P. Act 25.

(*u*) The day of service is excluded under this rule: *Young* v. *Higgon*, 6 M. & W. 49, and Rule 18.

(*v*) See notes to section 18.

mons, and the Clerk shall add a new notice of the proper days of the week and month on which the next two sittings of the Court are to be held, and shall return or transmit the same to the Bailiff for service.

20. A defendant giving notice of set-off or other Statutory defence, (*v*) or paying money into Court, (*x*) or pleading a tender, shall be deemed to have sufficiently given the Clerk notice of disputing the plaintiff's claim within the meaning of the Act of 1869. (*y*)

21. When the defendant's notice of defence disputes the claim in part only, (*z*) the Clerk shall, in the manner provided for in Rule 88, hereby notify the plaintiff thereof, and require him forthwith to say in writing, if he is willing to take judgment for such part; and if the plaintiff fails to notify the Clerk that he is content to take judgment for the part admitted, it will be assumed that he seeks to recover the whole claim, and in such case the plaintiff must proceed to trial as in ordinary cases.

22. In case there are several defendants, (*a*) and all of them have not been served with a special summons, then, unless the plaintiff is content to take judgment against those served only, judgment cannot be entered on his behalf under the said Act, but the plaintiff will have to proceed to a hearing before the Judge as in ordinary cases.

23. In case the notice required by the second section (*b*) of the Act of 1869 has not been given by a sole defendant, or by one or more of several defendants (and the plaintiff is willing to take judgment against those only), and leave to dispute the plaintiff's claim has not been given by the Judge, the Clerk, after receiving a return of the "*special summons*," with the proper affidavit of service, may, on the twelfth day after the service of the summons, where the return day is the eleventh day after service, and on the seventeenth and twenty-second days respectively, where the sixteenth and twenty-first

(*w*) See notes to sections 92 and 136.

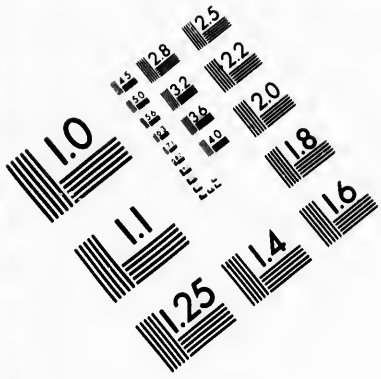
(*x*) See notes to sections 86 and 89 as to tender and payment into Court. A letter by the defendant's Solicitor to the plaintiff's Solicitor before suit, offering to pay the plaintiff's demand, is not a tender: *Garforth* v. *Cairns*, 9 L. J. N. S. 212.

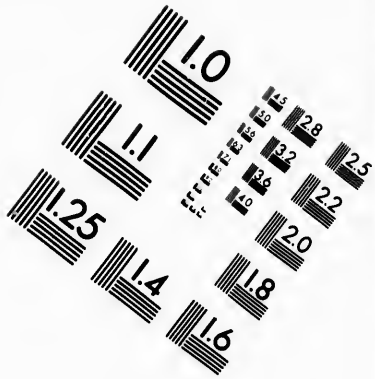
(*y*) See sections 79 and 80, and notes.

(*z*) See section 79.

(*a*) See notes to section 77.

(*b*) See section 79, and notes.





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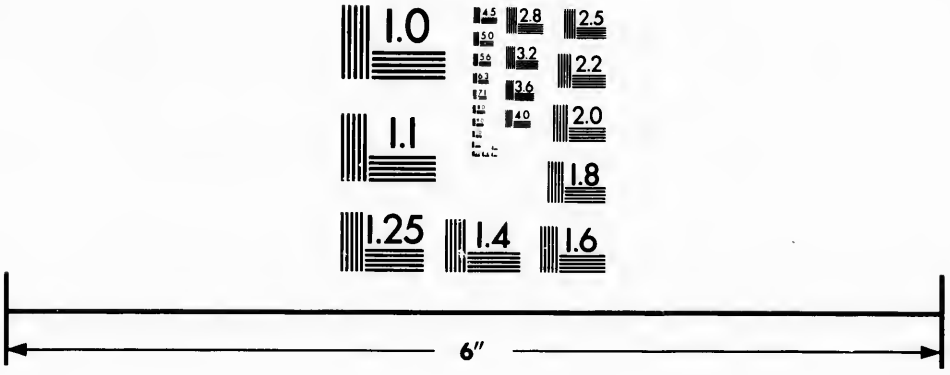

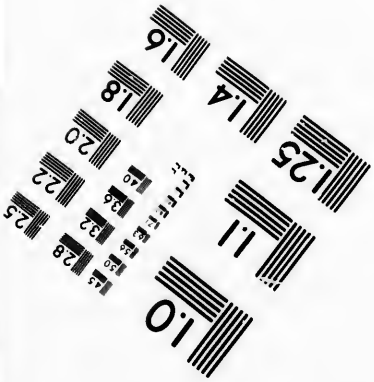

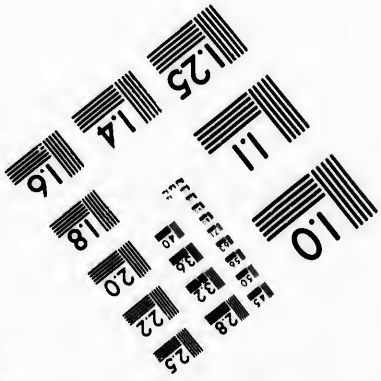

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days after the day of service are the return days of such summons, or at any time within one month after such return day, enter judgment against the defendant or defendants so served as aforesaid, for the claim, or so much thereof as has not been disputed, if the plaintiff is content with judgment for such part. If the plaintiff is not content to take judgment for the part not disputed, he must proceed to trial, as in ordinary cases, and the part of such claim not disputed shall be considered as admitted and confessed by the defendant or defendants.

24. In case a sole defendant, or some one or more of several defendants served with a "special summons," has or have given the necessary notice of defence required by the Statute, and the plaintiff is not willing to take judgment against those defendants only who have made default, the action shall thereafter be proceeded with as in ordinary cases, and the default of those defendants (if any there be) who have not given the notice at the time limited (unless the Judge gives further leave to put in such notice afterwards) shall be considered, as against them, a confession of the plaintiff's claim.

26. In actions commenced by special summons where there are more defendants than one, and some of them have been served with process, but have not given any notice disputing the plaintiff's claim, and other or others of them have not been served, but have given a confession of the debt, the Clerk shall produce or transmit the confession duly proved to the Judge for his order, and when the Judge's order shall be procured, the Clerk may enter judgment therein within one month after the return of the summons against all the defendants for the amount claimed in the particulars, or so much thereof as has not been disputed (if the plaintiff is content with judgment for part), provided that the defendants who have confessed shall have acknowledged the same amount by their confession, and such judgment may be in the Form 53; and it shall not be in the power of the plaintiff to elect either to proceed on the confession against some of the defendants or to obtain final judgment against those defendants who have not confessed, but the judgment shall be entered against all the defendants jointly.

27. In any action brought against two or more defendants by "Special Summons," and all such defendants are not served on the

same day, the Clerk, if no notice of defence is entered by such defendant or defendants as are first served, may, on the day he could have entered final judgment against such defendants, if they had been all served, enter a minute in the Procedure Book, stating the fact of service, and of no defence, and the Clerk may so proceed against each defendant as the time falls due, until the last is served, when, if he does not put in the necessary notice of defence in the proper time, final judgment may be signed against all; but if it is not desired (*c*) to enter judgment against one of the several defendants till all have been served, no such minute need be made.

28. If one or more, not being all of such defendants, put in the necessary notice, the action shall proceed as in other cases, the Clerk (unless the plaintiff wishes to abandon those who defend) not signing judgment against those who have been minuted, as aforesaid, until the action against all is determined, so as to have but one taxation of costs. When the case is tried, if a judgment be given for the plaintiff against those defendants who dispute the claim, the Clerk may enter final judgment against all the defendants; if at such trial a judgment be given for those defendants, or any of them that dispute the plaintiff's claim, the plaintiff, if not intending to make a motion to have the said judgment reversed or altered, must obtain leave to amend his proceedings by striking out the names of those defendants in whose favour judgment at the trial was given, and final judgment may be then entered against those who have been minuted as above, and against any defendant against whom judgment at such trial was given.

29. Any defendant who has been minuted, as aforesaid, may be let in to defend on sufficient grounds (*d*) shown to the Judge as in any ordinary case of judgment entered in default of the necessary notice.

30. In case the defendant has given a confession or acknowledgment of debt, and has not put in the notice disputing the plaintiff's claim, the plaintiff may either proceed on the confession, (*e*) as in ordinary cases, or may obtain final judgment under the Act of 1869, as he may elect. The costs and disbursements of transmitting such

(*c*) That is by the plaintiff. He should notify the Clerk of his determination in that respect.

(*d*) See notes to section 79, sub-section 3.

(*e*) See section 152, and notes and Rule 26.

confession to the Judge to obtain the order for entering of judgment, shall be costs in the cause.

31. In case judgment be not entered by default, on a special summons, within one month after the return of the summons, the Clerk cannot enter it afterwards; but the suit shall not thereby abate or be considered as discontinued, but the plaintiff may continue and revive the same at his own expense by suing out an *alias* summons in the ordinary form of summons to appear (Form 22), with the same particulars attached or endorsed as were attached to or endorsed on the "Special Summons," which shall be duly served upon the defendant in the usual way, and the suit may then proceed as in ordinary cases.

32. The judgment shall be entered by the Clerk in the Procedure Book, according to the form to these rules appended (No. 52), in lieu of the "*Form B*" in the Schedule to the Act of 1869.

33. The execution to be issued on a judgment under the second section (*f*) of the said Act shall be in the form set forth in the schedule of forms to these Rules, No. 77.

34. Where, under the provisions of sec. 18 (*g*) of the Act of 1869, a writ of execution is required to be executed out of the Division, the writ may be directed by name of office to the Bailiff of any of the Division Courts in the same County, but cannot be issued to the Bailiff in another County. (*h*) The returns required to be made under Secs. 18 and 19 [*now ss. 74 and 75*], must be made to the Clerk by whom the process or document has been issued.

ATTACHMENTS.

35. The Form of affidavit for an Attachment (*i*) shall be according to the Form 11. In all cases where an Attachment shall issue (whether the suit be commenced by attachment in the first instance or not), and the summons against the defendant shall not be personally served, (*j*) the hearing or trial shall not take place until a month after the seizure under the Attachment.

(*f*) Now 79th section.
(*g*) See section 74.
(*h*) There must be a transcript under section 161.
(*i*) See section 190.
(*j*) See sections 62 and 72, and notes.

36. When several persons sue out warrants of attachment against an absconding, removing or concealed debtor, each one of such attaching creditors may enter a defence, call and examine, and cross-examine witnesses as to any debt or claim proved or attempted to be proved against the debtor, in the same way and to the same extent (*k*) as the debtor himself might do were he personally to appear and defend the suit on any ground whatever.

INTERPLEADER.

37. When any claim shall be made to, (*l*) or in respect to, any goods or chattels, property, or security, taken in execution, (*m*) or attached (*n*) under the process of a Division Court, or the proceeds or value thereof, (*o*) by any landlord for rent, or by any person, not being the party against whom such process has issued, and summonses have been issued on the application of the officer, charged with the execution of such process, such summonses shall be served in such time and manner (*p*) as is directed for service of an ordinary summons to appear; and the case shall proceed as if the claimant were the plaintiff, and the execution or attaching creditor were the defendant.

38. The claimant shall, not less than six days (*q*) before the day appointed for the trial, leave at the office of the Clerk of the Court, a particular (*r*) of any goods or chattels, property or security, alleged to be the property of the claimant, and the grounds (*s*) of his claim,

(*k*) See *Offay* v. *Offay*, 26 U. C. R. 363.

(*l*) See section 210 and notes. The Bailiff should not retire from possession of the goods seized because an Interpleader summons has been issued: *Summers, Ex parte*, 18 Jur. 522.

(*m*) See sections 156 and 170.

(*n*) See section 192 and notes.

(*o*) See section 210 and notes, and *Reid* v. *McDonald*, 26 C. P. 147.

(*p*) See sections 62, 70 and 82, and notes.

(*q*) Six clear days.

(*r*) Great strictness should not be exacted of a claimant in this respect. The test appears to be, is it calculated to mislead? *Ex parte M'Fee*, 9 Ex. 261. This rule is taken almost *verbatim* from Rule 130 of the English County Court Rules. The grounds of the claim need not appear on the face of it to be valid, and therefore a claim to certain goods, stating that they had been assigned to the claimant by deed, is sufficient, although it does not appear that the deed was good as against creditors: *Reg.* v. *Richards*, 2 L. M. & P. 263.

(*s*) A particular of the grounds of claim which states that the goods were assigned to the claimant by an indenture, &c., of which it gives the date and

set forth in ordinary and concise language; or, in case of a claim for rent, the amount thereof, for what period, in respect to what premises the same is claimed to be due, and the terms of holding; and any money paid into Court shall be retained by the Clerk until the claim shall be adjudicated upon; (*t*) provided that, by consent, an interpleader claim may be tried, although these rules may not have been complied with; and the summonses, the particulars, and the order thereon, shall be according to the Forms given or to the like effect.

39. In case the claimant shall not have complied with the rule in respect of delivering a particular of his claim, the Judge may, upon such terms as he shall direct, order the trial and proceedings to be adjourned, so as to enable him fully to adjudicate upon the claim on the merits.

40. Where the claim to any goods or chattels, property or security, taken in execution or attached, or the proceeds or value thereof, shall be dismissed, the costs of the Bailiff shall be allowed to him out of the amount levied, (*u*) unless the Judge shall otherwise order.

REPLEVIN.

41. In actions of Replevin no other cause of action (*v*) shall be joined in the summons.

42. Where the distress is for rent, and the defendant succeeds in the action, if the defendant requires, the Judge shall find the value

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the parties, sufficiently sets forth the grounds of the claim under this rule: *Reg.* v. *Richards*, 2 L. M. & P. 263. Goods having been seized under an execution issued out of a County Court were claimed by a third party who delivered particulars of his claim. The Judge refused to adjudicate on the claim on the ground that the particulars did not distinguish that portion of the goods seized to which the claimant was entitled. *Held* that he should have determined what part the claimant was entitled to and given judgment accordingly: *Reg.* v. *Stapleton*, 15 Jur. 1177; 21 L. J. Q. B. 8, s. c. A notice that goods "are and were my own property, and not the property of R," is not a compliance with the rule: *Beswick* v. *Boffey*, 9 Ex. 315. The Judge's decision with respect to the sufficiency of the particulars is not conclusive: *Ex parte M'Fee*, 9 Ex. 261. A Superior Court will interfere to prevent a wrong of the Judge in holding particulars insufficient: *Whitehead* v. *Procter*, 3 H. & N. 532; *Churchward* v. *Coleman*, L. R. 2 Q. B. 18.

(*t*) See notes to section 210, sub-section 3; also Fisher's Digest, 2147.

(*u*) See *McCollum* v. *Kerr et al.*, 8 U. C. L. J. 71.

(*v*) See Rev. Stat. cap. 50, section 84; *G. W. Ry. Co.* v. *Chadwick*, 3 U. C. L. J. 29; Har. C. L. P. Act 85.

of the goods (*w*) distrained, and if the value be less than the amount of rent in arrear, judgment shall be given for the amount of such value; but if the amount of the rent in arrear be less than the value so found, judgment shall be given for the amount of such rent, and may be inforced in the same manner as any other judgment of the Court.

43. Where the distress is for *damage feasant* (*x*) and the defendant is entitled to judgment for the return, if the plaintiff requires, the Judge shall find the amount of the damages sustained by the defendant, and judgment shall be given in favor of the defendant in the alternative for a return, or for the amount of the damages so found.

44. In any other action of replevin, the judgment for the defendant shall be for a return (*y*) of the goods replevied with the costs of suit, together with such damages as the defendant shall sustain by the issuing of the writ of replevin, if damages are awarded. (*z*)

45. In case the defendant in an action of replevin shall pay damages and costs into Court, under the 90th section (*a*) of the Act, and shall leave with the Clerk a consent that the replevin bond be delivered up to be cancelled, and an express waiver of all right to the property replevied, and the plaintiff accept such damages, the proceedings in the said action of replevin shall thenceforth cease and be discontinued.

46. Before the Bailiff replevies, he shall take a bond in treble (*b*) the value of the property to be replevied, as stated in the writ

(*w*) The defendant is under no obligation to pursue this course. It is discretionary with him: *Rees* v. *Morgan*, 3 T. R. 349; Mayne on Damages, 3rd Ed. 374.

(*x*) To the unprofessional reader we may say that this means "Found doing damage:" Wharton, 207.

(*y*) See section 56, *et seq.*; Rob. & Jos. Digest, 3307; Mayne on Damages, 373, *et seq.*; see also Replevin Act, Rev. Stat. chap. 53.

(*z*) If damages are claimed they should be proved, as they are not recoverable in any subsequent action: *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454.

(*a*) Now the 89th section.

(*b*) A bond with *three* sureties is good and can be assigned (*Meyers* v. *Maybee*, 10 U. C. R. 200), and the assignee can sue on it in his own name: *Bacon* v. *Langton*, 9 C. P. 410; *Becker et al.* v. *Ball et al.*, 18 U. C. R. 192. The assignment of the bond need only be attested by one witness, but a subscribing witness is necessary: *Heley et al.* v. *Cousins et al.*, 34 U. C. R. 63; see section 56 and notes.

which bond shall be assignable to the defendant, and the bond and assignment thereof may be in the Form given. the condition being varied to correspond with the writ.

47. The copy of the "Summons in Replevin" shall not be served upon the defendant until the Bailiff has replevied the property, or some part of it, if he cannot replevy the whole in consequence of the defendant having eloigned the same out of the County in which he is Bailiff, or because the same is not in the possession of the defendant, or of any other person for him.

48. A copy of "Summons in Replevin" shall be served on the defendant personally, or if he cannot be found, by leaving the copy at his usual or last place of abode, with his wife, or some other grown person being a member of his household, or an inmate of the house wherein he resided (*c*) as aforesaid.

49. The Bailiff shall return the "Summons in Replevin" at or before the return day thereof, and shall annex thereto:—

a. The names of the sureties in and the date of the bond taken from the plaintiff, and the name or names of the witnesses thereto. (*d*)

b. The place of residence and additions (*e*) of the sureties.

c. The number, quantity and quality of the articles of property replevied; and in case he has replevied only a portion of the property mentioned in the summons, and cannot replevy the residue, by reason of the same having been eloined out of the County by the defendant or not being in the possession of the defendant, or of any other person for him, he shall state in his return the articles which he cannot replevy, and the reason why not. Form 119.

50. If the Bailiff makes such a return of the property distrained, taken or detained, having been eloined, then upon the filing of such return, a writ in Withernam (*f*) (Consol. Stats. U. C. c. 29), shall

(*c*) As to service of summons generally, see notes to sections 62 and 72.

(*d*) See Rule 46.

(*e*) See notes to section 62.

(*f*) In the event of the goods being eloined or removed out of the County, this, being a writ in reprisal, is issued; under which property of the defendant is taken, instead of the property sought under the first writ: Wharton, 264; Lush's Pract. 1025; see section 18 of the Replevin Act, and form of writ there referred to.

be issued by the Clerk who issued the summons in replevin; and before executing such writ, the Bailiff shall take pledges (*g*) (sureties) in like manner as in cases of distress.

GARNISHEE PROCEEDINGS.

51. The affidavit (Form 40), required by sec. 6 of the Act of 1869, (*h*) shall be made by the Primary Creditor, his Attorney or agent, and should state (in addition to the facts required by that section) the nature of the debt sought to be garnished, and the amount thereof, if known to the applicant; and the application to the Judge may be *ex parte*.

52. The warning (Form 42), shall be endorsed on or subjoined to the attaching order issued under section 6, sub-section 1, and on the summons referred to in section 6, sub-section 4, and section 7, sub-section 1. (*i*)

53. The service of the summons on the Garnishee shall in all cases be made at least ten days (*j*) before the return thereof, and the service on the Primary Debtor or Debtors, ten, fifteen, or twenty days (*k*) (according to the places of residence of the parties to be served), before the return thereof. If the amount of the Primary Creditor's claim exceed eight dollars, the service must be personal, unless the Judge order otherwise; if such claim does not exceed eight dollars, the service may be personal, or on some grown-up person being an inmate of the dwelling or usual place of abode, trading or dealing of the person requiring to be served.

54. The Primary Debtor shall in all cases, unless dispensed with (*l*) by the Judge, be served with every garnishee summons, and if not served, the Judge may, on such terms as to him may seem meet, adjourn the case until such service be effected, and may also order any other person to be made a party to such suit, and to be served with such summons.

(*g*) See Replevin Act, section 11, and Rule 46.
(*h*) See section 127, and notes.
(*i*) See sections 127 to 135 inclusive, and notes.
(*j*) See sections 70, 72 and 131, and notes.
(*k*) See Rule 18.
(*l*) See notes to sections 131 and 134.

55. The Judge, in any such garnishee proceeding, may order that the service need not be personal, (*m*) but may be made on any person or persons to be named in the order, or in such other manner as the Judge may direct.

56. If the Garnishee or the Primary Debtor having been served (*n*) does not appear on the return of such summons, judgment may be given against him by default; and if only some of the parties required to be served, are served, the Judge may give the same judgment against those served as in ordinary cases.

57. Where the summons, under section 6, sub-section 4, (*o*) is to be issued from any Court other than that in which the Primary Creditor has obtained judgment against the Primary Debtor, a transcript of such judgment shall be filed with the Clerk of such first mentioned Court, previous to the issuing of the summons against the Garnishee.

58. No payment (*p*) shall be made by a Garnishee to a Primary Creditor before judgment given against the Primary Debtor, except an order for that purpose be first obtained from the Judge.

59. The application under section 14 (*q*) must be by summons obtained from the Judge, returnable at any time and place the Judge may appoint, and calling upon the Garnishee, Primary Creditor, or such other person or persons as the Judge in his discretion shall think fit. If the money has been paid over, the Primary Creditor or other person may be called upon by the summons changing the form to suit, to shew cause why he should not pay the money to the Primary Debtor or other person applying. The order, if granted, may be in accordance with the summons, and may be granted if parties summoned make default, or otherwise, as in ordinary Chamber applications in the Superior Courts.

(*m*) After reasonable attempts have been made to effect service (*Tomlinson* v. *Goudy*, L. R. 1 C. P. 230), the Judge may prescribe in what way service may be made: see notes to sections 131 and 134. The efforts made to effect service should appear by affidavit or by the evidence of the Bailiff given in Court.

(*n*) Is personal service here meant, or would it apply to a case where personal service was dispensed with? It is submitted that it would not, and that judgment should not be entered by default where the Judge dispenses with personal service: see latter part of section 82; see also section 132.

(*o*) Now section 130.

(*p*) See section 129.

(*q*) See section 142.

60. The bond to be given under section 15 (*r*) shall be executed by the Primary Creditor, or his agent, with one sufficient surety in double the amount of the debt ordered to be paid by the Garnishee, and shall be an ordinary bond to the Clerk, by his name of office, conditioned for the re-payment of the money in case re-payment be ordered, and such bond shall be approved of by the Clerk. Form 47.

61. In addition to any costs that may be awarded against a Garnishee under the 11th section, (*s*) if the Primary Creditor is obliged to issue execution against him, the costs of such execution and the Bailiff's fees thereon may be also levied of the Garnishee.

62. The Forms subjoined to these Rules for garnishee proceedings shall be in lieu of the Forms for like proceedings in the schedule of the Act of 1869, and the entry in the debt attachment book shall commence when the attaching order or garnishee summons, as the case may be, first issues, and each subsequent proceeding shall be entered therein when taken.

63. In the proceedings against Garnishees under the Common Law Procedure Act, sections 292 to 296 inclusive, (*t*) the forms 48, 49, 50, 90, may be used; and the same proceedings may be taken in the Division Court against the Garnishee as provided in the Act of 1869, and in these Rules and Forms, made under the said Act, as far as applicable.

PROCEEDINGS BY AND AGAINST EXECUTORS AND ADMINISTRATORS.

64. A party suing an executor or administrator, may charge in the summons, in the Form 32, that the defendant has assets, and has wasted them. (*u*)

65. In all cases, if the Courts shall be of the opinion that the defendant has wasted the assets, the judgment shall be, that the

(*r*) See section 143.

(*s*) Now section 139.

(*t*) Now sections 311, 316, inclusive, of the C. L. P. Act.

(*u*) See Williams on Executors, 1629, *et seq.*; *Abbott* v. *Parfitt*, L. R. 6, Q. B. 346; Dicey on Parties to Action, 216; *Coward* v. *Gregory*, L. R. 2 C. P. 153; Davis C. C. Acts, 361; Law Reports Digest, 1215; Rob. & Jos. Digest, 1486; Arch. Pract. cap. VIII., p. 1232, Rule 71.

debt or damages, and costs shall be levied *de bonis testatoris si, &c., et, si non, de bonis propriis;* and the non-payment of the amount of the demand immediately, on the Court finding such demand to be correct, and that the defendant is chargeable in respect of assets, shall be conclusive evidence of wasting to the amount with which he is so chargeable.

66. Where an executor or administrator denies his representative character, or alleges a release to himself of the demand, whether he insists on any other ground of defence or not, and the judgment of the Court is in favor of the plaintiff, it shall be, that the amount found to be due, and costs, shall be levied *de bonis testatoris si, &c., et, si non, de bonis propriis.*

67. Where an executor or administrator admits his representative character, and only denies the demand, if the plaintiff prove it, the judgment shall be, that the demand and costs shall be levied *de bonis testatoris, si, &c., et, si non,* as to costs, *de bonis propriis.*

68. Where the defendant admits his representative character, but denies the demand, and alleges a total or partial administration of assets, and the plaintiff proves his demand, and the defendant proves the administration alleged, the judgment shall be, to levy the costs of proving the demand *de bonis testatoris si, &c., et, si non, de bonis propriis;* and as to the whole or residue of the demand, judgment of assets *quando acciderint;* and the plaintiff shall pay the defendant's costs of proving the administration of assets.

69. Where the defendant admits his representative character, but denies the demand, and alleges a total or partial administration of assets, and the plaintiff proves his demand, but the defendant does *not* prove the administration alleged, the judgment shall be, to levy the amount of the demand, if such amount of assets is shewn to have come to the hands of the defendant, or such amount as is shewn to have come to them, and costs, *de bonis testatoris si &c., et, si non* as to the costs, *de bonis propriis;* and as to the residue of the demand, if any, judgment of assets, *quando acciderint.*

70. Where the defendant admits his representative character and the plaintiff's demand, but alleges a total or partial administration of the assets, and proves the administration alleged, the judgment shall

be for assets, *quando acciderint*, and the plaintiff shall pay the defendant's costs of proving the administration of assets. (*v*)

71. Where a defendant admits his representative character, and the plaintiff's demand, but alleges a total or partial administration of the assets, but does not prove the administration alleged, (*w*) the judgment shall be, to levy the amount of the demand, if so much assets is shewn to have come to the defendant's hands, or so much as is shewn to have come to them, and costs, *de bonis testatoris si, &c., et, si non* as to the costs, *de bonis propriis;* and as to the residue of the demand, if any, judgment of assets, *quando acciderint.*

72. Where judgment has been given against an executor or administrator, that the amount be levied upon assets of the deceased, *quando acciderint*, the plaintiff, or his personal representative, may issue a summons (Form 34); and if it shall appear, that assets have come to the hands of the executor or administrator since the judgment, the Court may order that the debt, damages, and costs be levied *de bonis testatoris si, &c., et, si non,* as to the costs, *de bonis propriis:* provided, that it shall be competent for the party applying to charge in the summons that the executor or administrator has wasted the assets of the Testator or Intestate, in the same manner as in Rule 64; and the provisions of Rule 65 shall apply to such enquiry; and the Court may, if it appears that the party charged has wasted the assets, direct a levy to be made, as to the debt and costs, *de bonis testatoris si, &c., et si non, de bonis propriis.*

73. Where a defendant admits his representative character and the plaintiff's demand, and that he is chargeable with any sum in respect of assets, he shall pay such sum into Court subject to the rules relating to payment into Court in other cases.

74. In actions against executors and administrators, for which provision is not hereinbefore specially made, if the defendant fails as to any of his defences, the judgment shall be for the plaintiff, as to his costs of disproving such defence, and such costs shall be levied *de bonis testatoris si, &c., et, si non, de bonis propriis.*

(*v*) See, as to costs where defendant succeeds on plea of *plene administravit*, Arch. Pract. 12th Ed. 1231; *Iggulden* v. *Terson*, 2 Dowl. 277.

(*w*) See notes to Rule 64, and L. R. Digest, 986; Fisher's Digest, 3941.

75. In actions by executors or administrators, if the plaintiff fail, the costs shall, unless the Court shall otherwise order, be awarded in favor of the defendant, and shall be levied *de bonis propriis*.

CLERK'S AND BAILIFF'S DUTIES.

76. The Clerk of every Division Court shall have an office at such place, within the Division for which he is Clerk, as the Judge shall direct.

77. The following books shall be kept by the Clerk, and the necessary entries fairly made therein, namely: 1st, a book to be called "the Procedure Book," in which shall be entered a note of all Process issued, and of all Orders, Judgments, Decrees, Transcripts received, Warrants, Executions and Returns thereto, and of all other proceeding in every cause and at every Court; 2nd, a book to be called the "Cash Book," in which shall be entered an account of all suitors' moneys paid into and out of Court; and 3rd, a "Debt Attachment Book," which books shall be according to the Forms 4, 5, 6, and kept, as nearly as may be, in the manner shewn in the Forms.

78. The Clerk shall number every claim (*x*) in the order in which it is received by him: the numbering to show the standing of the suit, in respect to the whole number of suits entered in the Courts for the then current year.

79. In any case where the proceeding by Special Summons is warranted it shall be adopted by the Clerk unless otherwise ordered by the plaintiff.

80. The Clerk shall annex to every summons (*y*) (whether original, alias, pluries, or renewed) the copy of claim, entered with him according to the 3rd Rule; and to each copy of summons to be served, shall be likewise annexed a copy of such claim; and the Clerk shall, without delay, issue the same for service.

81. In case process is required to be served in a "Foreign Division" and the plaintiff does not elect, and the Judge or Clerk does not make any order as to how it shall be served, it may be trans-

(*x*) See section 68, and notes.
(*y*) See section 69, and notes.

mitted by mail, by the Clerk issuing the same (on receiving the necessary postage and fees) to the Clerk of the division where the same is required to be served; and such last mentioned Clerk shall forthwith deliver such summons, or other process, to the Bailiff of his division, to be executed; and such Bailiff shall serve the same, and forthwith make return thereof to the Clerk of his Court, in the manner required by the 90th Rule, and such last mentioned Clerk, on return made, shall forthwith transmit the papers, by mail, with the necessary affidavits of service, if effected, or if service is not effected, with the proper return to the first mentioned Clerk.

82. Every ordinary summons must be served ten, fifteen, or twenty days (*yy*) (according to the residence of the defendant) before the holding of the Court at which it is returnable (neither the day of service nor the day of holding the Court to be counted), and where any such summons has not been served, another summons, or successive summonses, may be issued.

83. The Returns required to be made by Clerks under the 41st (*z*) section of the Act, shall be according to the Form 115, and shall be made immediately after the 30th day of June and the 31st day of December in each year, without any special order from the Judge.

84. The list (*a*) of unclaimed moneys, required by the 43rd section of the Act, shall be made under oath according to the Form, and shall, in the month of January in each year, be transmitted by the Clerk, together with the moneys (if any) therein mentioned, to the County Crown Attorney, and if no money remains unclaimed, the fact shall be stated in the affidavit.

85. The summons, under the 160th section (*b*) of the Act, may be served by delivering to the defendant a copy thereof, and shall be served ten days at least before the day on which the party is required to appear; but the service of such summons, at any time before the day appointed for the appearance of such party, may be deemed by

(*yy*) See sections 70 and 71.

(*z*) See section 42 and notes; 41 Vic. cap. 2, sec. 34.

(*a*) See section 43.

(*b*) The 177th section now, and under which judgment debtor: are examined as to their estate and effects.

the Judge to be a good service, if it shall be proved to his satisfaction that such party was about to remove out of the jurisdiction of the Court.

86. All the papers in the cause received or filed by the Clerk shall be kept by him together in the original summons, (*c*) and be produced by the Clerk at the hearing of the cause, or when required, on application to the Judge. The original summons, in all cases, shall be printed on a half-sheet of foolscap, in order that the papers may be so kept therein.

87. The notice of payment into Court under sections 88 and 91 (*d*) of the Act, to be given by the Clerk, shall be according to the Form 102, secs. 9 and 10.

88. In case the defendant shall have given the Clerk notice that he disputes the plaintiff's claim, or any other notice of which the plaintiff should be informed before the trial, or if the defendant has given a confession, or failed to give notice of defence when required, the Clerk shall immediately send the plaintiff notice thereof. (Form 102, as the case may require.)

89. In every case in which the Clerk is required to tax costs he shall make out a bill in detail, and the same shall be endorsed upon or annexed to the original summons, and may be in the form shewn, No. 114.

90. Every Bailiff receiving summons for service from a Clerk, shall, within six days after service has been effected, make a return to such Clerk, shewing the mode of service, and for every such return and attending at the Clerk's office to make the necessary affidavit of service, the Bailiff will be entitled to a fee of ten cents, to be allowed as costs in the cause; but he shall not be entitled to such fee unless the return be duly made within the six days mentioned. (*e*) And where a summons has not been served, the Bailiff shall, immediately after the time for service has expired, return the same to the Clerk, stating the reason for non-service, in writing, on the back of the summons.

(*c*) See section 36.

(*d*) Now sections 87 and 90.

(*e*) The day of service is excluded: see sections 52 and 72, and notes; 9 U. C. L. J. 206.

91. The Bailiff shall attend every sitting of the Court at the place appointed for holding the same, at such time as shall be required by the Judge, and see that all suitable preparations are made for the proper accommodation of the Court. He shall make all necessary proclamations, preserve order, call the parties and witnesses, and perform such other duties as may be imposed by the Judge. And for calling the parties and their witnesses he shall be entitled to receive, in every defended case, the sum of [fifteen] (*ee*) cents, to be taxed as costs in the cause.

92. The Bailiff shall keep a book (see Form 126), to be called "*The Bailiff's Process Book*," and he shall enter therein every Warrant, Process, Order or Execution which he has been required to serve or execute, and shall enter, from time to time therein, what he shall have done under or with each said Warrant, Process, Order or Execution, and if the same be not executed or served according to the exigency thereof, why it was not so executed or served; and the Bailiff shall, at all reasonable times, give to a suitor or his agent every information he may require as to the execution or service, or non-execution or non-service of any Warrant, Process, Order or Execution which has been issued at his instance; and the book so required to be kept shall at all times be open to the inspection of the Judge or Clerk.

93. At every Court, and at such other times as the Judge shall require, the Bailiff shall deliver to the Clerk of the Court a statement or return on oath (Form 126), of what shall have been done, since his last return, under every Warrant, Precept, and Writ of Execution, which he shall have been required to execute.

94. The Returns mentioned in the 93rd Rule shall be filed by the Clerk in his office, and be open, without fee, to the inspection of any person interested; and the Clerk shall examine such Returns, and if found correct and complete, within ten days after the receipt thereof, endorse thereon a memorandum in the following words: "I "have carefully examined the within Return, the same is full, true, and "correct, in every particular, to the best of my knowledge and belief. "Dated the day of 18 , Clerk." And if such

(*ee*) Originally "five," but changed to "fifteen" by rules made on 26th June, 1874. Rule 168.

returns be found by the Clerk to be incorrect or incomplete, he shall forthwith notify the same, with the particulars thereof, to the Judge, and if no return be made he shall notify the Judge thereof accordingly.

95. In case the Clerk shall receive money for any party by virtue of his office, he shall, without charge therefor, forthwith notify the party entitled thereto, or the Clerk from whom he received the transcript, that the same is received, and subject to his order; and if he shall fail so to notify the party, and pay over the money upon demand, he shall be subjected to the loss of his office. (*f*)

96. Every Bailiff receiving any money by virtue of his office shall, within six days after the receipt thereof, pay over or transmit the same to the proper Clerk, and, neglecting or failing to do so, shall be subjected to the loss of his office.

97. The Clerks and Bailiffs of the Court shall not, upon any pretence whatever, withhold any moneys received for suitors, on the ground that the Clerk or Bailiff may be indebted to the officer holding such money either for fees or costs or otherwise; but all such moneys, when received or collected, shall at once be duly paid over to the order of the party entitled to the same without reference to such accounts.

98. In case the proceedings in any suit shall be hindered or delayed by the neglect or misconduct of the Clerk or Bailiff of a Foreign Court or of the Home Court, the Clerk or Bailiff causing the same shall forfeit all fees in such suit, and shall, in addition thereto, pay any loss or damage that may result from such hindrance or delay to the party suffering therefrom.

99. No Clerk or Bailiff shall, directly or indirectly, purchase or be concerned in the purchase, or have any personal interest in a suit or judgment or claim in suit, in the Court of which he shall be an officer, and any Clerk or Bailiff transgressing this rule shall be subjected to the loss of his office.

100. No Clerk or Bailiff shall, either by himself or his partner in business, be engaged as agent for any party, during the conduct of the cause in Court, and any Clerk or Bailiff transgressing this rule shall be subjected to the loss of his office.

(*f*) See section 26 and notes.

WARRANTS OF COMMITMENT.

101. Warrants of Commitment shall bear date on the day on which the order for Commitment is entered (*g*) in the Procedure Book, and shall have endorsed thereon the amount of debt and costs on such proceedings, or of fine and costs up to the time of its delivery to the Bailiff for execution, and shall continue in force for three calendar months (*h*) from such date and no longer, unless renewed by an *ex parte* order of the Judge upon affidavit shewing the cause of the non-execution, and that the moneys payable thereunder have not been satisfied.

102. The renewal (*i*) of a warrant may be made by the Clerk marking on the margin, or endorsing thereon, the following words:—"Renewed by Judge's order for three months from the day of A.D. 18 .

X——— Y———,
Clerk."

103. The Bailiff or other officer executing any Warrant of Commitment, shall, at the time of delivering the party arrested, with the Warrant, to the Jailer, indorse on the warrant the number of miles, shewing the amount of mileage, and also state, in writing, the actual day of the arrest.

AMENDMENTS.

104. In case a special summons is issued when an ordinary summons should be issued, or *vice versa*, the same may be altered or amended (*j*) by order of the Judge, either before or at the hearing, on such terms as the Judge may direct.

(*g*) The omission to enter the order does not render the warrant bad: *Peck* v. *McDougall*, 27 U. C. R. 353.

(*h*) If a party is arrested *within* the three months he can be detained after the expiration of that time: *Hayes* v. *Keene*, 12 C. B. 233; see also Davis' C. C. Acts, 148; 4 U. C. L. J. 62.

(*i*) It is submitted that there can only be *one* renewal of a warrant of commitment: *Neilson* v. *Jarvis*, 13 C. P. 176; see sec. 163 and notes.

(*j*) On the subject of amendment generally, see Rob. & Jos. Digest, 74, *et seq.*, and L. R. Digest, 137 & 1540. "The Courts have now power at all times to amend all defects and errors; and it is their duty to make all such amendments as may be necessary for determining the real controversy between the parties:" *per* Lord Campbell, C. J., in *Parsons* v. *Alexander*, 5 E. & B., p. 266. In the case of a misprison of the Clerk, the amendment may be made at any stage: *per* Parke, B., in *Kirk* v. *Dolby*, 8 Dowl. 766. When amendment has not been made within the time allowed, see *Waterous* v. *Farran*, 6 P. R. 31. If

105. The plaintiff shall be allowed to amend his proceedings by striking out a defendant's name at any time upon payment of such costs as the Judge shall order; or the Judge in his discretion may allow the plaintiff to make such amendment, and order a judgment to be entered as in case of nonsuit against the plaintiff in favour of the defendant whose name has been struck out.

106. In case an action shall be brought in the name of an assignee or person beneficially interested upon a chose in action which is not legally assignable, (*k*) the Judge may at any time order the proceedings to be amended, by substituting the name of the person legally entitled to sue for that of the plaintiff, upon such terms as to indemnity for costs or otherwise as to him may seem meet.

107. Where a party sues, or is sued in his own right, and it appears at the hearing that he should have sued, or been sued, in a representative character, (*l*) the Judge may, at the instance of either party, and on such terms as he shall think fit, amend the proceedings accordingly; and the case shall then proceed in all respects as to set-off and other matters, as if the proper description of the party had been given in the summons.

108. Where the name or description of a *plaintiff* in the summons is insufficient or incorrect, (*m*) it may at the hearing be amended, at the instance of either party, by order of the Judge, on such terms as he shall think fit; and the cause may then proceed, as to the set-off and other matters, as if the name and description had been originally such as it appears, after the amendment has been made.

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the case is beyond the jurisdiction the Judge cannot amend: *In re Mackenzie and Ryan*, 6 P. R. 323, and cases there cited; 10 U. C. L. J. 94. But see *Fitzsimmons* v. *McIntyre*, 5 P. R. 119, and *In re Stogdale and Wilson*, 8 P. R. 5; see also *Dixon* v. *Snarr*, 6 P. R. 336. An alteration in the parties to an action will not be made on an *ex parte* application: *Tildesley* v. *Harper*, 3 Ch. D. 277; see also Roscoe's N. P. 304; *Campbell* v. *Pettit*, 2 L. J. N. S. 211; Fisher's Digest, 122.

(*k*) As choses in action are *now* legally assignable (Rev. S. ... page 1117) there will be a difficulty in applying this rule. On the question of amendment by adding name of a plaintiff, see *Blake* v. *Done*, 7 H. & N. 4... *Ogilvie* v. *McRory*, 15 C. P. 557; *La Banca Nazionale* v. *Hamburger*, 2 ... & C. 330; *Clay* v. *Oxford*, L. R. 2 Ex. 54; *Mills* v. *Scott*, L. R. 8 Q. B. 496; *Bolingbroke (Lord)* v. *Townsend*, L. R. 8 C. P. 645; Dicey on Parties, 499. As to the assignment of choses in action and the consequences thereof, see notes to section 68.

(*l*) See notes to Rules 104 and 106 inclusive.

(*m*) Where any amendment is required in this respect, it is usually made as a matter of course.

109. In actions by or against a husband, if the wife is improperly joined or omitted as a party, the summons may, at the hearing, be amended at the instance of either party, by order of the Judge, on such terms as he shall think fit; and the cause may proceed, as to set-off and other matters, as if the proper person had been made party to the suit.

110. Where it appears at the hearing that a *greater number* (*n*) of persons have been made plaintiffs than by law required, the name of the person improperly joined may, at the instance of either party, be struck out by order of the Judge, on such terms as he shall think fit; and the cause may proceed, as to set-off and other matters, as if the proper party or parties only had been made plaintiffs.

111. Where it appears at the hearing that a *less number* (*o*) of persons have been made plaintiffs than by law required, the name of the omitted person may, at the instance of either party, be added (*p*) by order of the Judge, on such terms as he shall think fit; and thereupon the cause may proceed, as to set-off and other matters, as if the proper persons had been originally made parties; and if such person, either at the hearing or some adjournment thereof, personally or by writing, signed by him or his agent, consent to become a plaintiff in manner aforesaid, the Judge may then pronounce judgment as if such person had originally been made a plaintiff; but if such person shall not consent to become a plaintiff in manner aforesaid, either at the hearing or at the adjournment thereof, judgment of nonsuit may be entered.

112. When it appears at the hearing that more persons (*q*) have been made defendants than by law required, the name of the party

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(*n*) See *Bricker* v. *Ancell*, 23 U. C. R. 481.

(*o*) See *DeGendre* v. *Bogardus*, L. R. 7 C. P. 409; *Maughan* v. *Blake*, L. R. 3 Ch. 32; *Henderson et al.* v. *White*, 23 C. P. 78; *Trustees Ainleyville Wesleyan Methodist Church* v. *Grewer*, 23 C. P. 533.

(*p*) There can be no *substitution* of one plaintiff for another: *per* Brett J., at page 413 of L. R. 7 C. P.; *per* Blackburn, J., at page 499 of L. R. 8 Q. B.; and *per* Hagarty, C. J., at page 538 of 23 C. P.

(*q*) See notes to Rules 104, 106, 110 and 111. There is no authority for *adding* a defendant under these Rules. "It appears clear that neither the Court nor a Judge have any power to remedy the *non-joinder* of a defendant:" Dicey on Parties, 507; *Garrard* v. *Guibilei*, 11 C. B. N. S. 616; in Ex. Ch. 13 C. B. N. S. 832. A *misjoinder* can be amended under Rule 105. In England it was *held* that the provisions of the C. L. P. Act, in respect to amendments, did not extend to County Courts: *Wickes* v. *Grove*, 2 Jur. N. S. 212; see also *Wickens* v. *Steel*, 2 C. B. N. S. 488; *Holden* v. *Ballantyne*, 29 L. J. Q. B. 148;

improperly joined may, at the instance of either party, be struck out by order of the Judge, on such terms as he shall think fit; and the cause shall proceed, as to set-off and other matters, as if the party or parties liable had been sued, and judgment may be given for the party improperly joined.

113. Where several persons are made defendants, and all of them have not been served, (*r*) the name or names of the defendant or defendants who have not been served may, at the instance of either party, be struck out by order of the Judge, on such terms as he shall think fit; and the cause shall then proceed against the party served as to set-off and other matters, as if all the defendants had been served.

114. Where the name or description of a *defendant* in a summons is insufficient or incorrect, and the defendant appears and objects to the description, it may be amended at the instance of either party, by order of the Judge, on such terms as he shall think fit; and the cause may proceed, as to set-off and other matters, as if the name or description had been originally such as it appears, after the amendment has been made; but if no such objection is taken, the cause may proceed, and in the judgment and all subsequent proceedings founded thereon, the defendant shall be described in the same manner.

115. Where a person, other than the defendant, appears at the hearing, and admits that he is the person whom the plaintiff intended to charge, his name may be substituted for that of the defendant, if the plaintiff consents; and thereupon the cause shall proceed as if such person had been originally named in the summons, and, if necessary, the hearing may be adjourned on such terms as the Judge shall think fit; and the costs of the person originally named as defendant shall be in the discretion of the Judge.

116. Where a party sues, or is sued in a representative character, but at the hearing it appears, that he ought to have sued or been

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Pryor v. *W. Ham., Local Board of*, 15 L. T. N. S. 250. "The name of a defendant can never be added at the trial, or at any time:" Roscoe's N. P. 13th Ed. 304; *Steward* v. *Moore*, 9 U. C. L. J. 82. Under the late Rules of Court in England, this amendment could probably be made in Superior Courts: *In re Wortley*, 4 Ch. D. 180; Fisher's Digest, 127.

(*r*) See section 77 and notes, and Rule 151.

sued in his own right, the Judge may, at the instance of either party, and on such terms as he shall think fit, amend the proceedings accordingly, and the case shall then proceed in all respects, as to set-off and other matters, as if the proper description of the party had been given in the summons.

117. Where, at the hearing, a variance appears between the evidence and the matters stated in any of the proceedings in a Division Court, such proceedings may, at the discretion of the Judge, and on such terms as he shall think fit, be amended.

118. The Judge may at all times amend all defects and errors in any proceeding, whether the defect or error be that of the party applying or not, and all such amendments may be made with or without costs, and on such terms as to the Judge seems fit.

119. In cases of amendment, a corresponding amendment shall be made by the Clerk, in the proceedings of the Court, antecedent to such amendment; and the subsequent proceedings shall be in conformity therewith.

GENERAL RULES.

120. Claims by husband, in their own right, may be joined with claims in respect to which the wife must be joined as a party.

121. Where the Court gives leave to take any proceeding, such leave shall be minuted in the Procedure Book, but it shall not be necessary to draw up any order.

122. In cases where the hearing is by Jury, the Judge has the same power to nonsuit (*s*) as in ordinary cases.

123. Under the 72nd section (*t*) of the Act, the leave to be granted for issuing a summons shall be by the Judge, before whom the action is to be tried under the order; but no leave shall be given to bring a suit in a Division other than the one adjacent to the Division, in which the party to be sued resides; but the Division may be in the same or an adjoining County.

124. The Court has no jurisdiction to try an action upon a note of hand, whether brought by the payee or any other person, the consideration, or any part of the consideration, of which was any

(*s*) See section 81 and notes. (*t*) Now section 64.

gambling debt, or for spirituous or malt liquors, or other like liquors, drunk in a Tavern or Ale-house. (*u*)

PARTIES TO LEAVE ADDRESS WITH CLERK.

125. Whenever the plaintiff, his Attorney or agent, shall enter his claim for suit, or the defendant shall give notice of set-off or other defence, he shall give to the Clerk his address, or that of his Attorney or agent, and the delivery of any notice to such plaintiff or defendant, his Attorney or agent, or the mailing thereof by the Clerk to such address, shall be a sufficient service, subject, however, to the right of the Judge to put off a trial, or to set aside or stay proceedings, on his being satisfied that the letter had either not reached the party, or that there has not been sufficient time after service of the process for either party to be prepared for trial, or to get the notices served.

INFANTS.

126. Where an infant applies to enter a suit for any cause of action (other than for wages), (*v*) he shall procure the attendance of a next friend (*w*) at the office of the Clerk at the time of entering the same, who shall undertake to be responsible for costs; and the cause shall proceed in the name of the infant by such next friend, but no order of the Court shall be necessary for the appointment of such next friend. If the plaintiff fail in, or withdraw or discontinue his suit, and do not pay the amount of costs awarded against him, proceedings may be taken for the recovery of such amount from the next friend, as for the recovery of any ordinary debt. (*x*)

CONTINUANCE OF ACTION.

127. In order to prevent the operation of any statute whereby the time for the commencement of any action is or may be limited, (*y*) it shall be only necessary to issue the first process or summons; and it shall in no case be necessary to serve, or to attempt to serve, the

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(*u*) See section 53, sub-section 3, and notes; Byles on Bills, 119, 131 and 139, 9th Ed.

(*v*) See section 58.

(*w*) See Rob. & Jos. Digest, 1734; Arch. Pract., title, "Infants." For form of undertaking to pay costs, see Form 7.

(*x*) The next friend must be summoned in the ordinary course: *Abrahams* v. *Taunton*, 1 D. & L. 319.

(*y*) See *Rhodes* v. *Smethurst*, 4 M. & W. 42; 6 M. & W. 351, s. c.; but see *Seagram* v. *Knight*, 3 L. J. N. S. at page 266; 3 L. J. N. S. 317; see 7

same, or to issue an *alias* or *pluries* or successive summons, or otherwise to do any act for the continuance of the action other than serving the defendant with the process, and the process when served shall be a continuance of the action on and from the day on which the first summons or process issued. Provided that no process shall issue after twelve months from the issue of the first process without the order of the Judge; and the Judge shall make no such order after the lapse of eight years from the time when the cause of action accrued, unless it be made to appear to him that service has not been effected by reason of the absence of the defendant out of the Province.

STATUTORY DEFENCE.

128. In case the defendant desires to avail himself of the law of set-off, or of the Statute of Limitations, or of any defence under any other statute (*z*) having the force of law in this Province, he shall, not less than six days before the day appointed for the trial, give notice thereof in writing to the plaintiff, or leave the same for him at his usual place of abode, if living within the Division, or, if living without the Division, shall deliver the same to the Clerk of the Court in which the action is to be tried; and in case of set-off he shall deliver to the Clerk a copy of the particulars of such set-off, to be kept with the papers in the cause, and also a copy for the plaintiff, if his usual place of abode is not within the Division. And the Clerk shall forthwith give to such plaintiff a notice of such set-off, by mailing the same to him in a letter duly registered, addressed to his usual place of abode or business, according to the Form 102, sec. 4, together with one of the copies of the particulars of such set-off.

PAYMENT INTO COURT.

129. When the plaintiff shall, in accordance with the 88th or 91st sections (*a*) of the Act, signify to the Clerk his intention to proceed

U. C. L. J. 178–179; *Curlewis* v. *Mornington (Lord)*, 7 E. & B. 283; *Penny* v. *Brice*, 18 C. B. N. S. 393; Roscoe's N. P., 13th Ed., 639. The Statute of Limitations is to be computed exclusively of the day on which the cause of action arose: *Hardy* v. *Ryle*, 9 B. & C. 603; *Freeman* v. *Read*, 4 B. & S. 174. A summons could be amended according to the true facts, though the effect might be to defeat the Statute of Limitations (*Cornish* v. *Hockin*, 1 E. & B. 602); but the true date could not be altered: *Clarke* v. *Smith*, 2 H. & N. 753.

(*z*) See sections 92 and 136, and notes.

(*a*) Now sections 87 and 90.

for the remainder of his demand, and such signification shall be given within three days after he received notice of the payment into Court, but after the rising of the Court at which the summons was returnable, the case shall be tried at the then next sittings of the Court, and be put upon the list for that Court in the regular order.

130. In case of payment of money into Court under the 87th or 90th sections (*b*) of the Act, the same shall not be paid out to the plaintiff until the final determination of the suit, unless the Judge shall otherwise order.

CONFESSION BEFORE ACTION.

131. Every confession or acknowledgment of debt taken before suit commenced (*c*) must shew therein, or by statement thereto attached at the time of the taking thereof, the particulars of the claim, for which it is given with the same fullness and certainty as would be required in proceedings by "Special Summons;" and unless application for judgment on such confession shall be made to the Judge, within three calendar months next after the same is taken, or at the sittings of the Court next after the expiration of such period, no execution shall be issued on the judgment to be rendered, without an affidavit by the plaintiff or his agent that the sum confessed, or some and what part thereof, remains justly due; and applications for judgment shall be made at a Court holden for the division wherein the confession was taken.

NOTICE OF ADMISSION OF PART.

132. With a view to save unnecessary expense in proof, the defendant or plaintiff shall be at liberty to give the opposite party a notice (Form 103) in writing, that he will admit, on the trial of the cause, any part of the claim or set-off, or any facts which would otherwise require proof; and after such notice given, the plaintiff or defendant shall not be allowed any expense, incurred for the purpose of such proof; the notice to be served on the plaintiff or defendant, or left at his usual place of abode, at least six days before the day appointed for the trial or hearing.

(*b*) Now the 86th and 89th sections. (*c*) See section 152 and notes.

AFFIDAVITS AND OATHS.

133. Every affidavit, in any proceeding in the Court, must be entitled in the Court and cause, (*d*) (if a cause has been commenced), stating the christian and surname of the parties as in the summons, and also that of the deponent, and his place of abode and addition; and if an affidavit be sworn by an illiterate person, the jurat must contain a certificate of the Clerk or commissioner administering the oath, that the affidavit was read in his presence to the party making the same, and that such party seemed perfectly to understand it; and there shall be no erasure or interlineations in any jurat; but the Judge shall not be bound to reject, as insufficient, any affidavit not complying with the above requisites, or any of them, but may, in his discretion, (*e*) receive the same.

134. Oaths and affirmations administered to witnesses in open Court, or upon any *viva voce* examination before the Judge, and to jurors and others, may be in the forms prescribed.

STAMPS.

135. Rescinded by Rule of 26th June, 1874.

136. Rescinded by Rule of 26th June, 1874.

INSPECTION OF DOCUMENTS.

137. When, in any action, the defendant is desirous of inspecting any deed, (*f*) bond, or other instrument or writing, in which he has

(*d*) See Arch. Prac. 1612, 12th Ed., title, "Affidavits;" Lush's Pract. 872, *et seq.*; Rob. & Jos. Digest, 55, *et seq.*; *Kinghorn and the Corporation of Kingston*, 26 U. C. R. 130; *Hood* v. *Cronkrite*, 4 P. R. 279; 6 U. C. L. J. 165. If the words "make oath and" are omitted, the affidavit cannot be read: *Allen* v. *Taylor*, L. R. 10 Eq. 52. Where a judgment was entered without the proper affidavit to warrant it, it was *held* a mere irregularity, and the affidavit was allowed to be filed afterwards: *Potter* v. *Pickle*, 2 P. R. 391. As to the affidavit of a person in an asylum, see *Spittle* v. *Walton*, L. R. 11 Eq. 420. "*If indeed there had been a cause in Court, and the affidavit had omitted to name it, that would be bad, because no perjury could then be assigned on the affidavit:*" *per* Richards, C. J., in *In re Burrowes*, 18 C. P. at page 502; see also section 76 and notes.

(*e*) It is submitted that the proper course is for the Judge to compel the Clerks to observe the rule of Court. Should the Clerk act upon affidavits not according to this rule, without the Judge having "in his discretion" received the same, it is submitted that the proceedings would be irregular: see notes to section 76.

(*f*) For the cases on inspection of documents under this rule, see Fisher's Digest, 3726, 9487; Law Reports Digest, 2135; Rob. & Jos. Digest, 1334, *et seq.*; Arch. Pract. 12th Ed. 1436.

an interest, and which shall be in the possession, power, or control of the plaintiff, he may, within four days from the day of the service of the summons, give notice to the plaintiff by prepaid and registered post letter or otherwise, that he desires to inspect such instrument, at any place to be appointed by the plaintiff, within the division in which the suit is brought; and the plaintiff shall appoint a place accordingly; but if the plaintiff neglects or refuses to appoint such place, or to allow the defendant or his agent to inspect it within three days from the day of receiving such notice, the Judge may, in his discretion, on the day of hearing, adjourn the cause for the purpose of such inspection, and make such order as to costs as he shall think fit.

DISCONTINUANCE.

138. If the plaintiff be desirous of not proceeding in the cause, he shall serve a notice thereof, as provided, respecting the service of a notice of set-off and pay the defendant's taxable costs (if any), and after receipt of such notice, the defendant shall not be entitled to any further costs than those incurred up to the receipt of such notice, unless the Judge shall otherwise order; but if the plaintiff fails to give such notice and pay such costs, (*g*) and does not proceed to trial, the suit may be treated as still pending, and the defendant will be entitled to his costs, as in ordinary cases of nonsuit or of default by plaintiff.

ADJOURNMENT OF SUIT.

139. Where a cause is adjourned, no order of adjournment shall be served on either party, except by direction of the Judge.

140. When anything required by the practice of the Court to be done by either party, before or during the hearing, has not been done, the Judge may, in his discretion and on such terms as he shall think fit, adjourn (*h*) the hearing to enable the party to comply with the practice.

PUTTING OFF TRIAL.

141. Either party to an action may apply to the Judge, in writing, and as required by Rule 144, at any time before the hearing, for an order to put off the trial (*h*) on account of the absence of a material

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(*g*) Many people appear to have an idea that they can withdraw a suit at any time. They can only do so upon giving notice *six clear days* before Court (section 92), *and* paying costs. Should either or both of these not be done, it would be the duty of the Clerk to put the suit on the list for trial.

(*h*) See notes to section 83.

witness (whose name should be stated), or other sufficient grounds, to be disclosed on affidavit, and the Judge, in granting or refusing the application, may order the payment of costs, or impose such terms as he thinks fit.

NEW TRIAL.

142. Application for new trial (*i*) may be made *viva voce*, and determined on the day of hearing, if both parties be present; but if made when both parties are not present, it shall be in writing, and show briefly the grounds on which it is made, which grounds, if matters of fact requiring proof, shall be supported by affidavit.

(*a*) A copy of the application and of every such affidavit shall be served by the party making the same on the opposite party or his agent, or left at his usual place of abode or business, if within the division; or, if without the division, then with the Clerk, who shall forthwith transmit the same forthwith to the opposite party.

(*b*) The application and affidavits (if any) together with an affidavit of the service thereof, shall be delivered to the Clerk, within fourteen days after the day of trial, to be by him, on receiving the fees and necessary postage, transmitted to the Judge, with a copy of the original claim, and other papers requisite to the proper understanding of the case, which delivery to the Clerk shall operate as a stay of proceedings, until the Judge's final decision on the application is communicated to the Clerk.

(*c*) The Judge, after receiving such papers, shall delay for six days deciding upon the application, to enable the opposite party to answer the same in writing or by affidavit, if facts stated by the applicant in his affidavit are disputed; and the decision of the Judge (Form 76) shall be transmitted to the Clerk by mail, who shall, if a new trial be ordered, notify the parties thereof by mail or otherwise, and the suit shall be tried at the next sittings of the Court, unless the Judge shall otherwise order. (See Form 101.)

(*d*) If the application be refused, or if the party applying shall fail to comply with the terms imposed by the Judge, the proceedings in the suit shall be continued, as if no such application had been made. The Judge, instead of deciding the same, may hear the parties on the matter of such application, at the next sittings of the Court, or

(*i*) See section 107 and notes thereto.

at such other time and place as he may appoint, which decision shall be sent to the Clerk, and be by him communicated to the parties in like manner.

(*e*) The Judge may in his discretion make it a condition of granting a new trial, that it shall take place before a jury, whether the first trial took place before a jury or not; but if either party required a jury to try the case in the first instance, he shall be entitled to another jury on depositing the necessary fees for summoning such jury; and in such case the order for the new trial shall direct the summoning of a jury. (See Form 101.)

(*f*) Where, under the 106th section of the Act, judgment in writing is delivered at the Clerk's office, application for a new trial may be made within fourteen days from the day of delivering such judgment.

SETTING ASIDE OR STAYING PROCEEDINGS.

143. The Judge may, in any case, refuse to set aside or to hold void any of the proceedings, on account of any irregularity or defect therein, (*j*) which shall not, in his opinion, be such as to interfere with the just trial and adjudication of the case upon the merits; and may at all times amend all defects and errors in any proceeding, whether the defect or error be that of the party applying or not, and all such amendments may be made with or without costs, and on such terms as to the Judge seems fit.

144. All applications (*k*) to the Judge to set aside or stay any order, judgment, process or proceeding in any cause or matter in a Division Court, and all other applications, except in matters which may be disposed of upon an *ex parte* application to the Judge, and applications otherwise specially provided for by these Rules, may be made *viva voce* at any sitting of the Court, if both parties be present, or upon affidavit, the opposite party having notice of such application and of the grounds thereof and the order or decision of the Judge upon such application, if made at a sitting of the Court, shall be entered by the Clerk as in other cases of order made; if made upon affidavit elsewhere it shall be mailed to the Clerk by the party

(*j*) See Har. C. L. P. Act, 321.

(*k*) See section 107 and Rule 142, and notes thereto.

obtaining the same, and the Judge may enlarge the motion for further affidavits or evidence to such time and place as he may choose, or on such terms as he thinks fit.

POSTAGE AND REGISTRATION OF LETTERS.

145. All letters enclosing any papers in a cause sent from one Division Court officer to another, or to a party to a suit, or to the Judge, and all necessary notices sent by the Clerk, shall be prepaid and registered; and the costs of such postage and registration shall be costs in the cause.

COST OF APPEALS FROM COURT OF REVISION.

146. Rescinded by Rule of 26th June, 1874.

WITNESS FEES.

147. The Clerk shall determine (subject to appeal to the Judge) what number of witnesses shall be allowed on taxation of costs; (*l*) the allowance for whose attendance shall be according to the scale, (Form 3), unless otherwise ordered; but in no case to exceed such scale, except the witness attends under *subpœna* from the Superior Courts; and, before allowing disbursements to witnesses, the Clerk shall be satisfied that the witnesses attended, and that the claim for fees is just; and if a witness attends two or more trials the fees shall be apportioned between the different causes.

AS TO UNAUTHORIZED FORMS AND PROCEEDINGS.

148. All proceedings, books, and documents shall be in forms similar to the forms to these Rules appended, where the same are applicable, and no printed forms shall be used by any Clerk or Bailiff of a Division Court unless first approved by the Judge, in writing, as being in accordance with the forms appended to these Rules, and if an authorized (*ll*) form shall be used no fee shall be payable to the officer in respect thereto, and in cases where no forms are provided, parties shall frame the proceedings or documents, using as guides those appended to these Rules.

JUDGMENTS.

149. Every judgment, order, and decree of the Court, shall be

(*l*) See sections 38, 95 and 98, and notes thereto. Form 112 and notes.

(*ll*) Evidently intended by the framers of these Rules for "unauthorized."

entered (*m*) by the Clerk in the Procedure Book, according to the Forms 45 to 75 inclusive, or to the like effect; and when any order is made for the payment of any debt, damages, costs, or other sum of money, the same shall be payable at the office of the Clerk, at the expiration of fifteen days from the rendering of judgment, unless the Judge otherwise orders, but where judgment is signed by the Clerk under section 2 of the Act of 1869, execution may issue forthwith.

150. After an award is made and filed (with an affidavit of the due execution thereof) under the 109th, 110th, and 111th (*n*) sections of the Act, the duty of the Clerk is, forthwith to enter the judgment on such award, and issue execution thereon, at the request (*o*) of the party entitled to such execution, without any order from the Judge.

151. Where a plaintiff avails himself of the provisions of section 81 (*p*) of the Act, and proceeds against only one or more of several persons jointly liable, the defendant sued may avail himself of any set-off or other defence to which he would be entitled if all the persons liable were made defendants.

152. When judgment is given for the defendant on a set-off he will be entitled to issue execution and to take proceedings as in ordinary cases for the recovery of the balance of his set-off which exceeds the plaintiff's claim, if such balance does not exceed $100, or the defendant is willing to abandon the excess over $100.

ABATEMENT.

153. Where one or more of several plaintiffs or defendants shall die before judgment, the suit shall not abate (*q*) if the cause of action survive (*r*) to or against the surviving parties.

154. When one or more of several plaintiffs or defendants shall die after judgment, proceedings thereon may be taken by the survivors or survivor, or against the survivors or survivor, without leave of the Court.

(*m*) The record is not complete without the entry; *Strutton* v. *Johnson*, 7 L. C. G. 141; see notes to section 7.

(*n*) Now sections 147, 148 and 149.

(*o*) See notes to section 156.

(*p*) Now section 77; see also Rule 113.

(*q*) See Arch. Pract. 1569, 12th Ed., chapter XXXIV.; Lush's Pract. 59.

(*r*) See *Cameron* v. *Milloy*, 22 C. P. 331, and cases there cited; *Hemming* v. *Batchelor*, L. R. 10 Ex. 54; *Kramer* v. *Waymark*, L. R. 1 Ex. 241.

REVIVING JUDGMENTS, &c.

155. During the lives of the parties to a judgment, or of any of them, execution or other process may be issued at any time within six years from the recovery of the judgment, without a revival (*s*) thereof.

156. No execution or other process shall, without leave of the Judge, issue on a judgment more than six years old, unless some payment has been made thereon within twelve months previously; but no notice to the defendant, previously to applying for such leave, shall be necessary, and such leave shall be expressed on the execution or warrant, or summons in the words, "*Issued by leave of the Judge.*"

157. In case it becomes necessary to revive a judgment, by reason of a change by death, or otherwise, of the parties entitled or liable to execution, the party alleging himself to be entitled to execution may sue out a summons (Forms 30, 33) for the revival of the judgment, and issue an execution thereupon. In case it shall appear, upon such application, that the party making the same is entitled to execution, the Judge shall order execution to issue accordingly, and shall also order whether or not the costs of such application shall be paid to the party making the same; and in case it shall not so appear, the Judge shall discharge or dismiss the summons with or without costs.

158. The renewal of all writs of execution may be made from time to time, before the expiration thereof, by the Clerk of the Court issuing the same, by marking on the margin of the writ a memorandum to the following effect:—"Renewed for 30 days from the date hereof."

Dated day of 18 . X. Y., Clerk.

SUITORS' MONEYS: HOW PAYABLE.

159. It is the duty of parties entitled to moneys collected by officers of the Court to direct how the same are to be transmitted to them. The Clerk shall not be bound to transmit by post any such

(*s*) See Arch Pract. 12th Ed. 1122, *et seq.*; Lush's Pract. 59, 140, 577; Rob. & Jos. Digest, title, "Scire Facias and Revivor;" Har. C. L. P. Act; see page (in index) 831, and sections there referred to; *Rolt* v. *The Mayor of Gravesend*, 7 C. B. 777; *Turner* v. *Patterson*, 13 C. P. 412; *Johnston et al.* v. *McKenna*, 3 P. R. 229.

moneys, nor to procure and transmit post office orders therefor, except upon the request and at the expense of the party entitled thereto: without such direction and request, all moneys are payable to the parties at the office of the Clerk without the payment of any fee whatever; in no case is the Clerk to transmit moneys to the Clerk of another Court without the written order of the party entitled thereto, or his authorized agent.

TRANSCRIPTS OF JUDGMENT.

160. Every transcript of a judgment for a County Court shall be prepared by the Clerk upon a full sheet of foolscap paper, folded to the usual size of judgment rolls in the Courts of Record, carefully written in a plain hand or printed without contractions of words or figures, and shall be according to the Form 99, and if a judgment has been revived the order of revival or its purport shall be set forth therein.

161. When upon the application of any plaintiff or defendant having an unsatisfied judgment in his favor, a transcript of the entry of such judgment, under the 139th (*t*) sec., or a transcript of the judgment under the 142nd (*u*) sec. of the Act is issued from the Court in which the judgment has been recovered, an entry thereof shall be made by the Clerk in the Procedure Book, and no further proceedings (*v*) shall be had in the said Court upon the said judgment without an order from the Judge.

(*t*) Now the 161st section

(*u*) Now the 165th sec.; see 6 U. C. L. J. 84.

(*v*) It is to be observed that there is a great difference in effect between the 161st and 165th sections of the Act. Under the former section a transcript from one Division Court to another does not destroy the judgment of the home Court, nor entirely remove it to the Court to which a transcript may be sent. The proceeding by transcript under section 161 is collateral to (*Salter* v. *McLeod*, 10 U. C. L. J. 299), but suspensive of the original judgment. After pointing out the procedure to be observed by the two Clerks, the section declares that "all proceedings may be taken for the enforcing and collecting the judgment in such last mentioned Division Court" that is in the Court in which the transcript is entered; but the transcript to the County Court, under the 165th section, is, by the 166th section, declared to be, *when filed and entered*, a judgment of such County Court. It is submitted that there cannot be two judgments, one in the Division Court and the other in the County Court, subsisting at the same time for the same debt. The general opinion appears to be, that on transference of the case to the County Court, the Division Court judgment has ceased to exist, and that nothing can be done upon it. In this view we concur. Should the supposed judgment in the County Court be a void proceeding, such as was held in *Farr* v. *Robins*, 12 C. P. 35, and

162. No transcript or copy of a judgment shall be issued or acted upon under the 137th or 139th (*w*) sections of the Act where the proceedings have abated, or in a case where no Warrant of Execution or Judgment Summons shall have issued on a judgment more than six years old, unless such judgment shall have been revived.

163. The entries of proceedings on a transcript, under the 139th section (*x*) of the Act, may be made in the Procedure Book, in the form of an ordinary suit, as near as may be. And the Procedure Book shall, for that purpose, be the transcript of Judgment Book required by the Act.

OFFICERS' FEES.

164. The fees set forth in the tariff, marked "Schedule of Clerks' Fees" (Form 1) and "Schedule of Bailiff's Fees" (Form 2), shall be the fees to be received by the several Clerks and Bailiffs of Division Courts on and after the day that these Rules shall come into force, for and in relation to the duties and services to be performed by them as officers of the said Courts, and shall be in lieu of all other fees heretofore receivable for the same proceedings.

165. So far as applicable, these Rules shall extend and apply to the Judicial District of Algoma, and to the District of Muskoka, and the several Courts established, or to be established therein, and to the proceedings in such Courts.

166. The regular meeting of the Board shall be at the City of Toronto on the third Monday in June annually.

167. Rescinded 26th June, 1874. (See Rule 168).

Jacomb v. *Henry*, 13 C. P. 377; *Hope* v. *Graves*, 14 C. P. 393; or be set aside or vacated, then the Clerk could properly be directed by order under this section to proceed in the cause in the Division Court. So also if a transcript under the 161st section should be sent to a Division Court Clerk at a distance, and it be lost, or never reach its destination, or should the Clerk of the "home" Court be unable to obtain any return to the transcript, either through the negligence or connivance of the Clerk of the outer Court, with the debtor or otherwise, then, it is submitted, the Judge would, on these facts being made known to him, grant an order under this rule allowing proceedings to be taken in the Court in which the judgment was recovered. A pretty strong case should be made out so that the defendant would have no reason to complain of being harrassed by proceedings in two Courts at the same time for the same cause. The plaintiff would labor under the difficulty of attempting to enforce a judgment that might have been wholly or partially satisfied in the proceedings in the outer Division; *Dewar* v. *Carrique*, 14 C. P. 137.

(*w*) Now the 159th and 161st sections.

(*x*) Now the 161st section.

The following are Supplementary Rules made on the 26th June, 1874 :—

Rule No. 168.—Whereas by the ninetieth (now part of the 238th section of the D. C. Act) section of the said "The Administration of Justice Act, 1874," it is provided that no fees or charges shall be payable for the benefit of the Crown upon any proceeding had in any Division Court;

Therefore from and after the first day of July, A.D. 1874, Rules numbered 135, 136, and 146 of the said General Rules of the first day of July, 1869, and the Supplementary Rule numbered 167 of 3rd September, 1869, shall be rescinded; and the following Rules in the said General Rules of 1st July, 1869, shall be amended, as follows, viz. :—

Rule numbered 91, the word "five" in the last part thereof shall be struck out, and the word "fifteen" inserted in lieu thereof.

Rule numbered 138, the last twenty-three words shall be struck out.

Rule numbered 139, all after the word "judge" in the second line thereof shall be struck out.

Rule numbered 142 (*b*), the words "and stamps" shall be struck out

Rule No. 169.—From and after the said first day of July, 1874, so much of Form numbered 114, or any other form attached to the said Rules of 1st July, 1869, as indicates or refers to stamps for fees payable to the Fee Fund on proceedings had in the said Courts, shall be rescinded and cease to be used.

Rule No. 170.—The fees set forth in the Tariff hereunto annexed, marked "Schedule of Clerks' Fees" (Form 127,) and "Schedule of Bailiffs' Fees" (Form 128,) shall, from and after the first day of July, A.D. 1874, be the fees to be received by the several Clerks and Bailiffs of Division Courts in Ontario, for and in relation to the duties and services to be performed by them as officers of the said Courts, and shall be in lieu of all other fees heretofore receivable for the same proceedings.

DATED Toronto, 1st July, 1869.

JAS. ROBERT GOWAN,
S. J. JONES,
D J. HUGHES,
JAMES DANIELL,
JAS. SMITH.

Approved:

WM. B. RICHARDS, C. J.
JOHN H. HAGARTY, C. J. C. P.
ADAM WILSON, J.
JOHN W. GWYNNE, J.
THOMAS GALT, J.

FORMS.

(1.) SCHEDULE OF CLERKS' FEES. (*a*)

(2.) SCHEDULE OF BAILIFFS' FEES. (*b*)

(3.) ALLOWANCE TO WITNESSES.

Attendance per day in Court..... 75 cts.
Travelling expenses, per mile, one way ..... 10 cts.

N.B.—If a witness travels by railway or other public conveyance, he may only be allowed (besides the *per diem* allowance) instead of mileage the ordinary fare, and anything he is obliged to pay besides, owing to delays caused by casualities, but in no case to exceed what the mileage would be if that mode of calculation were adopted.

FEES TO JURORS AND APPRAISERS ALLOWED BY THE ACT.

TO JURORS.

Each juror sworn in any cause, out of the money deposited with the Clerk for jurors' fees, 10 cts.

TO APPRAISERS.

Fees of Appraisers of Goods, &c., seized under Warrant of Attachment.

To each Appraiser, 50 cts. per day during the time actually employed in appraising goods, to be paid in the first instance by plaintiff, and allowed in the costs of the cause.

(*a*) See Form 127. (*b*) See Form 128.

(4.) PROCEDURE BOOK.

——— Division Court in the County of A———,
Ensuing Sittings, 26th October, 1869.

No. 400. A.D. 1869. X——— Y———, Clerk.

JAMES BIRD, of the Township of———. vs. THOMAS FISH, of the Village of———.

1869.		
1st	Oct.	Received, particulars in detail, of claim for $12, plaintiff paid $1 towards costs.
2nd	"	Issued Special Summons to Bailiff, costs $, besides mileage.
8th	"	Summons returned, served 6th Oct., 5 miles travel.
15th	"	Wrote plaintiff that no defence [illegible].
17th	"	Plaintiff writes requesting Judgment to be signed and execution issued.
17th	"	Judgment signed by Clerk, "The defendant having been served with Special "Summons and particulars of claim and not disputing same, it is adjudged "that the plaintiff recover $12 for debt, and $ costs."
18th	"	Issued execution to Bailiff.
20th	"	Bailiff returned execution "*feci*," and paid amount $ to Clerk same day; wrote plaintiff informing him thereof.
25th	"	Paid plaintiff $12 debt, and $1 deposit, in full.

No. 401. A.D. 1869.

JOHN WHITE, of the Township of ———. vs. THOMAS GREEN, of the Village of B———.

3rd	Oct.	Received particulars of claim (for tort) for $25; plaintiff paid $4 on costs, and directed two subpœnas, and gave notice of Jury.
4th	"	Issued ordinary summons and sent by post (prepaid and registered) to Clerk of Division Court of D——— for service.
11th	"	Summons returned, served 8th Oct.; foreign fees, $.
11th	"	Issued Jury Summons and subpœnas to Bailiff.
14th	"	Jury Summonses returned served, 10 miles; subpœnas also served, six miles travel.
26th	"	Cause tried, "Judgment for plaintiff on verdict by Jury for $15 and $ costs, to be paid in 15 days." $4.00 allowed plaintiff for witnesses.
28th	"	Defendant paid Clerk $15 damages, and $ costs in full; same day notified plaintiff of payment, by post.
31st	"	Paid plaintiff $15 damages, $4 deposit and $4 witness fees in full.

No. 402. A.D. 1869.

JAMES JONES, of the Township of ———, Primary Creditor.
THOMAS CLARK, of the Town of ———, Primary Debtor, and
GEORGE GOOD, of the same place, Garnishee.

5th	Oct.	Received of Prim. Creditor, particulars of claim (not in detail) on contract for $50, and memo. of debt owing by Garnishee of $; deposit of $4.50 paid.
5th	"	Issued Garnishee Summons against Prim. Debtor, and Garnishee to Bailiff.
10th	"	Summons returned served on Prim. Debtor 7th October, and on Garnishee on 8th Oct. 12 miles travel; Prim. Debtor filed set-off (2 copies),
11th	"	Mailed to Prim. Creditor (prepaid and registered) copy of set-off and notice.
12th	"	Issued subpœnas for 4 witnesses for Prim. Creditor, and gave to Bailiff.
13th	"	Gave to Prim. Debtor 1 subpœna and 3 copies.
15th	"	Bailiff returned Prim. Creditor's subpœnas served, 8 miles travel.
26th	"	"On hearing all parties, it is adjudged that the Prim. Debtor is indebted to the "Prim. Creditor in $50, besides $ costs. Also that the Garnishee is in- "debted to the Prim. Debtor in $75, now due, which, to the extent of the "two first mentioned sums, it is adjudged, be applied in satisfaction thereof, "and that the Garnishee do pay the same in 15 days."
6th	Nov.	Prim. Creditor paid costs $ and stated suit is settled by the parties.

(5.) CASH BOOK.

RECEIPTS.

Suitors' Money paid into the Division Court for quarter commencing 1st October, 1869.

When received	Style of cause.	No. of Suit.	From whom received.	When paid out by Clerk.	Signature of person to whom paid.	Am't.
1869.						$ cts.
Oct. 1.	Bal. from last qr.	.....	.....	.....	.....	10 00
Oct. 15.	*Doe* v. *Roe*.....	136 A.D. 1869	Defendant.	Nov.1, 1869	John Sharp, Pltff's Atty	40 00
Oct. 30.	*Den* v. *Fen et al*..	94 " "	Bailiff.....	Oct. 31, "	James Den..	20 50
Nov 19.	*James* ats. *Joy*...	450 " 1868	Plaintiff ..	Nov. 25, "	Thos. James	2 75
Dec. 21.	*Dunn* v. *Cox*.....	312 " 1869	John Cox..	Jan. 5, 1870	John Dunn..	40 25
	Receipts up to 31st December, 1869.....					113 50
	To balance remaining in Court 31st December, 1869, brought forward.....					50 25
1870. Jan. 10. &c.	*Bull* v. *Brown*.... &c.	502 A.D. 1869 &c.	Bailiff .... &c.	....	....	9 35 .....

PAYMENTS.

Suitors' Money paid out of the Division Court for quarter commencing 1st October, 1869.

When paid out.	Style of cause.	No. of Suit.	To whom paid.	Amount.
				$ cts.
31st Oct., 1869....	*Den* v. *Fen et al*..	94 A. D. 1869.	Plaintiff	20 50
1st Nov., "	*Doe* v. *Roe*.....	126 " "	Plaintiff's Attorney....	40 00
25th Nov., "	*James* ats. *Joy*....	450 " 1868.	Defendant	2 75
	Balance to next quarter		.....	50 25
				113 50
5th Jan., 1870.... &c.	*Dunn* v. *Cook*.... &c.	312 A.D. 1869.. &c	Plaintiff ..... &c.	40 25 .....

(6.) FORM OF DEBT ATTACHMENT BOOK.

Name of Primary Creditor or Plaintiff.	Name of Primary Debtor or Defendant.	Date of Judgment, if claim a judgment.	Amount unsatisfied, if claim a judgment.	Amount found due from Primary Debtor to Primary Creditor, when claim not a judgment.	Name of Garnishee.	Date of attaching order or garnishee summons.	Date of service of attaching order or garnishee summons.	Amount adjudged against garnishee.

(7.) UNDERTAKING BY NEXT FRIEND OF INFANT TO BE RESPONSIBLE FOR DEFENDANT'S COSTS.

In the Division Court in the County of .

I, the undersigned, E. F., being the next friend of A. B., who is an infant, and who is desirous of entering a suit in this Court against C. D. of, &c., hereby undertake to be responsible for the costs of the said C. D. in such cause, and that if the said A. B. fail to pay the said C. D. all such costs of such cause as the Court shall direct him to pay to the said C. D., I will forthwith pay the same to the Clerk of the Court.

Dated this day of 18 .

(Signed) E. F.

Witness : _____

(8.) AFFIDAVIT FOR LEAVE TO SUE A PARTY RESIDING IN AN ADJOINING DIVISION.

In the Division Court in the County of .

I, A. B., of , yeoman (*or* I, E. F., of , yeoman, agent for A. B. of, etc.), make oath and say :

1st. That I have a cause of action against C. D. of , yeoman, who resides in the Division of the County of (*if by agent*, "That the said A. B. has a cause of action against C. D. of , yeoman").

2nd. That I (*or* the said A. B.) reside in the Division, in the County of .

3rd. That the distance from my residence (*or* from the said A. B.'s residence) to the place where this Court is held is about miles, and to the place where the Court is held in the Division in the County of is about miles.

4th. That the distance from the said C. D.'s residence to the place where the Court is held in the Division where he resides is about miles, and to the place where this Court is held about miles.

5th. That the said Division and this Division adjoin each other, and that it will be more easy and inexpensive for the parties to have this cause tried in this Division than elsewhere.

Sworn, &c. A. B. (*or* E. F.)

_____

(9.) AFFIDAVIT FOR LEAVE TO SUE IN A DIVISION ADJOINING ONE IN WHICH DEBTORS RESIDE WHERE THERE ARE SEVERAL.

In the Division Court in the County of .

I, A. B., of , yeoman, make oath and say (*or* E. F. of yeoman, agent for A. B. of, etc.), make oath and say :

1st. That I have (*or* that the said A. B. has) a cause of action respectively against each of the debtors named in the first column of the schedule on this affidavit indorsed.

2nd. That the columns in the said schedule numbered respectively 1st, 2nd, 3rd, 4th, 5th, 6th and 7th, are truly and correctly filled up, according to the best of my knowledge and belief.

3rd. That the Divisions named in the second and third columns of the said schedule, opposite each debtor's name, respectively adjoin each other.

4th. That it will be more easy and inexpensive for the parties to have the said causes respectively tried in this Division than elsewhere.

Sworn, &c. A. B. (*or* E. F.)

(10.) SCHEDULE REFERRED TO IN THE WITHIN AFFIDAVIT.

COLUMNS.

1st.	2nd.	3rd.	4th.	5th.	6th.	7th.
Debtor's names, place of residence, and addition.	Division in which suit is to be commenced.	Division in which debtor resides.	Number of miles from creditor's residence to where Court held in Division in which debtor resides.	Number of miles from creditor's residence to where Court held in Division in which suit to be commenced.	Number of miles from debtor's residence to where Court held in Division where suit to be commenced.	Number of miles from debtor's residence to where Court held in Division where debtor resides.
Jno. Doe, of Saltfleet, of the United Counties of Wentworth & Halton, yeoman.	Division No. 3, in the United Counties of Lincoln & Welland.	Division No. 1, in the United Counties of Wentworth & Halton.	22	1	5	17
Richard Roe, of Mono, County of Simcoe, Esquire.	Division No. 3 of the County of Simcoe.	Division No. 8.	28	11	18	4

A. B. (*or* E. F.)

A. B. (*or* E. F.)

(11.) AFFIDAVIT FOR ATTACHMENT.

(*If made after suit commenced insert style of Court and cause.*)

I, A. B., of the in the County of (*or* I, E. F., of etc., agent for the said A. B. of, &c.) make oath and say:

1st. That C. D. of (*or* late of) in the County of is justly and truly indebted to me (*or* to the said A. B.) in the sum of dollars and cents, on a promissory note for the payment of dollars and cents, made by the said C. D., payable to me (*or* the said A. B.) at a day now past;

Or for goods sold and delivered
Or for goods bargained and sold
Or for crops bargained and sold
Or for money lent
Or for money paid for the said C. D.
} by me (*or* the said A. B.) to the said C. D.;

Or for and in respect of my (*or* the said A. B. having relinquished and given up to and in favour of the said C. D., at his request, the benefit and advantage of work done and materials found and provided and moneys expended by me (or the said A. B.) in and about the farming, sowing, cultivating and improving of certain land and premises;

Or for the use by the said C. D., by my permission (*or* by the permission of the said A. B.) of messuages and lands of me (*or* the said A. B.);

Or for the use by the said C. D. of pasture land of me (*or* the said A. B.) and the eatage of the grass and herbage thereon, by the permission of me (*or* the said A. B.);

Or for the wharfage and warehouse room of goods deposited, stowed and kept by me (*or* the said A. B) in and upon a wharf, warehouse, and premises of me (*or* the said A. B.) for the said C. D., at his request;

Or for horse-meat, stabling, care and attendance provided and bestowed by me (or the said A. B.), in feeding and keeping horses for the said C. D., at his request; *or* for work done and materials provided by me (or the said A. B.,) for the said C. D., at his request;

Or for expenses necessarily incurred by me (or the said A. B.) in attending as a witness for the said C. D., at his request, to give evidence upon the trial of an action at law then depending in the Court, wherein the said C. D. was plaintiff and one E. F. defendant;

Or for money received by the said C. D. for my use (or for the use of the said A. B.);

Or for money found to be due from the said C. D. to me (*or* to the said A. B.) on an account stated between them, (*or other cause of action, stating the same in ordinary and concise language.*)

2nd. I further say that I have good reason to believe, and do verily believe, that* the said C. D. hath absconded from that part of the Dominion of Canada which heretofore constituted the Province of Canada, leaving personal property liable to seizure under execution for debt in the County of in this Province.*

(*Or instead of matter between the asterisks*, the said C. D. hath attempted to remove his personal property liable to seizure under execution for debt out of this Province; *or* the said C. D. hath attempted to remove his personal property liable to seizure under execution for debt from the County of to the County of in this Province; *or* the said C. D. keeps concealed in the County of in this Province to avoid service of process) with intent and design to defraud me (or the said A. B.) of my (*or* his) said debt.

3rd. That this affidavit is not made by me nor the process thereon to be issued from any vexatious or malicious motive whatever.

Sworn, etc. A. B.

(12.) ATTACHMENT AGAINST AN ABSCONDING OR REMOVING DEBTOR.

To A. B., Bailiff of the Division Court in the said County of
(*or* to A. B., a constable of the County of *as the case may be.*)

You are hereby commanded to attach, seize, take, and safely keep, all the personal estate and effects of C. D. (*naming the debtor*), an absconding, removing, or concealed debtor, of what nature or kind soever, liable to seizure under execution for debt within the County of (*here name the County*), or a sufficient portion thereof to secure A. B. (*here name the creditor*) for the sum of (*here state the amount sworn to be due*), together with the costs of his suit thereupon, and to return this warrant, with what you shall have taken thereupon, to the Clerk of the (*here state the number of the division*) Division Court in the County aforesaid forthwith ; and herein fail not.

Witness my hand and seal (*or the Seal* of the said Court) the day of one thousand eight hundred and .

X—— Y——, [L.S.]
Clerk, or Justice of the Peace (*as the case may be*).

REPLEVIN.

(13.) AFFIDAVIT TO OBTAIN JUDGE'S ORDER FOR WRIT OF REPLEVIN.

In the Division Court in the County of .

County of , } I, A. B., of , make oath and say:
To wit. }

1st. That I am the owner of (*describe property fully*) at present in the possession of C. D.; *or* that I am entitled to the immediate possession of (*describe property*), as lessee, (bailee, *or* agent), of E. F., the owner thereof (*or* as trustee for E. F.) (*or as the case may be*), at present in the possession of C. D.

2nd. That the said goods, chattels, and personal property are of the value of dollars, and not exceeding $40.

3rd. That on or about the day of , the said goods, chattels, and personal property, were lent to the said C. D. for a period which has expired, and that although the said goods, chattels, and personal property have been demanded from the said C. D., he wrongfully withholds and detains the same from me, the said A. B. ; *or* that on or about the day of , the said C. D. fraudulently obtained possession of the said goods, chattels, and personal property, by falsely representing that (*here state the false representation*), and now wrongfully withholds and detains the same from me ; *or*, that the said goods, chattels, and personal property were, on the day of , last, distrained or taken by the said C. D., under color of a distress for rent, alleged to be due by me to one E. F., when in fact no rent was due by me to the said E. F. (*or as the case may be, setting out the facts of the wrongful taking or detention complained of with certainty and precision.*)

4th. That the said C. D. resides (*or* carries on business) at within the limits of the Division Court in the County of , (*or* that he said goods, chattels, and personal property were distrained), (*or* taken detained), (*or* detained), at within the limits of the Division Court of the County of .

Sworn, &c. A. B.

(14.) AFFIDAVIT TO OBTAIN WRIT WITHOUT ORDER IN FIRST INSTANCE.

[*The first four sections may be as above, and the following must be stated in addition*] :

5th. That the said personal property was wrongfully taken (*or* fraudulently got) out of my possession within two calendar months before the making of this affidavit, that is to say, on the day of last.

6th. I am advised and believe that I am entitled to an order for the writ of replevin now applied for, and I have good reason to apprehend, and do apprehend, that unless the said writ is issued without waiting for an order, the delay will materially prejudice my just rights in respect to the said property.

[*Or if the property was distrained for rent or damage feasant, then the statement given in the last specific alternative under the 3rd clause of the above form will be sufficient to obtain writ without order.*]

(15.) CLAIM IN REPLEVIN.

No. A.D. 18 .

In the Division Court in the County of .

A. B. of states that C. D. of did on or about the day of A.D. 18 , take and unjustly detain (*or* detain, *as the case may be*), and still doth detain his goods, chattels and personal property, that is to say (*here set out the description of property*) which the said A. B. alleges to be of the value of dollars, whereby he hath sustained damages, and the said A. B. claims the said property with damages in this behalf as his just remedy.

A. B.

(16.) PARTICULARS IN CASES OF CONTRACT.

No. A.D. 18 .

A. B., of claims of C. D., of , the sum of $, the amount of the following account, viz., (*or* "the amount of the note, a copy of which is under written,") together with the interest thereon, [*or*, for that the said C. D. promised (*here state shortly the promise*) which undertaking the said C. D. hath not performed, *or*, for that the said C. D. by deed under his seal, dated the day of A.D. 18 , covenanted to, &c., and that the said C. D. hath broken said covenant whereby the said A. B. hath sustained damages to the amount aforesaid; *or* for money agreed by the said C. D. to be paid by the said A. B., together with a horse of the said C. D., in exchange for a horse of the said A. B., delivered by the said A. B. to the said C. D.; or for that the said C. D., by warranting a horse to be then sound and quiet to ride, sold the said horse to the said A. B., yet the said horse was not then sound and quiet to ride; or for that the said C. D., in consideration that the said A. B. would supply E. F. with goods on credit, promised the said A. B. that he, the said C. D., would be answerable to the said A. B. for the same, that the said C. D. did accordingly supply the said E. F. with goods to the price of $ and upwards, on credit, that such credit has expired, yet neither the said E. F. nor the said C. D. has as yet paid for the said goods; *or* for that the said A. B. let to the said C. D. a house for seven years, to hold from the day of , A.D. , at $ a year, payable quarterly, of which rent quarters are due and unpaid.

(*The above forms are given merely as examples of statements of causes of action, and the claim must shew such further particulars as the facts of the case require.*)

(17.) PARTICULARS IN CASES OF TORT.

No. , A.D. .

A. B., of states that C. D., of did, on or about the day of , A.D. 18 , at the Township of , unlawfully [take and convert one cow and one calf, the property of the said A. B. ; *or* break and injure a waggon of the said A. B. : *or* falsely represent L. O. as fit to be trusted, the said C. D. at the same time knowing that the said L. O. was insolvent, whereby the said A. B. was induced to give him credit : *or* assault and beat the said A. B. (*or as the case may be, stating the Tort sued for in concise language*) ;] The said A. B. hath sustained thereby damages to the amount of , and claims the same of the said C. D.

A. B.

(18.) PARTICULARS IN ACTIONS AGAINST A CLERK OR BAILIFF AND HIS SURETIES.

No. A.D. 18 .

A. B. of claims of C. D., Clerk (*or* Bailiff) of the Division Court for the County of , and of E. F. of , and G. H. of (sureties for and parties with the said C. D. to a covenant for the due performance of the duties of his said office) the sum of for moneys had and received by the said C. D. as such Clerk (*or* Bailiff) as aforesaid, in a certain cause in the said Division Court, wherein the said A. B. was plaintiff, and one H. H. was defendant, to and for the use of the said A. B., the payment whereof the said C. D. unduly withholds. And also (*stating in like manner any other similar claim*)—[*or* the sum of for damages sustained by the said A. B. through the misconduct (*or* neglect) of the said C. D. in the performance of the duties of his said office : For that on the day of , at (*describe in ordinary language the neglect or misconduct, whereby the damage was occasioned*).]

A. B.

(19.) APPLICATION OF BAILIFF FOR INTERPLEADER.

In the Division Court in the County of .

BETWEEN A—— B——, *Plaintiff*,

AND

C—— D——, *Defendant*.

By virtue of a writ of execution (*or* "attachment") in this cause, dated the day of , 18 , from this Court, I did, on the day of , 18 , seize and take in execution (*specify goods, chattels, etc., seized*) as the property of the defendant. E. F., of the Township of etc., now claims the same as his property (*or* now claims the said and as his property), and that the value thereof is $; you will therefore be pleased to issue an Interpleader summons to the plaintiff and to the said E. F., according to the statute in that behalf.

To the Clerk of the said Court.

V—— W., Bailiff.

Dated, etc.

(20.) LANDLORD'S CLAIM FOR RENT UNDER SEC. 176. (*a.*)

Whereas I have been informed that you have seized the goods of C. D., of , on his premises at , to satisfy a certain judgment of the Division Court in against the said C. D., at the suit of A. B.; I hereby give you notice that I am the landlord of the said premises, and that I claim $ for rent now in arrear, being for one quarter (*or as the case may be*), and I require you to pay the same to me before you apply the proceeds of the sale of said goods or any part thereof to satisfy the said judgment.

Dated, etc. E. F.
Landlord of said Tenement.

To V. W.,
Bailiff of &c.

(21.) PARTICULARS OF CLAIM ON INTERPLEADER.

In the Division Court in the County of .

BETWEEN A—— B——, *Plaintiff*,
AND
C—— D——, *Defendant*,
E—— F——, *Claimant*.

To whom it may concern:

E. F. of claims as his property the following goods and chattels (*or* moneys, &c.,) seized and taken in execution (*or* attached), as it is alleged, namely (*specify the goods and chattels, or chattels or moneys, &c., claimed*), and the grounds of claim are (*set forth in ordinary language the particulars on which the claim is grounded, as how acquired, from whom, when, and the consideration paid or to be paid, and when*), and this the said E. F. will maintain and prove.

E. F.

Dated this day of , 18 .

N. B.—*If any action for the seizure has been commenced, state in what Court and how the action stands.*

(22.) ORDINARY SUMMONS TO APPEAR.

No. , A.D. 18 .

In the Division Court in the County of .

[*Seal.*] BETWEEN A—— B——, *Plaintiff*,
AND
C—— D——, *Defendant*.

To C. D., the above-named defendant.

You are hereby [as before (*or* as often before) you were] summoned to appear at the sittings of this Court to be holden at , in the Township of , in the said County of , on the* day of A.D. 18 , at the hour of in the forenoon to answer the above-named plaintiff, in an action on contract (*or* in an action for Tort), for the causes set forth in the plaintiff's statement of claim herewith; and in the event of your not so appearing, the plaintiff may proceed to obtain judgment against you by default.

Dated the day of , A.D. 18 .

By the Court.

X—— Y——, Clerk.

Claim.....$
Costs, exclusive of mileage....

* N. B.—The day of holding the Court must always, and in all forms, be stated at length in words, and not in figures.

(*a*) Now section 211.

NOTICE.

Take notice, that if the defendant desires to *set-off any demand against the plaintiff* (*if the action be for tort, omit the words in italics*) at the trial or hearing of this cause (*or*) to take the benefit of any Statute of Limitations, or other statute, notice thereof in writing, *and if a set-off containing the particulars of such set-off (omit the words last in italics, if the action be for tort)* must be given to the plaintiff, or left at his usual place of abode, if living within the Division, or left with the Clerk of the said Court, if the plaintiff resides without the Division, not less than six days before the day appointed for the said trial or hearing, and in case of set-off a copy of the particulars of his set-off and also a copy for the plaintiff.

(23.) SPECIAL SUMMONS.

No. A.D. 18 .

In the Division Court in the County of

[*Seal.*] BETWEEN A——— B———, *Plaintiff*,

AND

C——— D———, *Defendant*.

The above named defendant.

The plaintiff demands of you $ as shown by his claim herewith; you are notified that this summons is returnable on the eleventh (*or* sixteenth or twenty-first, *according to the residence of the defendant*) day after the day of the service hereof upon you; and you are to satisfy the said claim against you, or if you dispute the same or some part thereof, you are to leave with the Clerk within eight (*or* twelve, *according to the residence of the defendant*) days after the day of such service the notice mentioned in warning No. 1, subjoined; otherwise after such return day has passed judgment may be given against you by default. In case you give such notice disputing the claim, the cause will be tried at the sittings of this Court, to be held at in the said County on, or next after the day when the summons is returnable, at which time and place you are required to appear. And, in default of your so appearing, the plaintiff may proceed to obtain judgment against you.

Dated the day of A.D. 18 .

By the Court.

X——— Y———, Clerk.

Claim ..... $
Costs, exclusive of mileage.....

NOTICES AND WARNINGS TO THE DEFENDANT.

WARNING No. 1.—If the defendant disputes the plaintiff's claim, or any part of it, he must leave with the Clerk within *eight or twelve* days after the day of service hereof, a notice to the effect that he disputes the claim, or if not the whole claim, how much he disputes, in default whereof final judgment may be signed for the whole claim, or such part as is not disputed (if the plaintiff is content with judgment for such part) at any time within one month after the return of the summons.

WARNING No. 2.—If the defendant desires to set-off any demand against the plaintiff at the trial or hearing of this cause, or to take the benefit of any Statute of Limitations, or other statute, notice thereof in writing must be given to the plaintiff, or left at his usual place of abode, if living within the Division, or left with the Clerk of the said Court, if the plaintiff resides without the Division, not less than six days before the day appointed for the said

trial or hearing, and, in case of set-off, a copy of the particulars of his set-off and also a copy for the plaintiff.

The two next ensuing sittings of the said Court will be held as follows, viz.: at o'clock, A.M.

On the day of A.D. 18
On the day of A.D. 18

(24.) SUMMONS IN REPLEVIN.

In the Division Court in the County of .

No. A.D. 18 .

[*Seal.*] BETWEEN A—— B——, *Plaintiff*,
AND
C—— D——, *Defendant*.

To V. W., the Bailiff of the said Court, and to C. D., the above-named defendant:

You, the said Bailiff, are commanded that without delay you cause to be replevied to the plaintiff the goods, chattels and personal property described in the statement of the plaintiff's claim hereunto annexed, in order that the plaintiff may have his just remedy in that behalf.

And you, the said defendant, are hereby summoned to be and appear at the next sittings of this Court, to be holden at , in the County of on the day of , A.D. 18 , at the hour of ten o'clock in the forenoon, to answer the above-named plaintiff in an action of Replevin, for the causes set forth in the plaintiff's statement of claim hereunto annexed; and in the event of your not so appearing, the plaintiff may proceed to obtain judgment against you by default.

Dated the day of , A.D. 18 .

By the Court.

X—— Y——,
Clerk.

Claim for return of goods and damages..$
Costs, exclusive of mileage.....

WARNINGS TO THE DEFENDANT.

1st. In case you do not appear to this writ at the time specified in the summons, the plaintiff may, on filing the writ and affidavit of due service, proceed thereon as if you had appeared, and obtain judgment against you by default.

2nd. If you claim a right to the possession of the goods by reason of any claim which you may have to urge under any statute, or to take the benefit of any Statute of Limitations or other statute, notice thereof in writing must be given to the plaintiff, or left at his usual place of abode, if living within the Division, or left with the Clerk of the said Court, if the plaintiff resides without the Division, at least six days before the day appointed for the said trial or hearing.

(25.) INTERPLEADER SUMMONS TO CLAIMANT.

No. , A.D. 18 .

In the Division Court in the County of .

[*Seal.*] BETWEEN A—— B——, *Plaintiff*.
AND
C—— D——, *Defendant*.
E—— F——, *Claimant*.

You are hereby summoned to appear at a Court to be holden on at the hour of A.M. at , touching a claim made by you to certain goods and chattels [*or* moneys, &c., *or* securities (*as the case may be*)], viz.:

(*here specify*) seized and taken in execution (*or* attached) under process issued out of this Court in this action (*or* by a Justice of the Peace), and in default of your then establishing such claim, the said goods and chattels will be sold (*or* the said moneys, &c., paid and delivered over) according to the exigency of the said process: and take notice that you are required, six days before the day appointed for the said trial or hearing, to leave at the Clerk's office a particular of the goods and chattels (*or as the case may be*) so claimed by you, and the grounds of your claim.

Given under the seal of the Court this day of 18 .

X——— Y———, Clerk.

To E. F., the above-named claimant.

(26.) SUMMONS TO PLAINTIFF ON INTERPLEADER.

In the Division Court in the County of .

No. A.D. 18 .

[*Seal.*] BETWEEN A——— B———, *Plaintiff*,

AND

C——— D———, *Defendant*.

E——— F———, *Claimant*.

Whereas, E. F. of hath made a claim to certain goods [*or* to certain securities or money (*as the case may be*)], viz.: (*here specify*) which have been seized and taken in execution (*or* attached) under and by virtue of process issuing out of this Court in this action (*or* by a Justice of the Peace); you are therefore hereby summoned to be and appear at a Court to be holden at on at the hour of , when the said claim will be adjudicated upon, and such order made thereupon as the Court shall deem fit.

Given under the seal of this Court this day of , 18 .

X——— Y———, Clerk.

To A——— B———,

The above-named plaintiff.

N. B.—*The claimant is called upon to give particulars of his claim, which you may inspect on application at the office of the Clerk of the Court five days before the day of hearing.*

(27.) APPLICATION FOR JUDGMENT SUMMONS.

To X. Y., Clerk of the Division in the County of .

Be pleased to summon of, &c., to answer according to the statute in that behalf touching the debt due me by the judgment of the said Court of the Division Court of the County of , on my behalf, a minute whereof is hereunto annexed.

A. B., Plaintiff.

(28.) SUMMONS TO DEFENDANT AFTER JUDGMENT.

In the Division Court in the County of .

No. A.D. 18 .

[*Seal.*] BETWEEN A——— B———, *Plaintiff*,

AND

C——— D———, *Defendant*.

To the above-named defendant.

Whereas on the day of , A.D. 18 , the plaintiff duly recovered judgment against you in said Court, holden in and for said Division,

for $ for debt, and $ for costs of suit, which remains unsatisfied, you are therefore hereby (in case of a second summons here insert the words "as before you were") summoned to appear at the next sittings of this Court, to be holden at on the day of , at the hour of , to be then and there examined by the Judge of the said Court touching your estate and effects, and the manner and circumstances under which you contracted the said debt (*or* incurred the damages *or* liability) which was the subject of the action in which the said judgment was obtained against you, and as to the means and expectations you then had, and as to the property and means you still have, of discharging the said debt (*or* damages *or* liability), and as to the disposal you may have made of any of your property. And take notice, that if you do not appear in obedience to this summons, you may, by order of this Court, be committed to the Common Jail of the County.

Given under the Seal of the Court this day of , 18 .

By the Court.

X—— Y——, Clerk.

Amount of Judgment.....$
Costs of this summons.....

(29.) SUMMONS TO DEFENDANT AFTER DEFAULT. (*a.*)

No. , A.D. 18 .

In the Division Court in the County of .

[*Seal.*] BETWEEN *Plaintiff.*

AND

Defendant.

Whereas at the sittings of this Court (*or* of, etc.), holden at the in the Town of in the County of , on the day of , 18 , the above named plaintiff obtained a judgment against you for the sum of $ for debt, besides interest thereon, and $ costs to be paid , and which said judgment remained unsatisfied ;

And whereas by a summons bearing date the day of 18 . you were summoned to appear at the sittings of this Court, holden at the of in the County of , on the day of , 18 , at the hour of of the clock in the forenoon, to be then and there examined by the Judge of the said Court touching your estate and effects, and the manner and circumstances under which you contracted the said debt, which was the subject of the action in which the said judgment was obtained against you, and as to the means and expectations you then (at the time of contracting) had, and as to the property and means you still had (at the said last day aforesaid) of discharging the said debt, and as to the disposal you may have made of any of your property. (*If debtor did not appear upon the first but did upon a second summons recite accordingly* ;)

And whereas upon your appearing thereto, and upon examination and hearing of both parties (*or* of you, and the evidence, *if any*), it appeared to the satisfaction of the said Judge that you then had (*or* had since the judgment obtained against you, *as the case may be*) sufficient means and ability to pay the said debt and the interest thereon, and costs so recovered against you ; and the said Judge did then and there order and direct that you should pay to

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(*a*) This summons is applicable where, on examination of a debtor under the 177th section, he has been ordered to pay the debt in such time and manner as the Judge thinks proper and has made default. It does not apply to a case where after examination, the Judge has for good reasons appearing to him ordered the debtor, then present, to be committed under the 182nd section: *Baird* v *Story*, 23 U. C. R. 624 In the latter case no summons to shew cause is necessary before commitment: *Ib.* ; *Ely* v. *Moule*, 5 Ex. p. 925. But an order for payment containing the alternative of commitment in the event of default is *bad: Abley* v. *Dale*, 10 C. B. 62; *Dews* v. *Riley*, 11 C. B. 434.

the said plaintiff the sum of $ debt, and interest then accrued, and $ costs, and also $ costs of the said last mentioned summons, to be paid as follows, that is to say, the sum of $ to be paid on the day of , 18 , the further sum of $ to be paid on the day of , 18 , or forthwith (*as the case may be*);

And whereas the plaintiff alleges that you have not paid the and instalments of each; (*or* the said sums) so ordered to be paid;

You are therefore hereby summoned to appear at the next sittings of this Court, to be holden at the in the town of in the County of , on the day of , 18 , at the hour of of the clock in the forenoon, to be then and there examined by the Judge of the said Court touching your estate and effects, and the manner and circumstances under which you contracted the said debt, which was the subject of the action in which the said judgment was obtained against you, and as to the means and expectations you then had, and as to the property and means you still have, of discharging the said debt, and as to the disposal you have made of any of your property, and as to the reasons why you have not paid to the plaintiff the said and instalments of each of the said debt, so ordered to be paid by you, as last above mentioned and recited, pursuant to the said order of the Judge.

And also to shew cause why you should not be committed to the common jail of the County for not complying with the said order of the said Judge.

Given under the seal of the Court this day of 18

By the Court.

X—— Y——, Clerk.

Amount of judgment..... £
" instalment .....
Cost of this summons.....

(30.) SUMMONS ON BEHALF OF EXECUTOR OR ADMINISTRATOR TO REVIVE A JUDGMENT.

No. , A.D. 18 .

In the Division Court in the County of .

[*Seal.*] BETWEEN A—— B——, Executor of C. D., deceased, *Plaintiff.*

AND

E—— F——, *Defendant.*

To E. F., the above-named defendant,

Whereas on the day of A.D. 18 , the above-named C. D. duly recovered in said Court holden in and for said Division, judgment against you for $ debt, and $ costs of suit, which judgment, a transcript of which is hereunto annexed, still remains unsatisfied, and the said plaintiff as executor aforesaid, claims to have execution thereof you are hereby summoned to appear at the sittings of this Court to be holden at on at in the forenoon to shew cause, if any you have, why the said plaintiff, executor as aforesaid, should not have execution against you of the said judgment, according to the force and effect of the said recovery, and, in the event of your not appearing, judgment will be entered against you by default.

By the Court.

X—— Y——, Clerk.

Dated this day of , 18

Claim .....$
Costs exclusive of mileage.....

N. B.—This form may be altered to suit other facts shewing a change of the parties entitled to execution, which make a revival necessary.

(31.) SUMMONS ON A DEVASTAVIT.

No. , A.D. 18 .

In the Division Court in the County of .

[*Seal*] BETWEEN A—— B——, *Plaintiff*,

AND

[*Stamp.*] C—— D——, Executor (*or* Administrator) of E. F., deceased, *Defendant*.

To C. D., the above-named defendant.

You are hereby [as before (or as often before) you were] summoned to be and appear at the sittings of this Court to be holden at , on the day of , A.D. 18 , at the hour of in the forenoon, to answer the above-named plaintiff in an action, for that you, the defendant, have withheld and wasted divers goods and chattels, which were the property of E. F., deceased, at the time of his death, and which came to the hands of you, the defendant, as executor (*or* administrator) of the said E. F., to be administered, whereby a certain judgment recovered against you by the plaintiff in this Court on the day of A.D. 18 , for $ remains unsatisfied; and in the event of your not appearing, the plaintiff may proceed to obtain judgment against you by default.

Dated this day of 18 .

X—— Y——, Clerk.

(32.) SUGGESTION OF DEVASTAVIT ON ORIGINAL SUMMONS.

(*Commence with Form of Summons, as in "Ordinary Summons to Appear," but naming defendant as executor or administrator and adding after the word* "default") and the plaintiff alleges that you, the defendant, have money, goods and chattels, which were the property of the said C. D., deceased, at the time of his death, and which came to your hands as such executor (*or* administrator) to be administered; and if not, that you have withheld or wasted the same.

(33.) SUMMONS TO REVIVE JUDGMENT AGAINST AN EXECUTOR.

No. , A.D. 18 .

In the Division Court in the County of .

[*Seal.*] BETWEEN A—— B——, *Plaintiff*,

AND

[*Samp.*] C—— D——, Executor of E. F., deceased, *Defendant*.

To C. D., the above-named defendant.

Whereas, on the day of , A.D. 18 , the plaintiff duly recovered in the said Court, holden in and for the said Division, judgment against the said E. F. in his life-time for $ for debt, and $ costs of suit, which judgment, a transcript whereof is hereunto annexed, still remains unsatisfied; and the said plaintiff claims to have execution thereof against you, as executor of the said E. F.: you are hereby summoned to appear at the sittings of this Court, to be holden at , on , at the hour of . to shew cause, if any you have, why the said plaintiff should not have execution of the said judgment against you, as executor as aforesaid, to be levied of the goods and chattels of the said E. F., deceased, in your hands to be administered;

and, in the event of your not appearing, judgment herein will be entered against you by default.

Dated this day of , 18 .

By the Court.

X—— Y——, Clerk.

Amount claimed..... $
Costs exclusive of mileage .....

N.B.—This form may be altered to suit other facts shewing a change of the parties liable to execution which make a revival necessary.

(34.) SUMMONS TO EXECUTOR OR ADMINISTRATOR, WHERE PLAINTIFF INTENDS TO APPLY TO THE COURT, ALLEGING THAT ASSETS HAVE COME TO THE DEFENDANT'S HANDS SINCE JUDGMENT.

In the Division Court in the County of .

No. A.D. 18.

[*Seal.*] BETWEEN A—— B——, *Plaintiff,*

AND

C—— D——, Executor (*or* Administrator) of E F., deceased, *Defendant.*

The plaintiff, having learned that the property of the said deceased has come to your hands as executor (*or* administrator) since the judgment herein to be administered (and that you have withheld and wasted the same), intends to apply at the next sitting of this Court, to be holden at on the day of , at the hour of , for an order that the debt and costs be levied of the goods and chattels of the said deceased, if you have so much thereof to be administered (and that if you have not, then that it shall be levied of your own proper goods and chattels), and that the its be levied of your proper goods and chattels.

You are, thereupon, hereby summoned to appear said Court, at the time and place aforesaid, to answer touching the matter aforesaid.

Dated this day of , 18 .

X—— Y——, Clerk.

To the above named defendant.

(35.) ORDER OF REFERENCE.

In the Division Court in the County of .

BETWEEN A—— B——, *Plaintiff,*

AND

C—— D——, *Defendant.*

By consent of the plaintiff and defendant (*or* agents, *if so*) given in *open* Court (*or* produced in writing to the Court) it is ordered that all matters in difference in this cause (*and if consented to, add,* "and all matters within the jurisdiction of this Court in difference between the said parties") be referred to the award of so as said award be made in writing, ready to be delivered to the parties entitled to the same, on or before the day of ; and that the said award may be entered as the judgment in this cause (*add any terms that the Judge may prescribe, or the parties may agree upon.*)

Given under the seal of the Court this day of 18 .

X—— Y——,

Clerk.

(*a*) APPOINTMENT OF UMPIRE TO BE ENDORSED.

We hereby appoint , of, &c., as a third arbitrator with us for determining the matters in dispute within referred to us.

Or, We hereby appoint , of, &c., as an umpire as to certain differences of opinion which have arisen between us as arbitrators of the matters within referred to us.

(*b*) APPOINTMEMT FOR MEETING ON REFERENCE.

In the, &c.

B. } I appoint the day of next, at the
v. } hour of , at for proceeding on this reference.
D. } , Arbitrator.

To (*both parties*).

(*c*) ENLARGEMENT TO BE ENDORSED.

I enlarge the time for making my award respecting the matters referred to me by the within order of reference until the day of , 18 .

Dated, &c. , Arbitrator.

(36.) AWARD.

The award, when endorsed on the order, may be in the following Form.

After hearing and considering the proofs laid before me (*or* us) in the matter of the within reference, and in full determination of the matters to me (*or* us) referred, I (*or* we) do award that the within named A. B. is entitled to recover from the within named C. D. the sum of , together with the costs of this suit, and also the costs of this reference (*or as the case may be*), and that the same shall be paid by the said C. D. within days, and that judgment be entered in the within mentioned case accordingly.

Dated this day of 18 .

Witness. ———, Arbitrator.

(*Add affidavit of caption.*)

(37.) SUMMONS TO JURORS.

[*Seal.*]

In the Division Court in the County of .

You are hereby summoned to appear and serve as a Juror in this Court, to be holden at on , at the hour of . Herein fail not at your peril.

Given under the seal of the Court this day of 18 .

X—— Y——, Clerk.

To

(38.) SUMMONS TO WITNESS.

In the Division Court in the County of .

[*Seal.*] BETWEEN A—— B——, *Plaintiff*,

AND

C—— D——, *Defendant*.

You are hereby required to attend at the sittings of the said Court, to be holden at on the 18 , at the hour of in the fore-

noon, to give evidence in the above cause on behalf of the above-named [and then and there to have and produce (*state particular documents required*) and all other papers relating to the said action, in your custody, possession, or power.]

Given under the seal of the Court this day of 18 .

X—— Y——, Clerk.

To

(39.) SUMMONS TO WITNESS TO APPEAR BEFORE ARBITRATOR.

In the Division Court in the County of .

[*Seal.*] BETWEEN A—— B——, *Plaintiff*,

AND

C—— D——, *Defendant*.

You are hereby required to attend before the Arbitrator (*or* Arbitrators) to whom this cause stands referred, at on the day of A.D. 18 , at o'clock of that day, being the time and place appointed by the said Arbitrator for a meeting upon the said reference, to give evidence in the above cause on behalf of the above-named and then and there to have and produce (*state the particular documents required*) and all other papers relating to the said action, in your custody, possession or power.

Given under the seal of the Court this day of A.D. 18 .

To

X—— Y——, Clerk.

GARNISHEE PROCEEDINGS TO JUDGMENT.

(40.) AFFIDAVIT FOR ORDER TO GARNISH DEBT.

In the Division Court in the County of .

BETWEEN A—— B——, *Plaintiff*,

AND

C—— D——, *Defendant*.

I, A—— B——, of the of in the County of the plaintiff in the suit (*if the affidavit be made by the plaintiff's attorney or agent make the necessary alteration*), make oath and say, that judgment was recovered in this case against the above-named defendant on the day of A.D. 18 , for the sum of $ debt and costs (*or according to the judgment*), and that the same remains wholly unsatisfied (or that $ part thereof yet remains unsatisfied.)

That I have reason to believe, and do believe, that E—— F——, residing at within this Province is (*or if the person indebted to the defendant be not known, say* "that one or more persons residing in this Province, whom I am unable to name, are") indebted to the defendant in the sum of $ (*or if the amount be unknown, say* "in an amount which I am unable to name," for goods sold and delivered by the defendant to the said E—— F—— (*or otherwise, according to the nature of the debt sought to be garnished.*)

Sworn before me at the of in the County of this day of A.D. 18 .

X—— Y——, Clerk.

A—— B——.

(41.) JUDGE'S ATTACHING ORDER.

[*Stamp.*] In the Division Court in the County of .

Between A—— B——, *Plaintiff*, AND C—— D——, *Defendant*. } Judgment entered in the Division Court in the County of on the day of , A.D. 18 .

Amount unsatisfied $

On application of the plaintiff and upon reading his affidavit [*or* "the affidavit of A. B, his attorney (or 'agent,' *as the case may be*,)] it is ordered that all debts now owing to the defendant from any party in this Province, whether due, or accruing due, be and the same are hereby attached, to satisfy the judgment in this cause.

Dated the day of A.D 18 .

——, Judge.

(*Add Warning as in next Form.*)

(42.) WARNING TO GARNISHEE.

To D. E., Garnishee.

You are hereby notified that from and after the time of the service of this ("order" *or* "summons") on you, all debts due, or accruing due, from you to the above-named C. D., are attached, and if you pay the same to any one other than to the person holding the proper order to receive the same, or into Court, you will be liable to repay it, in case the Court or Judge so order.

(43.) SUMMONS TO GARNISHEE AND PRIMARY DEBTOR AFTER JUDGMENT.

No , A.D. 18 .

[*Seal.*] In the Division Court in the County of .

Between A. B., Primary Creditor, and C. D., Primary Debtor, and E. F., Garnishee. } Judgment recovered on the day of , A.D. 18 . in the Division Court in the County of . Amount unsatisfied, $.

You, the above named Garnishee and the Primary Debtor, are hereby summoned to appear at the sittings of this Court, to be held at on the day of A.D. 18 (*or before the Judge presiding at on the day of A.D.* 18), at of the clock in the noon, to state and shew whether or not you, the said Garnishee, owe any, and what debt to the above named Primary Debtor, and why you should not pay the same into Court, to the extent due on the above-named judgment, to satisfy the same; and take notice, that if you have any set-off or other statutable defence, as between you and the Primary Debtor, you must give notice thereof to the Primary Creditor, six days before the day you are so required to appear. You or any one interested may also shew any other cause why the said debt should not go to satisfy the said judgment.

Dated the day of A.D. 18 . X—— Y——, Clerk.

(44.) SUMMONS TO PRIMARY DEBTOR (BEFORE JUDGMENT) AND GARNISHEE.

No. , A.D. 18 .

In the Division Court in the County of .

[*Seal.*] Between A. B., Primary Creditor, and C. D., Primary Debtor, and E. F., Garnishee, } The Primary Creditor claims from the Primary Debtor the amount of the annexed account:

(*giving the account or claim in detail.*)

You, the above-named Primary Debtor, are hereby summoned to appear at the sittings of this Court to be held at on the day of A.D. 18 (*or* at on the day of A.D. 18 , before the Judge then and there presiding), to answer the Primary Creditor, who sues you for the recovery of the annexed claim; and you, the Garnishee, are required to appear at the same time and place to state and shew whether or not you owe any and what debt to the Primary Debtor, and why you should not pay the same into Court, to the extent of the Primary Creditor's claim in satisfaction thereof; and take notice, that if either of you have any set-off, or other statutory defence, as between you, or as between the said Primary Debtor and the Primary Creditor, you must give notice of all such defences to the Primary Creditor not less than six days before you are so required to appear. You and all others interested may also shew any other cause why the debt owing from the Garnishee should not be paid and applied to satisfy the said claim of the Primary Creditor.

Dated the day of A.D. 18 .

X——— Y———, Clerk.

(45.) MINUTE IN PROCEDURE BOOK OF JUDGMENT AGAINST GARNISHEE ON JUDGMENT ALREADY RECOVERED.

Judgment entered on the day of in the Division Court in the County of .

Amount unsatisfied, $

On hearing all parties [*or* on "hearing the above-named" (*the parties appearing*)], the above-named having made default, it is adjudged that the Garnishee is indebted to the Primary Debtor in $ now due (or *coming due as follows,*) which (*or* $ of which) ought to be applied in satisfaction of the said judgment, and that the said Primary Creditor do recover against the Garnishee, for levying whereof execution may issue at any time (*or if the debt be not due, or time for payment be given, add*) after from this date, unless the Garnishee shall sooner pay the same into Court, to satisfy the said judgment.

Entered the day of A.D. 18 .

(46.) MINUTE IN PROCEDURE BOOK OF JUDGMENT AGAINST PRIMARY DEBTOR AND AGAINST GARNISHEE.

On hearing all parties [*or* "on hearing the Primary Creditor (*or as the case is*) the Primary Debtor (*or as the case is*) having made default,] it is adjudged, 1st, that the Primary Debtor is indebted to the Primary Creditor in $. and $ costs. 2nd, that the Garnishee is indebted to the Primary

Debtor in $, which (*if the Garnishee's debt be larger than the Primary Creditor's claim, say,* "to the extent of the two first mentioned sums,") ought to be applied in satisfaction thereof. 3rd, that the Primary Creditor do recover against the Garnishee the said sum of $ in days (*as time may be given for payment or debt becomes due*) in satisfaction as aforesaid.

(47.) MINUTE OF JUDGMENT IN FAVOUR OF GARNISHEE.

On hearing all parties (*or* on hearing the Garnishee, the Primary Creditor having made default), it is adjudged that the Garnishee is not indebted to the Primary Debtor as claimed by the Primary Creditor, and that the Primary Creditor pay the Garnishee $ for his costs, to be paid in days.

(47 *a.*) BOND UNDER SEC. 15 (*a*) OF THE ACT OF 1869.

(*Commencement and conclusion same as in Replevin bond, condition as follows.*)

Whereas in a certain garnishee proceeding under the Act 32 Vic., cap. 23, wherein the said A. B. is Primary Creditor, C. D., Primary Debtor, and E. F., Garnishee, a certain debt of $ due from the garnishee to the Primary Debtor, has been garnished to answer the debt of the Primary Creditor, and whereas the Judge of the said Court, acting under the 15th section of the said Act, ordered that upon payment of the said debt by the Garnishee to the Primary Creditor, security should be given by or on behalf of the Primary Creditor for the repayment thereof into Court by the Primary Creditor. Now, the condition of this obligation is such that if the above bounden A. B. do pay into Court the said debt, in case a proper order shall be made for such repayment within five days after notice of such order, then this obligation to be void, else to remain in full force.

(48.) CLERK'S MEMORANDUM OF NON-APPEARANCE OF GARNISHEE (COMMON LAW PROCEDURE ACT, SEC. 296.)

Memorandum.

I, X. Y., Clerk of the Division Court, in the within order named, attended this day of 18 , at the place within mentioned, from o'clock in the noon (*as the case may be*) till past in the noon (*as the case may be*) of the same day, and the said J. K. (*Garnishee*) did not appear before me according to the said order.

X—— Y——, Clerk.

(49.) MEMORANDUM OF ADMISSION OF DEBT WHEN SIGNED BY GARNISHEE (C. L. P. ACT, SEC. 296.)

Memorandum.

On this day of 18 , the within named (*Garnishee*) appeared before me according to the within order,* and admitted that he was and is indebted to the within named G. H. (*judgment debtor*) in the sum of $ (*if the whole debt be not admitted,* add, "and no more.") (*If the*

(a) Now section 143.

Garnishee be willing to sign the admission, add, "and signed the subjoined admission in my presence.") X—— Y——, Clerk.

I, J. K. , within named, admit that there is a debt of $ (*if the whole debt be not admitted*, add, "and no more,") due from me to the within named (*Judgment Debtor.*)

J—— K—— (*Garnishee's signature.*)

(50.) MEMORANDUM, WHERE GARNISHEE DENIES DEBT (UNDER SEC. (*a*) 296, C. L. P. ACT).

On, &c. (as in previous form to the asterisk *), and disputes the debt claimed to be due from him to the within named . (*Judgment Debtor.*)

(*If the Garnishee be willing to sign the denial of debt*, add, "and signed the subjoined denial of debt in my presence.")

X. Y.

I dispute the debt claimed to be due from me to within named.

J—— K—— (*Garnishee's signature.*)

MINUTES OF JUDGMENT IN PROCEDURE BOOK.

(51.) OF JUDGMENT AGAINST DEFENDANT FOR DEBT OR DAMAGES.

Judgment for the plaintiff * for $ and $ costs; to be paid in days (*when an excess has been abandoned, add*, being "in full discharge of his cause of action set forth in the claim.")

* *Add* "On verdict by jury," *if such be the fact.*

(52.) OF JUDGMENT UNDER 32 VIC., CAP. 23, SECS. 2 & 3. (*b*)

The defendant, having been served with "*Special Summons*," and particulars of claim, and not disputing same (*or* "not disputing $ part thereof, and plaintiff being content with judgment for such part,") it is adjudged that plaintiff recover $ for debt, and $ costs.

Dated day of , 18 .

(53.) OF JUDGMENT WHERE SOME DEFENDANTS HAVE BEEN SERVED WITH SPECIAL SUMMONS, AND OTHERS HAVE CONFESSFD.

The defendant, C. D., having been served with special summons and particulars of claim, and not disputing $ part thereof, and the plaintiff being content with judgment for such part, and the defendants, E. F. and G. H., having confessed the same sum as due to the plaintiff, it is adjudged that the plaintiff recover $ for debt, and $ for costs.

(*a*) Rev. Stat. cap. 50, sec. 316. (*b*) Now section 79.

(54.) OF JUDGMENT OF NONSUIT OR DISMISSAL FOR WANT OF PROSECUTION.

Judgment of Nonsuit, "*or* that the cause be dismissed" (*if costs, &c., ordered, add*, "and the plaintiff pay $ for defendant's costs," *or* $ for defendant's trouble, and $ for his costs; to be paid in days).

(55.) OF JUDGMENT ON AWARD.

Judgment for the plaintiff (*or* defendant) for $ costs (*or* for the sum of and costs) pursuant to award; to be paid in days.

(56.) OF JUDGMENT FOR DEFENDANT.

Judgment for the defendant* (*or* for the defendant for $ costs; *or* $ for his trouble and loss of time, and also $ for his costs; to be paid forthwith).

* Add "on verdict by Jury, *if such be the fact.*

(57.) OF JUDGMENT FOR DEFENDANT ON SET-OFF WHERE SET-OFF IN PART SATISFIED.

It appearing that the defendant's set-off exceeds the plaintiff's claim as proved, by over $100, it is adjudged that the plaintiff's claim, proved at $ be discharged, and that the defendant's set-off to $ be satisfied, and further, that the defendant do recover against the plaintiff $ for his costs to be paid in days.

(58.) OF JUDGMENT FOR DEFENDANT FOR BALANCE OF SET-OFF.

It appearing that the defendant's set-off exceeds the plaintiff's claim, it is adjudged that the plaintiff's claim, proved at $ be discharged, and that the said set-off as to that amount be satisfied, and further, that as to $, residue of such set-off, the defendant have judgment for the same, together with $ for his costs; to be paid in days.

(59.) OF ORDINARY JUDGMENT AGAINST EXECUTOR OR ADMINISTRATOR.

Judgment for plaintiff for $ and $ costs, to be paid in days, to be levied on the goods and chattels of the deceased; failing such goods, the costs to be levied of the defendant's proper goods and chattels.

(60.) OF JUDGMENT AGAINST AN EXECUTOR OR ADMINISTRATOR WHO HAS WASTED ASSETS.

Judgment for plaintiff for $ and $ costs, to be paid in days, to be levied of the goods and chattels of the deceased; failing such

goods, then the whole (*or* the sum of $ and the said costs) to be levied of the defendant's proper goods and chattels; the defendant having wasted the goods of the deceased to that amount.

(61.) OF JUDGMENT AGAINST AN EXECUTOR OR ADMINISTRATOR, WHO HAS DENIED HIS REPRESENTATIVE CHARACTER, OR PLEADED A RELEASE TO HIMSELF.

Judgment for plaintiff for $ and $ costs, to be paid in days, to be levied of the goods and chattels of the deceased; failing such goods, then to be levied of the defendant's proper goods, the defendant having pleaded a release to himself (*or* "the defendant having denied his representative character,") and this plea being found against him.

(62.) OF JUDGMENT AGAINST AN EXECUTOR OR ADMINISTRATOR, WHO ADMITS HIS REPRESENTATIVE CHARACTER, AND DENIES THE DEMAND.

The same as in ordinary judgment against Executor or Administrator (*Form* 59.)

(63.) OF JUDGMENT AGAINST AN EXECUTOR OR ADMINISTRATOR, WHERE HE ADMITS HIS REPRESENTATIVE CHARACTER, BUT DENIES THE DEMAND, AND ALLEGES TOTAL OR PARTIAL ADMINISTRATION ASSETS: AND THE PLAINTIFF PROVES HIS DEMAND, AND THE DEFENDANT PROVES ADMINISTRATION.

Judgment for the plaintiff for $ debt, and also $ costs, to be paid in days; the plaintiff's demand, which was denied, having been proved, and full (*or* partial) administration also having been proved, which was denied, the said costs to be levied of the goods and chattels of the deceased; failing such goods, then of the defendant's proper goods; the said debt to be levied of the goods and chattels of the deceased, hereafter to come to the defendant's hands to be administered, and ordered that $ the costs in proving such administration, be paid by the plaintiff in days.

(64.) OF JUDGMENT AGAINST EXECUTOR OR ADMINISTRATOR WHERE THE DEFENDANT ADMITS HIS REPRESENTATIVE CHARACTER, BUT DENIES THE DEMAND, AND ALLEGES TOTAL OR PARTIAL ADMINISTRATION OF ASSETS: AND THE PLAINTIFF PROVES HIS DEMAND, AND THE DEFENDANT DOES NOT PROVE ADMINISTRATION.

Judgment for plaintiff for $ debt, and also $ costs, to be paid in days, to be levied of the goods and chattels of the deceased; failing such goods, then the said costs to be levied of the defendant's proper goods, and the debt to be levied of the goods and chattels of the deceased, hereafter to come to the defendant's hands to be administered, the plaintiff's demand having been proved, which was denied, and administration, which was alleged, not having been proved.

(65.) OF JUDGMENT AGAINST EXECUTOR OR ADMINISTRATOR, WHO ADMITS HIS REPRESENTATIVE CHARACTER, AND THE PLAINTIFF'S DEMAND, BUT ALLEGES A TOTAL OR PARTIAL ADMINISTRATION OF ASSETS, AND PROVES THE ADMINISTRATION.

Judgment for plaintiff for $, to be paid in days; to be levied of the goods and chattels of the deceased, hereafter to come to the defendant's hands to be administered; the debt not being denied, and full (*or* partial) administration, which was denied, having been proved, Ordered that the plaintiff pay $ for the defendant's costs in days.

(66.) OF JUDGMENT AGAINST EXECUTOR OR ADMINISTRATOR, WHO ADMITS HIS REPRESENTATIVE CHARACTER, AND THE PLAINTIFF'S DEMAND, BUT ALLEGES A TOTAL OR PARTIAL ADMINISTRATION OF ASSETS, AND DOES NOT PROVE THE ADMINISTRATION.

Judgment for plaintiff for $ debt, and $ costs, to be paid in days; full (*or* partial) administration, which was alleged, and disputed, not having been proved, Ordered that the said sums be levied of the goods and chattels of the deceased; failing such goods, then the debt of the goods and chattels, hereafter to come to the defendant's hands to be administered, and the costs to be levied of the defendant's proper goods.

(67.) OF JUDGMENT AGAINST EXECUTOR OR ADMINISTRATOR ON DEVASTAVIT AFTER JUDGMENT.

Judgment that the defendant has wasted goods and chattels of A. B., deceased, to the sum of $, whereby a judgment recovered against him by the plaintiff in the Division Court in the County of , on the day of , 18 , remains unsatisfied; and that the plaintiff now recover against the defendant the first named sum, and also $ costs; to be paid in days.

(68.) OF JUDGMENT TO REVIVE A JUDGMENT AGAINST AN EXECUTOR.

Judgment for the plaintiff, that he have execution against the defendant, as executor of E. F., deceased, of a judgment of this Court (*or* of the Division Court, etc.,) whereby the plaintiff, on recovered against the said E. F. in his life-time the sum of $, to be levied of the goods and chattels of the said deceased, in the hands of the said defendant to be administered.

(69.) OF JUDGMENT FOR EXECUTOR TO REVIVE A JUDGMENT.

Judgment for plaintiff, that he have execution against the defendant of a judgment of this Court (*or* of the Division Court, etc.,) whereby the said C. D. in his life-time, on recovered against the said defendant the sum of $.

(70.) OF JUDGMENTS IN REPLEVIN.

For plaintiff (same as general form of judgment for plaintiff for damages and costs, No. 51.)

For defendant in Replevin for rent. Adjudged that the plaintiff do return to the defendant the goods and chattels (*or* "cattle," *stating the particulars thereof*) and pay $ for costs in days [*or*, adjudged that the amount due for rent in arrear from the plaintiff to the defendant is $, and that the goods and chattels, (*or* "cattle") were of the value of $, and that the plaintiff do in days pay the said sum of $, and also the sum of $ for costs of suit.]

For defendant in Replevin of cattle damages, feasant. Adjudged that the plaintiff do return to the defendant the cattle (*here specify the cattle*), or do pay in days, the sum of $ which is adjudged as the damages sustained by the defendant, and that the plaintiff do pay within the time aforesaid $ for costs.

For defendant where Replevin is not for rent nor for damage feasant. Adjudged that the plaintiff do return to the defendant the cattle (*or* "goods and chattels" (*as the case may be*) *stating the particulars thereof*) forthwith (*or* in days), and that the plaintiff do pay the defendant in days, $ for costs of suit * and $ for damages sustained by the defendant by reason of the issuing of the Writ of Replevin in this cause.

* *If no damages are awarded then omit from last Minute all the words from the asterisk.*

(71.) OF ADJUDICATION ON INTERPLEADER.

Adjudged that the goods [*or* the goods, chattels and moneys, *or* proceeds of the goods, etc., (*as the case may be*) mentioned in the Interpleader Summons [*if only for a part of the goods, etc., add the words*, "hereafter mentioned, that is to say" (*here enumerate them*)] are (*or* are not) the property of E. F. (the *Claimant*), *or* that rent to the amount of $ is due to E. F. (the *Claimant*); Ordered that $ the costs of this proceeding be paid by (*here insert each order as the costs or the subject in dispute, if any, as the Judge shall have made*) in days.

(72.) OF IMPOSITION OF FINE ON A JUROR FOR NON-ATTENDANCE.

Adjudged that G. H. was duly summoned to attend this Court now holden as a Juror; that he hath made default therein, that he pay a fine of $ for such default, in days (*or* forthwith).

(73.) OF ORDER FOR IMPOSITION OF FINE FOR CONTEMPT.

It is adjudged that E. F., at the sittings of this Court now holden, in open Court, is guilty of a contempt of the said Court, by wilfully insulting , Judge (*or* Deputy *or* Acting Judge) of the said Court [*or* "in view of the Court, by wilfully insulting , Clerk (*or* Bailiff) of the said Court, during his attendance at such Court,") (*or* "by wilfully interrupting the proceedings of the said Court")]: And it is ordered, that the said E. F. forthwith pay a fine of $ for such offence, and, in default of payment, be committed to the Common Jail of this County for days, unless such fine, the costs herein, and the expense attending the commitment, be sooner paid.

(74.) OF IMPOSITION OF FINE ON WITNESS.

Adjudged that H. H. was duly summoned to appear as a witness, in this action, at the sittings of this Court here this day [and also to produce (*as the case may be*)] that payment (*or* a tender of payment) of his reasonable expenses was made to him,—and that he did not appear [*or* having appeared, did wilfully refuse to be sworn, and give evidence in this action (*or* to produce such, &c.)] (*Or* Adjudged that H. H., being before this Court, now holden and called upon to give evidence in this cause, did wilfully refuse to be sworn and give evidence.) And further adjudged that the said H. H. pay a fine of $, for such neglect (*or* refusal) in days (*or* forthwith); And that the sum of $, part of the said fine, be paid by the Clerk to the plaintiff (*or* defendant) being the party injured by such neglect or refusal.

(75.) POSTPONED JUDGMENT UNDER SEC. 106.

In the Division Court in the County of .

BETWEEN A——— B———, *Plaintiff*,

AND

C——— D———, *Defendant*.

At the sitting of this Court held on the day of 18 , at in the said Division, this case came on to be heard, and after the hearing thereof by the Judge in open Court the giving of judgment thereupon was postponed by the Judge till the day of 18 , at the hour of at the office of the Clerk of this Court; the case having since been maturely considered by the Judge. It is adjudged, &c. (*according to judgment.*)

The Clerk will read this decision to the parties or their agents, if present, and forthwith enter judgment according to the statute in that behalf.

Dated, &c. ———, Judge.

(76.) ORDER FOR NEW TRIAL.

In the Division Court in the County of .

BETWEEN A——— B———, *Plaintiff*,

AND

C——— D———, *Defendant*.

It is ordered, that the judgment rendered in this cause and all subsequent proceedings be set aside, and a new trial be had between the parties on (*set out the terms or conditions, if any, on which the order is made.*)

Dated , 18 . ———, Judge.

EXECUTIONS.

(77.) AGAINST GOODS OF DEFENDANT.

No. , A.D., 18 .

In the Division Court in the County of .

[*Seal.*] BETWEEN A——— B———, *Plaintiff*,

AND

C——— D———, *Defendant*.

Whereas on the day of , A.D. 18 , the plaintiff duly recovered in the said Court, holden in and for said Division, judgment against the defendant for $ for debt, and $ for costs of suit, which remains unsatisfied (*when the judgment has been revived, add,* "and on the day of A.D. 18 , the said judgment was duly revived,") you are hereby required

to levy of the goods and chattels of the defendant in the said County (not exempt from execution), the said moneys, amounting together to the sum of $ and your lawful fees; so that you may have the same within thirty days from the date hereof, and pay the same over to the Clerk of this Court for the plaintiff.

Given under the seal of the Court this day of A.D. 18 .

X——— Y———, Clerk.

To V. W.

Bailiff of said Court.

Judgment ..... $
Interest .....
Subsequent costs .....
This execution .....

Levy the sum of ..... $, and your lawful fees upon this precept.

(78.) AGAINST GOODS OF PLAINTIFF.

No. , A.D. 18 .

In the Division Court in the County of .

[*Seal.*] BETWEEN A——— B———, *Plaintiff*,

AND

C——— D———, *Defendant*.

Whereas on the day of A.D. 18 , in said Court, holden in and for said Division, judgment was given for the defendant, and for $ costs (*or* judgment of dismissal was given, and $ for defendant's trouble, and $ for costs), which remains unsatisfied—*here follow the last form of execution to end, transposing the words "plaintiff" and "defendant" where they occur.*

(79.) ON JUDGMENT FOR BALANCE OF SET-OFF.

No. A.D. 18 .

In the Division Court in the County of .

[*Seal.*] BETWEEN A——— B———, *Plaintiff*,

AND

C——— D———, *Defendant*.

Whereas at the sittings of this Court, holden on the day of , A.D. 18 , at , it was adjudged that the above-named defendant should recover against the above-named plaintiff the sum of $, the residue of his set-off exceeding the plaintiff's claim, together with $ his costs of suit, which remains unsatisfied, you are hereby required (*conclude as directed in last form.*)

(80.) EXECUTION UNDER 27 AND 28 VIC. C. 27, (*a*) WHERE JUDGMENT OBTAINED AGAINST A DEFENDANT RESIDING IN A FOREIGN COUNTY.

No. A.D. 18 .

In the Division Court in the County of .

[*Seal.*] (*Style of Cause.*)

Whereas the place of sittings of this Court is nearest to the defendant's residence, and at the sittings of the said Court holden on the day of

(*a*) See section 63.

A.D. 18 , in and for the said Division, by judgment of the said Court the plaintiff recovered against the defendant, under the provisions of the Act 27 and 28 Vic. cap. 27 (*a*) $ for debt, with $ for costs, which said debt and costs remains unsatisfied, you are hereby required to levy to levy of the goods and chattels of the defendant (not exempt from execution) in the said County of A or in the County of B (*where the defendant resides*) the said moneys, &c. (*conclude as in form* 77.)

(81.) ON TRANSCRIPT OF JUDGMENT FROM ONE COURT TO ANOTHER.

No. A.D. 18 .

In the Division Court in the County of .

BETWEEN A—— B——, *Plaintiff*,

AND

[*Seal.*] C—— D——, *Defendant*.

Whereas on the day of , A.D. 18 , the plaintiff duly recovered in the Division Court in the County of , holden in and for the said Division, judgment against the defendant for $ for debt, and $ for costs of suit (*If the judgment was revived, use the following words*, "and on the day of , A.D. 18 , the said judgment was duly revived") as appears by a transcript of the entry of such judgment attested by the seal of the Court, certified and signed by the Clerk thereof, and sent and addressed to the Clerk of this Division Court, pursuant to the provisions of "The Division Courts Act;" and whereas it appears, by certificate at the foot of the said transcript attached, certified, signed, sent, and addressed as aforesaid, that the amount unpaid on the said judgment is $, which said transcript and certificate is duly entered in the book of this Court, therefore you are hereby required, etc. (*conclude as in form* 77.

(82.) FOR AN EXECUTOR ON JUDGMENT REVIVED IN HIS FAVOUR.

No. A.D. 18 .

In the Division Court in the County of

[*Seal.*] BETWEEN A—— B——, Executor of C. D., deceased, *Plaintiff*,

AND

E—— F——, *Defendant*.

You are hereby required to levy of the goods and chattels of the defendant (not exempt from execution) in the said County of the sum of $, which C. D. in his lifetime in this Court (*or* in the Division Court, etc.,) on , recovered against the defendant for his debt (*or* damages) and costs, and whereof it was on etc., in this Court (*or* the Division Court, etc.,) adjudged that the plaintiff, as executor of the said C. D., should have execution, together with your lawful fees; so that you may have the same within thirty days after the date hereof, and pay the same over to the Clerk of this Court for the plaintiff.

Given under the seal of the Court this day of , A.D. 18 .

X—— Y——, Clerk.

To V. W., Bailiff of the said Court.

Due on Judgment..... $
Interest.....
Subsequent costs.....
This execution.....

Levy the sum of $, besides your lawful fees on this precept.

(*a*) Substitute the following "under the provisions of the Division Courts Act section 63."

(83.) OF JUDGMENT REVIVED AGAINST EXECUTOR OR ADMINISTRATOR.

In the Division Court in the County of .

[*Seal.*] BETWEEN A—— B——, *Plaintiff*,

AND

C—— D——, Executor of E. F., deceased, *Defendant.*

You are hereby commanded (*or* as before *or* as often before) to make and levy by distress and sale of the goods and chattels of E. F., deceased, in the hands of the said defendant, as executor (*or* administrator) to be administered, the sum of , which the plaintiff in this Court (*or* in the Division Court, &c.,) on , recovered against the said deceased in his lifetime for the plaintiff's debt (*or* damages) and costs, and whereof it was on adjudged in this Court (*or* in the Division Court, etc.,) that the said plaintiff should have execution against the said defendant as executor (*or* administrator) of the said deceased, to be levied of the goods and chattels of the said deceased, in the said defendant's hands to be administered, together with the costs of execution herein, and your lawful fees; so that you have the same within thirty days after the date hereof, and pay the same over to the Clerk of this Court for the plaintiff.

Given under the seal of the Court this day of , 18 .

X—— Y——, Clerk.

To V. W., Bailiff of the said Court.

Judgment	$
Interest	
Subsequent costs	
This execution	

Levy the sum of $, besides your own lawful fees upon this precept.

N.B.—*Executions upon the judgments in other cases against Executors may be drawn from this Form, with the requisite alterations.*

(84.) AGAINST GOODS OF TESTATOR.

No. A.D. 18 .

In the Division Court in the County of .

BETWEEN A—— B——, *Plaintiff*,

AND

[*Seal.*] C—— D——, Executor or Administrator of E. F., deceased, *Defendant.*

Whereas on the day of , A.D. 18 , the plaintiff duly recovered, in the said Court holden in and for said Division, judgment against the said defendant as executor (*or* administrator) of E. F., deceased, the sum of $, for a certain debt of $ and costs, to be levied of the goods and chattels of the deceased; failing such goods, the costs to be levied of the defendant's proper goods and chattels, which said debt and costs were ordered to be paid at a day now past, and remain unsatisfied: These are therefore to command you, forthwith to make and levy, by distress and sale of the goods and chattels, which were the

property of the said E. F in his life-time, in the hands of the defendant to be administered in the said County of , the said debt and costs, amounting together to the sum of $, together with the costs of this execution, if the defendant have so much thereof in his hands to be administered; and if he hath not so much thereof in his hands to be administered, then that you levy of the proper goods and chattels of the defendant, in the said County of not exempt from execution, the said moneys and your lawful fees, so that you may have the same within thirty days after the date hereof, and pay the same over to the Clerk of this Court for the plaintiff.

X—— Y——, Clerk.

To V. W., Bailiff of the said Court.

Judgment..... $
Interest .....
Subsequent costs .....
This Execution .....

Levy the sum of $, besides your lawful fees upon this precept.

(85.) IN REPLEVIN AGAINST PLAINTIFF WHEN RETURN OF GOODS ADJUDGED WITH DAMAGES AND COSTS.

No. , A.D. 18 .

In the Division Court in the County of .

[*Seal.*] BETWEEN *Plaintiff,*

AND

Defendant.

Upon hearing this action of Replevin at a Court holden at in and for the said Division, on the day of , A.D. 18 , it was adjudged that the plaintiff do return to the defendant the cattle (*or* the goods or chattels, *as the case may be, stating particulars thereof,*) in days , (*as the case may be*), *and also that the plaintiff should pay to the defendant the sum of $ for damages;* (*omit the words between the asterisks when there are no damages awarded, but the judgment is merely for a return and for costs*); and also the sum of $ for costs of suit; and the plaintiff has not returned to the said defendant the cattle (*or* the said goods and chattels,) (or paid the said *damages* and costs), these are, therefore, to require and order that without delay you cause the cattle (*or* goods and chattels) aforesaid to be returned to the defendant, and that you levy of the goods and chattels of the plaintiff, in the said County of (not exempt from execution), the said moneys, amounting together to the sum of $, and your lawful fees, so that you may have the same within thirty days after the date hereof, and pay the same over to the Clerk of this Court for the plaintiff.

Given under the Seal of the Court this day of A.D. 18 .

To V. W., Bailiff of the said Court.

Judgment ..... $
Interest .....
Subsequent costs.....
This execution .....

X—— Y——, Clerk.

Levy the sum of ..... $ besides your lawful fees on this precept.

(86.) AGAINST GARNISHEE ON JUDGMENT ALREADY RECOVERED.

In the Division Court in the County of

Between A—— B——, *Plaintiff*,
AND
C—— D——, *Defendant*,
AND
E—— F——, *Garnishee*.

Judgment recovered on the day of , A.D. 18 , in the Division Court in the County of
Amount unsatisfied, $

[*Seal.*]

Adjudged against the Garnishee on the day of A.D. 18 , $

To V. W., Bailiff of the said Court.

You are hereby required to levy of the goods and chattels of the Garnishee (not exempt from execution), $ money owing from him to the defendant, and which has been attached to satisfy the judgment in this case; and what you shall have done herein return with this writ within thirty days after the date hereof.

Dated the day of A.D. 18 .

X—— Y——, Clerk.

(87.) AGAINST GARNISHEE ON JUDGMENT RECOVERED AGAINST HIM AND PRIMARY DEBTOR.

In the Division Court in the County of

Between A—— B——, *Primary Creditor*,
AND
C—— D——, *Primary Debtor*,
AND
E—— F——, *Garnishee*.

Amount adjudged due from the Primary Debtor to the Primary Creditor the day of A.D. 18 , for debt, $
for costs, $

[*Seal.*]

Total sum, $

Amount adjudged to the Primary Creditor for money owing from the Garnishee, the day of A.D. 18 . $

To V. W., Bailiff of the said Court.

You are hereby required to levy of the goods and chattels of the Garnishee, (not exempt from execution), $ money owing from him to the Primary Debtor, and which has been adjudged to the Primary Creditor, to satisfy his said claim against the Primary Debtor, and what you shall have done herein return with this writ within thirty days after the date hereof.

Dated the day of 18 .

X—— Y——, Clerk.

(88.) AGAINST PRIMARY DEBTOR AND GARNISHEE.

No. A.D. 18 .

In the Division Court in the County of

Between A—— B—— *Primary Creditor*,
AND
C—— D——, *Primary Debtor*.
AND
E—— F——, *Garnishee*.

[*Seal.*]

Amount adjudged due from the Primary Debtor to the Primary Creditor, the day of , A.D 18 , for debts. $ ——————
For costs ..... $ ——————
Total debt and costs ..... $ ——————
Amount adjudged to the Primary Creditor for money owing from the Garnishee, the day of A.D. 18 ..... $ ——————

To V. W., Bailiff of the said Court.

You are hereby required to levy of the goods and chattels of the Primary Debtor in the said County of K—— (not exempt from execution), $ above adjudged to be due to the Primary Creditor from the Primary Debtor, together with the costs of this precept, and your lawful fees in executing the same. And if so much goods and chattels of the Primary Debtor be not found in the said County as will satisfy the said judgment, then that you levy of the goods and chattels of the Garnishee in the said County (not exempt from execution) $ (or so much thereof as may be necessary to satisfy the said judgment) money owing from the Garnishee to the Primary Debtor, and which has been adjudged to the Primary Creditor; and what you shall have done herein, return with this writ within thirty days after the date hereof.

Dated the day of , A.D. 18 .

X—— Y——, Clerk.

(89.) FOR GARNISHEE'S COSTS.

No , A.D. 18 . In the Division Court in the County of

BETWEEN A—— B——, *Primary Creditor*,

AND

[*Seal.*] C—— D——, *Primary Debtor*,

AND

E—— F——, *Garnishee*.

To V. W., Bailiff of the said Court.

Whereas at the sittings of this Court holden on the day of 18 , at , it was adjudged that the Garnishee was not indebted to the Primary Debtor, as claimed by the Primary Creditor, and judgment was given for the Garnishee against the Primary Creditor, for $ for his costs to be paid at a day now past, and the Primary Creditor has not paid the same;

You are hereby required to levy of the goods and chattels of the above-named Primary Creditor in the said County of (not exempt from execution,) $ for his said costs, together with the costs of this precept and your lawful fees in executing the same, and what you shall have done herein return with this writ within thirty days after the date hereof.

Dated this day of 18 .

X—— Y——, Clerk.

(90.) EXECUTION UNDER 293RD AND 296TH SECTIONS (*a*) OF THE COM. LAW PRO. ACT.

In the Division Court in the County of

[*Seal.*] In the matter of the suit in the Court of (Queen's Bench, or Common Pleas, or County Court of the County of).

BETWEEN A—— B——, *Plaintiff*,

AND

C—— D——, *Defendant*,

AND

E—— F——, *Garnishee*.

V. W., Bailiff of the said Division Court.

You are hereby required to levy of the goods and chattels of the above-named Garnishee, in the said County of (not exempt from execution)

(*a*) Now sections 312-316 of Rev. Stat. cap. 50.

$ money, owing from him to the defendant, which has been attached to satisfy the judgment of the said Court in the said cause, and which, by the order of the Judge of the County Court of the said County of , dated the day of , A.D. 18 , the said Garnishee was ordered to pay to the plaintiff. And what you shall have done herein, return with this writ within thirty days after the date hereof.

Dated the day , A.D. 18 . X——— Y———, Clerk.

(91.) EXECUTION AGAINST THE GOODS OF CLAIMANT ON INTERPLEADER.

In the Division Court in the County of .

No. A.D. 18 .

BETWEEN A——— B———, *Plaintiff*,

[*Seal.*] AND C——— D———, *Defendant*,

AND E——— F———, *Claimant*.

Whereas on the day of A.D. 18 , the plaintiff duly recovered in said Court, holden in and for said Division, judgment against the defendant for $ debt, and $ for cost of suit which remained unsatisfied (*when the judgment has been revived add the following words*, "and on the day of , A.D. 186 , the said judgment was duly revived,") and the said moneys not being paid, an execution issued against the goods and chattels of the defendant, under which certain goods and chattels were seized. [*If the interpleader was in respect to goods attached, omit all the preceding after the word "claimant," and say in lieu thereof as follows*, "whereas a writ of attachment was sued out of this Court (*or* issued by a Justice of the Peace), under which certain goods and chattels, etc., were seized and attached"] to which the above-named claimant made claim, and which claim came off to be heard and decided, upon interpleader summons, at a sitting of this Court held on at , and at such last mentioned Court it was adjudged, touching the said claim, that the goods [(*or* the goods, chattels and moneys, *or* proceeds of the goods, etc. (*as the case may be*)] mentioned in the interpleader summons [*if only for a part of the goods, etc., add the words* "hereafter mentioned," that is to say (*here enumerate them*) were not the property of E. F. (*the claimant*); and it was ordered that the sum of $, the costs of that proceeding, should be paid by the said claimant to the Clerk in days, for the use of the said plaintiff; and whereas the said sum of $ has not been paid, pursuant to the said order, you are hereby requested to levy of the goods and chattels of the defendant, in the said County of (not exempt from execution) the said sum of $ and your lawful fees, so that you may have the same within thirty days after the date hereof, and pay the same over to the Clerk of this Court for the plaintiff.

Given under the seal of this Court this day of A.D. 18 .

X——— Y———, Clerk.

To V. W., Bailiff of said Court.

Judgment	$
Interest	
Subsequent	
This execution	
Levy	$

, besides your own lawful fees upon this precept.

(92.) EXECUTION UNDER THE ACT RESPECTING LINE FENCES AND WATER-COURSES.

In the Division Court in the County of .

No. A.D. 18 .

BETWEEN A—— B——, *Plaintiff*,

[*Seal.*]

AND

C—— D——, *Defendant*.

(*a*) Whereas under the provisions of an Act of the Legislature of the late Province of Canada, 22 Vic., chap. 57, entitled "An Act respecting Line Fences and Water-courses," A. B., of the Township of , C. D., of the same place , and E. F., of the same place , three fence viewers duly appointed for the said Township of in the County of having been summoned by G. H., a Justice of the Peace in and for the County of and residing within the said Township, to ascertain the amount payable by the above named defendant to the above named plaintiff, "for making his share of a certain fence," "water-course," or "ditch," (*as the case may be*) in the said Township of did on this day of A.D. 18 , make their determination between the said plaintiff and defendant, of and concerning the same, and of and concerning the amount, the said defendant should pay the plaintiff as follows (*here state the award of the fence-viewers*), and duly reported the same in writing under their hands, to the said G. H., on the day and year aforesaid , and the said G. H. did, on the day of in the year aforesaid, transmit the said determination to the Clerk of this Court, being the Division Court having jurisdiction over that part of the said Township of in which the said fence is situated, and did certify therewith that the costs of him, the said G. H., with the fence-viewers', bailiff's and witnesses' fees, amounted to the sum of $ which the defendant by the said determination was ordered to pay.

And whereas the defendant did not pay to the plaintiff, within forty days from the date of the said determination the said sum of $ and costs, and the same remain wholly unsatisfied, now, therefore, at the request of the plaintiff, and in pursuance of the said Act, you are hereby required to levy of the goods and chattels of the defendant, in the said County (not exempt from execution), the said moneys, amounting together to the sum of $ and your lawful fees; so that you may have the same moneys thirty days after the date hereof, and to pay over the same to the Clerk of this Court, for the plaintiff.

Given under the seal of the Court this day of A.D. 18 .

X—— Y——, Clerk.

To V. W., Bailiff of the said Court.

Judgment	$
Interest	
Subsequent costs	
This execution	

Levy this sum of..... $, besides your lawful fees upon this precept.

(*a*) Substitute "The provisions of the Revised Statutes of Ontario, chapters 198 and 199 and amending Acts." See also 40 Vic., cap. 8, sec. 58, and cap. 29.

(93.) WARRANT OF COMMITMENT IN DEFAULT OF APPEARANCE.

No , A.D. 18 .

In the Division Court in the County of .

[*Seal.*] BETWEEN A—— B——, *Plaintiff*,

AND

C—— D——, *Defendant*.

To V. W., Bailiff of the said Court, and to all Constables and Peace Officers of the County of and to the Jailer of the Common Jail of the said County of .

Whereas at the sittings of this Court (*or* of the Division Court for, etc.,) holden at , on the day of 18 , the plaintiff, by the judgment of the said Court, in a certain suit wherein the Court had jurisdiction, recovered against the defendant the sum of $, for his debt (*or* damages) and costs of suit, which were ordered to be paid at a day now past; and whereas the defendant, not having made such payment upon application of the plaintiff, a summons was duly issued from and out of this Court, against the defendant, by which summons the defendant was required to appear at the sittings of this Court, holden at on, etc., to answer such questions as might be put to him, touching (*set out as in the summons*);* and whereas it was duly proved, on oath, at the said last mentioned sittings of this Court, that the defendant was personally served with the said summons; and whereas the defendant did not attend, as required by such summons, nor allege any sufficient cause for not so attending; and whereas it appeared to the satisfaction of the Judge that such non-attendance was wilful (*or*, "whereas the defendant has failed to attend after being twice so summoned.")

And thereupon it was ordered by the Judge of this Court that the defendant should be committed, for the term of days, to the Common Jail of the said County, according to the form of the statute in that behalf, or until he should be discharged by due course of law; these are therefore to require you, the said Bailiff, and others, to take the defendant, and to deliver him to the Jailer of the Common Jail of the said County: And you, the said Jailer, are hereby required to receive the defendant, and him safely to keep in the said Common Jail for the term of days from the arrest under this warrant, or until he shall be sooner discharged by due course of law, according to the provisions of the Act of Parliament in that behalf; for which this shall be your sufficient warrant.

Given under the seal of the Court this day of A.D. 18 .

X—— Y——, Clerk.

Debt and costs up to the time of the delivering of this warrant for execution ... . $

(94.) WARRANT OF COMMITMENT AFTER EXAMINATION.

In the Division Court in the County of .

(*as in last Form, down to the asterisk,* * *conclude as follows*):

And whereas the defendant, having duly appeared at the said Court pursuant to the said summons, was examined touching the said matters; and whereas it appeared, on such examination, that [*here insert the particular ground of commitment in the language used in the Statute, e. g.*) "C. D., the defendant, 'incurred the debt (*or* liability), the subject of this action under false pretences" (*or* "by means of fraud *or* breach of trust")]; and thereupon it was ordered by the said Judge that the defendant should be committed for the term of days to the Common Jail of the said County, according to the form of the statute in that behalf, or until he should be discharged by due

course of law: These are therefore to require you, the said Bailiff and others, to take the said defendant, and to deliver him to the Jailer of the Common Jail of the said County; and you, the said Jailer, are hereby required to receive the defendant, and him safely keep in the said Common Jail, for the term of days from the arrest under this warrant, or until he shall be sooner discharged by due course of law, according to the provisions of the Act of Parliament in that behalf; for which this shall be your sufficient warrant.

Given under the seal of the Court this day of A.D. 18 .

X—— Y——, Clerk.

Debt and costs up to the time of the delivery of this warrant of execution $

(95.) WARRANT TO LEVY FINE UPON WITNESS.

In the Division Court in the County of .

[*Seal.*] BETWEEN A—— B——, *Plaintiff*,

AND

C—— D——, *Defendant*.

Whereas at the sittings of this Court, holden on at , it was adjudged that H. H., was duly summoned to appear as a witness in this action, at a sittings of this Court [and also to produce (*as the case may be*)]; that payment (*or* a tender of payment) of his reasonable expenses was made to him, and that he did not appear [*or*, having appeared, did willfully refuse to be sworn and give evidence in this action (*or* to produce such, &c.)]: (*where a witness in Court refuses to give evidence instead of foregoing, commence*, "Whereas H. H., being before the Court at a sittings thereof, and called upon to give evidence in the above cause, did wilfully refuse to be sworn and give evidence"); and thereupon it was adjudged that the said H. H. should pay a fine of $ for such neglect (*or* refusal) in days (*or* forthwith); and whereas the said H. H. hath not made such payment: These are therefore (as before *or* as often before) to command you forthwith to make and levy by distress and sale of the goods and chattels of the said H. H. (not exempt from execution) the said fine and costs, amounting together to the sum of $, and your lawful fees; so that you may have the same within thirty days after the date hereof, and pay the same over to the Clerk of the Court.

Given under the seal of the Court this day of 18 .

By order of the Judge.

X—— Y——, Clerk.

To V. W., Bailiff of the said Court.

Fine ..... $

Costs .....

Execution.....

Levy the sum of..... $, and your own lawful fees.

(96.) WARRANT OF COMMITMENT FOR CONTEMPT IN OPEN COURT.

In the Division Court in the County of .

To V. W., Bailiff of the said Court, and to all Constables and Peace Officers of the County of , and to the Jailer of the Common Jail of the said County of .

Whereas at the sittings of this Court, holden on at , it was adjudged that E. F. did then and there, in open Court, wilfully insult me,

, Judge (*or* Deputy or acting Judge) of the said Court [*or* did, in view of the Court, wilfully insult , Clerk (*or* Bailiff) of the said Court, during his attendance at such Court (*or* did unlawfully interrupt the proceedings of the said Court)]; and it was ordered that the said E. F. should forthwith pay a fine of $, for such offence, and in default of payment, be committed to the Common Jail of the County of for days; and whereas the said E. F. did not pay the said fine, in obedience to the said order: These are therefore to require you, the said Bailiff and others, to take the said E. F., if he shall be found within the said County of , and deliver him to the said Jailer of the Common Jail of the said County of : And you, the said Jailer, are hereby required to receive the said E. F., and him safely keep in the Common Jail aforesaid, for the term of days from the arrest under this warrant, unless the said fine and costs, the costs amounting to $, and also the expenses attending the commitment, amounting together to the sum of $, be sooner paid.

Given under my hand and seal this day of , 18 .

[*L.S.*] ———, Judge.

Sealed with the seal of the Court. [*L.S.*]

X——— Y———, Clerk.

(97.) CERTIFICATE FOR DISCHARGE OF A PARTY FROM CUSTODY.

No. , A.D. 18 .

In the Division Court in the County of .

BETWEEN A——— B———, *Plaintiff*,

AND

C——— D———, *Defendant*.

I, X——— Y———, certify that the defendant, now in your custody under Warrant of Commitment in this cause, has, since the issuing of the said warrant, satisfied the moneys for the non-payment whereof he was so committed, together with all costs and charges in respect thereof; and the said defendant may, in respect of such warrant, be forthwith discharged from and out of your custody.

Given under the seal of the Court this day of , 18 .

[*Seal.*] X——— Y———, Clerk.

To the Jailer of the Common Jail of the County of .

County of
(*here insert the County.*)

TRANSCRIPTS.

(98.) TRANSCRIPT TO ANOTHER DIVISION COURT OF JUDGMENT UNDER THE ACT OF 1869. (*a*)

In the Division Court in the County of .

BETWEEN A——— B———, *Plaintiff*,

AND

C——— D———, *Defendant*.

[*Seal.*] On the day of , 18 , a "*Special Summons*" requiring the defendant to answer the plaintiff's claim for a debt or money demand, amounting to $, was issued out of this

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(*a*) Now section 161.

Court in this cause, with the particulars of the plaintiff's claim thereto attached; on the day of , 18 , the defendant was duly served with a copy of the said summons, and particulars of claim, and the defendant did not leave with the Clerk a notice, as required by the statute in that behalf, that he disputed the plaintiff's claim, or any part thereof (*or as the case may be*); the said summons and particulars, with an affidavit of the due service of each, having been filed, final judgment was entered on the day of , A.D. 18 , by the Clerk, as follows: (*here copy minute of judgment, and if judgment revived state the fact, as in Form* 100). An execution issued against the goods of the defendant on the day of 18 , and was returned on the day of , 18 , *nulla bona* (*or as the case may be*).

Pursuant to the provisions of the Division Courts Act, I, X—— Y——, Clerk of the said Court, do certify that the above transcript is correct, and duly taken from the Procedure Book of the said Court, and that judgment in the above cause was recovered at the date above stated, viz., the day of 18 ; and further, that the amount unpaid on said judgment is $, as stated below.

Given under the seal of the said Court the day of A.D. 18 .

Amount of judgment..... $
Debt .....
Costs .....

Total..... $
Additional costs .....
do Interest .....

Total .....$
Paid .....

Amount due .....$

X—— Y——,
Clerk.

To R—— S——, Clerk of Division Court, County of .

(99.) TRANSCRIPT TO COUNTY COURT OF JUDGMENT UNDER THE ACT OF 1869. (*a*)

In the Division Court in the County of .

BETWEEN A—— B——, *Plaintiff*,

AND

C—— D——, *Defendant*.

The following proceedings were had:—

On the day of 18 , a "*Special Summons*," [*Seal.*] requiring the defendant to answer the plaintiff's claim for a debt or money demand, amounting to $, was issued out of this Court in this cause, according to the statute in that behalf, with the particulars of the plaintiff's claim thereto attached; on the day of 18 , the defendant was personally served with a copy of the said summons, and particulars of claim, and the defendant did not leave with the Clerk a notice, as required by the statute in that behalf, that he disputed the plaintiff's claim, or any part thereof (*or as the case may be*); the said summons and particulars, with an affidavit of the due service of each, having been filed, final judgment was entered on the day of 18 , by the Clerk, as follows: (*here copy minute of judgment, and if judgment revived state the fact,*

(*a*) Now section 165.

as in Form 100). On the day of 18 , a writ of execution on the said judgment was duly issued (*conclude as in last Form, omitting the address to the Clerk*).

(*N. B.—The above Form may be adapted with the necessary alteration for a Transcript to the County Court of a Judgment upon ordinary Summons.*)

(100.) TRANSCRIPT OF JUDGMENT ON ORDINARY SUMMONS FROM ONE DIVISION COURT TO ANOTHER.

In the Division Court in the County of .

Transcript of the entry of a judgment recovered on the day of A.D. 18 , in said Court, holden in and for said Division in a suit numbered , A.D. 18 .

BETWEEN A—— B——, *Plaintiff*,

[*Seal.*]

AND

C—— D——, *Defendant*.

Amount of judgment.	Judgment for plaintiff for $ debt, and $ costs of suit; execution issued on the day of , A.D. 18 , and returned on the day of , A.D. 18 (*here state the return.*) (*If the judgment was revived, add the following words,* "and on the day of , A.D. 18 , the said judgment was duly revived.") Pursuant to the provisions of "The Division Courts Act."
Debt, $	
Costs, $	
$	
Additional costs, $	
Total, $	
Amount paid, $	I, X—— Y——, Clerk of the said Division Court, do certify that the above transcript is correct, and duly taken from the Procedure Book of the said Court, and that judgment in the above cause was recovered at the date above stated, viz., the day of A.D. 18 ; and further, that the amount unpaid on said judgment is $, as stated in the margin hereof.
18	
18	
Total paid, $	
Amt. due, $	

Given under the seal of the said Court this day of A.D. 18 .

X—— Y——, Clerk.

To , Clerk of the Division Court in the County of

NOTICES.

(101.) OF TRIAL BY JURY AND NEW TRIAL.

In the Division Court in the County of .

BETWEEN A—— B——, *Plaintiff*,

AND

C—— D——, *Defendant*.

Take notice, that this cause will be tried by a jury, the plaintiff (*or* defendant) having demanded a jury therein, *or* take notice that the Judge has ordered a new trial upon payment of costs (*or* with costs to abide the event, *or* as the case may be), and has ordered the next trial to be had before a jury (*or as the case may be*).

Dated this day of A.D. 18 .

Yours, &., X—— Y——, Clerk.

To

The above-named plaintiff (*or* "defendant)."

(102.) FOR CLERK'S NOTICES TO THE PLAINTIFF.

No. , A.D. 18 .

In the Division Court in the County of .

BETWEEN *Plaintiff,*

AND

Defendant.

1st. Take notice that the defendant * has given a confession for the full amount of your claim.

Or 2nd. * Disputes your claim, *or* does not dispute your claim.

Or 3rd. * Disputes the following items of your claim, viz., (*here specify the items set forth in the defendant's notice to the Clerk*), and admits the residue, and you are required forthwith to say in writing if you are willing to take judgment for the part admitted.

Or 4th. * Will on the trial claim a set-off against your demand, and the particulars thereof are hereunto annexed.

Or 5th. * Will on the trial insist that your claim is barred by the Statute of Limitations (*or other statutory defence not herein specified*).

Or 6th. * Will on the trial insist that he is discharged from payment of your claim by the provisions of the Insolvent Act.

Or 7th. * Will admit on the trial the 1st, 9th, 11th (or other) items of your particulars of account to be correct.

Or 8th. * Will admit on the trial the signing [*or* endorsement] of the promissory note [*or* bill of exchange] sued upon (*or as the case may be*), and denies the residue of your claim.

Or 9th. * Has paid into Court the sum of $, together with $, for costs of suit incurred up to the day of such payment in full satisfaction of your claim, which will be paid to you upon demand at my office; and all proceedings in the action will be stayed, unless within three days after you receive this notice you signify to me your intention to proceed for the remainder of your demand; and in case you either accept or refuse the same in full, you must give a written notice to that effect to me within the said three days, otherwise you will be liable to pay to the defendant such subsequent costs as he may incur in this action.

Or 10th. * Has pleaded that he duly tendered to and offered to pay you before this action was brought the sum of $ in full satisfaction of your claim, and has filed a plea of such tender in my office, and paid that sum into Court, pursuant to the 87th section (*a*) of the Division Courts Act, and that sum will be paid to you, less one dollar, in case you do not wish to further prosecute your suit, and all proceedings in the action will be stayed, unless you signify to me, within three days from the time you receive this notice, your intention to proceed for your demand, notwithstanding such plea.

Or 11th. * Will on the trial insist that you are not a duly certificated Attorney or Solicitor.

Or 12th. * Will insist upon the defence at the trial that the note (*or* bill) you have sued upon, and which forms (part of) the particulars of your claim, was not duly stamped (*or* that the stamp was not duly cancelled) according to law.

Or 13th. * Will insist as a defence upon the trial that you have not given the proper notice of action before suit to which the defendant is entitled as a Justice of the Peace (*or* Peace Officer) under Con. Stat. of U. C. cap. 126, (*b*) *or* as a Bailiff of the Division Court, under the 193rd section (*c*) of the Division Courts Act.

(*a*) For the words "87th section," insert in notice the words "86th section."

(*b*) Read Revised Statutes, chapter 73.

(*c*) Read 231st section.

Or 14th. *Defends this action under the protecting clauses of the Division Courts Act, viz., sections 192, 193, 195, 196, 197 and 198. (*a*)

Dated the day of A.D. 18 .

X——— Y———, Clerk.

To

The above-named plaintiff.

(103.) DEFENDANT'S NOTICES TO THE PLAINTIFF OR CLERK.

No. , A.D. 18 .

In the Division Court in the County of .

BETWEEN A——— B———, *Plaintiff,*

AND

C——— D———, *Defendant.*

Take notice that I will admit, on the trial, the first, second and third items of the plaintiff's particulars to be correct [or the signing and endorsement of the promissory note sued upon (*or as the case may be,*)] *or*

Take notice that I dispute the claim of the plaintiff *in full* (*or here specify all or any of the grounds of defence set forth in the form for Clerk's notices.*)

Dated the day of , A.D. 18 .

Yours, etc.,

C—— D——, Defendant.

To the Plaintiff (*or* to the Clerk of said Court).

(104.) CONFESSION OF DEBT AFTER SUIT COMMENCED.

In the Division Court in the County of .

BETWEEN A——— B———, *Plaintiff,*

AND

C——— D———, *Defendant.*

I acknowledge that I am indebted to the plaintiff in the sum of $, and consent that judgment for that amount and costs may be entered against me in this cause, according to the practice of the Court.

Dated the day of , 18 . C—— D——, Defendant.

Witness , Clerk (*or* Bailiff).

(105.) BOND ON SUPERSEDEAS TO WARRANT OF ATTACHMENT.

In the Division Court in the County of .

BETWEEN A——— B———, *Plaintiff,*

AND

C——— D———, *Defendant.*

Know all men by these presents, that we, C. D. of [*insert place of residence and addition*], the above defendant, E. F. of, &c., and G. H. of, &c., are, and each of us is, jointly and severally held and firmly bound to A. B. of, &c., the above plaintiff, in the sum of $, to be paid to the said plaintiff, his certain attorney, executors, administrators, and assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, and each and every of us binds himself, his heirs, executors, and administrators firmly by these presents.

Sealed with our respective seals, and dated the day of , 18 .

(*a*) Read sections 230, 231, 226, 227, 228 and 229, respectively.

Whereas the above-named plaintiff hath sued out of the said Court (*or* from a Justice of the Peace) a warrant of attachment against the goods and chattels of the defendant, for the sum of , and under and by virtue of the said attachment, certain goods and chattels of the defendant, to wit: (*specify property seized*) have been seized and attached; and the defendant desires that the said warrant be superseded, and the property so attached restored to him under the provisions of the 209th section (*a*) of the Division Courts Act.

Now the condition of this obligation is such, that if the said defendant, his heirs, executors, or administrators, do and shall, in the event of the claim in the said cause being proved, and judgment being recovered thereon, as in other cases where proceedings have been commenced against the person, pay the same, or pay the value of the said property, so taken and seized as aforesaid, to the plaintiff, his executors or administrators, or produce such property, whenever thereto required, to satisfy such judgment: Then this obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of } C. D. (L.S.) G. H. (L.S.) E. F. (L.S.)

(*Add affidavit of caption.*)

AFFIDAVITS AND OATHS.

(106.) AFFIDAVIT OF SERVICE OF ORDINARY SUMMONS.

In the Division Court in the County of .

BETWEEN A—— B——, *Plaintiff*,

AND

C—— D—— and E—— F——, *Defendants*.

I, V. W., Bailiff of the Division Court in the County of (*or* "of the said Court") make oath and say, that I did on the day of , A.D. 18 , duly serve each of the above defendants (*or if but one served, state* "C. D., one of the defendants,") with a true copy of the annexed summons and statement of claim, by delivering the same personally to each of the said defendants (*or if but one served,* "to C. D., one of the said defendants") (*or if the service was not personal, state how and on whom served,* see D. C. Act, sec. 77), (*b*) and that I necessarily travelled miles to make such service.

Sworn, &c. V—— W——, Bailiff.

(*Or, this form may be used when the affidavit is endorsed on the summons.*)

I swear that this summons and claim therewith were served by me on the day of by delivering a true copy of both, personally, to the defendant (*or* to the wife *or* servant of the defendant, *or* to a grown up person being an inmate of and at the defendant's dwelling), and that I necessarily travelled miles to do so.

Sworn, etc. V—— W——, Bailiff.

(107.) AFFIDAVIT OF SERVICE OF "SPECIAL SUMMONS."

In the Division Court in the County of .

BETWEEN A—— B——, *Plaintiff*.

AND

C—— D——, *Defendant*.

I, V. W., Bailiff of the Division Court in the said County of (*or* of the Court) make oath and say, that I did, on the day of

(*a*) Insert "200th section." (*b*) See section 72.

18 , duly serve the above-named defendant with a true copy of the Summons, Notices and Warnings therein, and the particulars of claim therewith in this cause, by delivering the same personally to the said defendant, (*or if the service was not personal, state how and on whom served*, see D. C. Act, (*a*) sec. 77), and that I necessarily travelled miles to make such service.

Sworn before me at this day of 18 . Clerk. } V. W., Bailiff.

(*Or, this form may be used when the affidavit is endorsed on the summons.*)

I swear that this Summons and the Notices and Warnings therein, and the particulars of claim therewith, were duly served by me on the day of A.D. 18 , by delivering a true copy of each to the defendant personally, (*or if the service was not personal, state how and on whom served*, see D. C. Act, sec. 77), (*a*) and that I necessarily travelled miles to effect such service.

Sworn before me at this day of 18 . Clerk. } V. W., Bailiff.

(108.) AFFIDAVIT OF EXECUTION OF CONFESSION.

In the Division Court in the County of .

BETWEEN A—— B——, *Plaintiff*,

AND

C—— D——, *Defendant*.

I, Clerk (*or* Bailiff) of the Division Court in the County of (*or* of the said Court) make oath and say, that I saw the above (*or* annexed confession) duly executed by the defendant, and that I am a subscribing witness thereto, and that I have not received, and am not to receive, anything from the plaintiff or defendant, or any other person, except my lawful fees, for taking such confession, and that I have no interest in the demand sought to be recovered in this action.

X. Y. (*or* V. W.)

Sworn before me, &c.

(109.) AFFIDAVIT OF EXECUTION (CAPTION).

In the Division Court in the County of .

BETWEEN A—— B——, *Plaintiff*,

AND

C—— D——, *Defendant*.

I, O. P., of the, etc. make oath and say, that on the day of A.D. 18 , I was present and saw G. H. and K. L. (*as the case may be*) duly sign and execute the annexed award (*or* bond, *or other instrument*).

That the names G. H. and K. L. at the foot the of said award (*or as the case may be*) are of the proper handwriting of the said G. H. and K. L., and that the name O. P. subscribed to the same as the witness thereto is my proper handwriting.

Sworn, etc. O. P.

(*a*) Now section 72.

(110.) FORMS OF OATH, &c.

(*a*) To a witness at the trial who swears upon the Bible:

"The evidence you shall give to the Court (and Jury sworn), touching the matters in question between the parties, shall be the truth, the whole truth, and nothing but the truth. *So help you God.*"

(*b*) To a witness who swears with uplifted hand:

Add to the foregoing after the last word "*truth*," "and this you do swear in the presence of the everliving God, and as you shall answer to God at the great judgment day. *So help you God.*"

(*c*) To a Jew: He is to be directed to cover his head, the Pentateuch is to be opened and placed before him; then proceed as in the first form, only make use of the name "*Jehovah*" instead of "*God.*"

(*d*) To a Quaker, Menonist, or Tunker, or other person allowed by law to affirm:

The witness is to be directed to repeat his name after the Clerk, and the following: "I, K. L., do solemnly, sincerely and truly declare and affirm that I am one of the Society called Quakers" (*or as the case may be*), after which, the affirmant, repeating his name, "I, K. L., do solemnly, sincerely and truly declare and affirm that the evidence I shall give to this Court touching the matters in question," &c.

(*e*) To an interpreter (where witness cannot speak English, or is deaf and dumb):

"You shall truly interpret between the Court (the Jury), the parties in this cause, and the witness produced. *So help you God.*"

(*f*) To a witness sworn on *Voire Dire:*

"You shall true answers make to such questions as shall be put to you touching your interest in the event of this cause. *So help you God.*"

(*g*) To Jury called by parties:

"You and each of you shall well and truly try the matters in difference between the parties, do justice between them according to the best of your skill and ability, and a true verdict give according to the evidence. *So help you God.*"

(*h*) To Jury called by the Judge:

"You and each of you shall well and truly try the facts controverted in this cause between the parties, and a true verdict give according to the evidence. *So help you God.*"

(*i*) To a defendant who appears upon a judgment summons:

"You shall true answers make to all such questions as shall be put to you touching the subject upon which you have been now summoned to appear for examination, and what you shall state respecting the same shall be the truth, the whole truth, and nothing but the truth. *So help you God.*"

(*j*) To the officer who conducts a retiring Juror out of Court:

"You shall retire with such Jurors as have leave of absence from this Court; you shall not speak to them yourself in relation to the subject of this trial, nor suffer any person to speak to them, and you shall return with them without unnecessary delay. *So help you God.*"

(*k*) To the officer, when the Jury retire to consider their verdict:

"You shall keep every person sworn on this Jury in some private and convenient place without meat or drink; you shall not suffer any person to speak to them, or speak to them yourself, except to ask them whether they have agreed on their verdict. *So help you God.*"

(*l*) To a deponent or affirmant swearing to an affidavit or affirmation:

"You do swear (or affirm) that the contents of this affidavit (*or* affirmation), to which you have subscribed your name (*or* made your mark), are just and true.

So help you God." (*Or*, "and so you solemnly, sincerely and truly declare and affirm.")

(*m*) OATH TO BE ADMINISTERED TO WITNESS BY ARBITRATOR OR UMPIRE.

The evidence which you shall give before me as arbitrator (*or* umpire) touching the matters in difference in this reference shall be the truth, the whole truth, and nothing but the truth. *So help you God.*

(*n*) JURAT TO AFFIDAVIT BY ILLITERATE DEPONENT.

Sworn by the above named deponent, A. B., at , in the County of on , and I certify that the affidavit was first read in my presence to said A. B., who seemed perfectly to understand the same, and wrote his signature (*or* made his mark) thereto in my presence.

X——Y——, Clerk, &c.,
(*Or as the case may be*).

(*o*) AFFIRMATION BY QUAKERS, ETC., AND JURAT THERETO.

(Court and style of cause).

I, A. B., of , &c., do solemnly, sincerely and truly declare and affirm, that I am one of the Society called Quakers (*or* Menonists, Tunkers, Unitas Fratrum or Moravians, *as the case may be*), and I do also solemnly, sincerely, and truly declare and affirm as follows, that is to say (*state the facts*).

Solemnly affirmed at , in the County of , on , before me. } A.B.

X—— Y——, *Clerk, &c.*
(*Or as the case may be*).

(III.) AFFIDAVIT OF JUSTIFICATION.

In the Division Court in the County of .

BETWEEN *Plaintiff*,

AND

Defendant.

We (C. D. and E. F., of, &c.), the sureties in the annexed bond named, do severally make oath and say, as follows:

First: I, deponent C. D., for myself, make oath and say, that I am a holder, residing at , and that I am worth property to the amount of $ over and above what will pay my just debts.

Secondly: I, deponent E. F., for myself, make oath and say, that I am a holder, residing at , and that I am worth property to the amount of $ over and above what will pay my just debts.

C—— D——.
E—— F——.

The above-named C. D. and E. F. were severally sworn before me at , in the County of , the day of A.D. 18 .

X——Y——, Clerk.

(112.) AFFIDAVIT OF DISBURSEMENTS (*a*) TO SEVERAL WITNESSES.

In the Division Court in the County of

BETWEEN A—— B——, *Plaintiff.*

AND

C—— D——, *Defendant.*

I, A. B., of the above plaintiff (*or* C. D., the above defendant, *or* E. F., agent for the above plaintiff *or* defendant), make oath and say:—

1st. That the several persons whose names are mentioned in the first column of the schedule at the foot hereof were necessary and material witnesses on my behalf (*or* on behalf of the said plaintiff *or* defendant), and attended at the sittings of this Court on the day of as witnesses on my behalf (*or* on behalf of the said defendant or plaintiff), and that they did not attend as witnesses in any other cause; (*if otherwise, state the facts*).

2nd. That the said witnesses necessarily travelled, in going to the said Court, the number of miles respectively mentioned in figures in the second column of the said schedule opposite to the names of each of the said witnesses respectively.

3rd. That the several and respective sums of money mentioned in figures in the third column of the said schedule, opposite to the names of the said witnesses, respectively, have been paid by me (*or* by the plaintiff *or* defendant) to the said witnesses, respectively, as in the said schedule set forth, for their attendance and travel as witnesses in this cause.

A. B.

Sworn before me at this day of 18 .

X—— Y——, Clerk.

SCHEDULE REFERRED TO IN THE FOREGOING AFFIDAVIT.

NAME OF WITNESSES.	MILES.	SUMS PAID.

(*a*) In order to entitle a party to a cause to witness fees, it must be shewn that he attended solely for the purpose of giving evidence on his own behalf, and not for the purpose of superintending the cause: *Howes* v. *Barber*, 18 Q. B. 588; *Flower* v. *Gardner*, 3 C. B. N. S. 185; *Moffatt* v. *Prentice*, 6 P. R. 33; sec. 88, note (*d*); *Dowdell* v. *Australian Nav. Co.*, 3 E. & B. 905, *per* Lord Campbell, C. J. For that purpose the affidavit of disbursements should contain an additional clause, which may be in these words: "4th. That I was a necessary and material

(113.)—AFFIDAVIT FOR REVIVAL OF JUDGMENT.

In the Division Court in the County of .

BETWEEN A——— B———, *Plaintiff*,

AND

C——— D———, *Defendant*.

I, A. B., of the of in the County of , yeoman (*if the affidavit be made by the plaintiff's attorney or agent with the necessary alteration*), make oath and say as follows:

1st. On the day of , A.D. 18 , I recovered a judgment of this Court against the above-named defendant for $ debt, and $ costs of suit.

2nd. No part of said moneys so recovered has been paid or satisfied, and the said judgment remains in full force (*or* "the sum of , part only of the said moneys, has been paid, and the judgment remains in full force as to the residue of the said moneys so recovered thereby.")

3rd. I (*or* "the said plaintiff,") am entitled to have execution of the said judgment, and to issue execution thereupon (for the sum of $) as I verily believe.

Sworn, etc.

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witness on my own behalf on the trial of this cause, and I attended and gave evidence on my own behalf on said trial; that I attended said trial solely for the purpose of giving such evidence, and not as a witness in any other cause or matter whatsoever, or for any other reason whatsoever, and I would not have attended said sittings except to give said evidence, and in order to do so I necessarily travelled miles." When the affidavit is made by an agent the above form can easily be adapted. The Judge could, independently of this order, allow defendant a sum of money for his trouble and attendance, under section 154. As to what witnesses should be allowed, and the amount of their fees, are matters in the discretion of the Clerk: *Skelton* v. *Seward*, 1 Dowl. 411, R. 147, subject to revision by the Judge under section 38. The general rule is to disallow the expenses of witnesses rejected by the Judge at the trial: *Galloway* v. *Keyworth*, 15 C. B. 228, and the same rule applies to a witness rejected by an arbitrator: *Ib.* The fact of witnesses not being called at the trial is no ground for disallowing their expenses, provided the Clerk is satisfied their attendance was *reasonably* necessary: *Morison* v. *Harmer*, 5 Scott, 410. "The costs of all witnesses will be allowed whom a *prudent* attorney, having regard to the interests of his client, would have brought, though they may not have been called, or the jury may have refused to act upon their evidence, unless in either case it was inadmissible or inapplicable to any issue upon which the party has succeeded:" Lush's Pract., 3rd Ed., 895. Should any admissions be made, or the state of the cause be altered, rendering certain witnesses unnecessary, the party who subpœnaed them must make reasonable efforts to prevent their attendance or their expenses will not be allowed: *Allport* v. *Baldwin*, 2 Dowl. 509; *Davis* v. *Thomas*, 5 Jur. N. S. 709. A witness who does not arrive until after the cause is disposed of is not properly chargeable as a witness in the cause: *Fryer* v. *Starr*, 16 C. B. 218. The Clerk should not allow anything more than the sum *actually paid* to a witness: *Ratcliffe* v. *Hall*, 2 C. M. & R. 258. The *materiality* of a witness is a question for the Clerk, subject to review by the Judge: *Galloway* v. *Keyworth*, *supra*. The true criterion of taxation appears to be, whether the evidence is necessary for the party *at the time of the trial*: *Matthews* v. *Livesley*, 11 Ex. 224. All witnesses must be *paid* before taxation: *Ham* v. *Lasher*, 24 U. C. R. 357. It is submitted that where a public officer in charge of documents for which he is responsible attends as a witness in his public capacity under a Division Court subpœna, and in relation to matters connected with his office, he should not be allowed any more than an ordinary witness. It may be that he should be allowed $4 a day if he attended under Superior Court subpœna: *In re Nelson*, 2 Chan. Cham. 252. The engagement of a witness who was a Senator of the Dominion and a member of the Executive Council at his duties at Ottawa, when the Senate was in session, was deemed sufficient excuse for not procuring his attendance, and good ground for putting off the hearing of a cause: *Rees* v. *Atty.-General*, 2 Ch. Cham. 386. Where a party to a suit calls the opposite party he is not necessarily concluded by his answers: *Muir* v. *Cody*, 10 U. C. R. 321. The fact of money due to a witness for his attendance having been set-off against expenses incurred by the successful party in conveying him to Court and keeping him while there, is an insufficient payment: *Cross* v. *Durrell*, 29 L. J. Ex. 473. If the witnesses have not been *actually* paid, the Judge would probably order the sums sworn to have been paid, and allowed by the Clerk, to be refunded: *Trent* v. *Harrison*, 2 D. & L. 941; see sections 95 and 96.

(114.) BILL OF COSTS.

Upon a Claim for say $20.

Upon Special Summons to Judgment entered.

Clerk's Fees—Receiving claim, &c.	$0 10
Issuing Special Summons	0 25
Copies of Process and Claim	0 20
Affidavit of Service and Oath	0 20
Entering Bailiff's Return	0 05
Notice of Admission	0 10
Entering final Judgment	0 25
Postages	0 05
Bailiff's Fees—Service of Summons	0 10
Attending to make return and proving	0 10
(*a*) Fee Fund, entering, &c., 10c.; hearing and order, 30c	0 40
6th Oct., 186 .—Taxed costs at	$1 80

X——— Y———, Clerk.

Upon Claim for say $60, Defended, Tried and Judgment Entered.

Clerk's Fees—Receiving claim, &c.	$0 10
Issuing Special Summons, &c	0 35
Copy of Process and Claim	0 30
Affidavit of Service and Oath	0 20
Entering Bailiff's Return	0 05
Summons to Witness, 10c.; 2 copies, 10c.	0 20
Entering Notice of Defence	0 15
Notice to Plaintiff and postage	0 15
Entering Judgment	0 25
Bailiff's Fees—Service of Summons, 20c; mileage 20c.	0 40
Attending to Return and Proof	0 10
Service Summons on Witnesses	0 20
Mileage	0 50
Duties at Trial	0 05
(*a*) Fee Fund—Entering, &c	0 40
Hearing and Order	1 30
	$4 70
Allowed Witnesses	2 00
——Oct. 18 .—Taxed costs at	$6 70

X——— Y———, Clerk.

(*a*) Fee Fund moneys abolished by 37 Vic. cap. 7, sec. 90; see also Rule 169.

(115.)—CLERK'S RETURN OF EMOLUMENTS.

RETURN of X——— Y———, Clerk of the Division Court in the County of , of all Fees and Emoluments from first day of to the day of 18 , both days inclusive, made in pursuance of "The Upper Canada Division Courts Act," section 41. (*a*).

ON WHAT.	No.	RATE.	AM'NT.
Receiving claim, numbering and entering in Procedure Book	....	$0 10	
Issuing summons, with necessary notices thereon, or Judgment Summons — Not exceeding $20	....	0 20	
Issuing summons, with necessary notices thereon, or Judgment Summons — Exceeding $20	....	0 30	
Issuing summons, with necessary notices thereon, or Judgment Summons — Exceeding $60	....	0 40	
(For "Special Summons," with warnings subjoined. Summons in replevin or interpleader, or under the garnishee clauses, 5cents extra.)	....	0 05	
Copy of process, or claim, or set-off or other paper required for service or transmission to Judge, each — Not exceeding $20	....	0 10	
Copy of process, or claim, or set-off or other paper required for service or transmission to Judge, each — Exceeding $20	....	0 15	
Copy of process, or claim, or set-off or other paper required for service or transmission to Judge, each — Exceeding $60	....	0 20	
(Where the claim or set-off exceeds 3 folios of 160 words in length, for every additional folio 5 cents, if allowed by the Judge.)	....	0 10	
Summons to witnesses, with any number of names therein	....	0 10	
For every copy to serve	....	0 05	
Drawing every necessary affidavit, and administering oath	....	0 20	
(When exceeding 2 folios in length, 5 cents for every additional folio if allowed by the Judge.)			
Entering Bailiff's return to process, or Judge's order	....	0 05	
Entering notice of set off, plea of payment or other defence requiring notice to the plaintiff, or notice of admission as to claim	....	0 15	
Taking confession of judgment	....	0 10	
Every notice required to be given by Clerk to any party to a cause or proceeding, or to the Judge in respect to the same, and mailing	....	0 10	
Entering every judgment, or order made at the hearing, or final order made by the Judge, or final judgment entered by Clerk	....	0 25	
Summons for each Juryman, when called by the parties	....	0 10	
Returning Judge's Jury	....	0 25	
Order of reference, attaching order, or other order drawn and entered by Clerk	....	0 15	
Transcript of judgment (under sec. 139 or 142) (*b*)	....	0 25	
Every writ of execution, warrant of attachment, or warrant for arrest of delinquent — Not exceeding $20	....	0 30	
Every writ of execution, warrant of attachment, or warrant for arrest of delinquent — Exceeding $20	....	0 40	
Every writ of execution, warrant of attachment, or warrant for arrest of delinquent — Exceeding $60	....	0 50	
Every bond, when necessary, including affidavit of justification	....	0 50	
Necessary entries made in the debt attachment book in each case (in all)	....	0 15	
Transmitting papers for service to another division or to Judge, on application to him, including the necessary entries, but not including postages	....	0 20	
Receiving papers from another division for service entering the same, handing to the Bailiff, receiving his return and transmitting same	....	0 30	
Searches	....	0 10	

I, X——— Y———, above named, make oath and say that the foregoing Return contains a full and correct statement, in every particular, to the best of my knowledge and belief, of the Fees and Emoluments of my Office, received or receivable on business done during the period above mentioned.

X——— Y———, Clerk.

Sworn before me at in the County of , this day of 18 .

(*a*) *Now* sec. 42.

(*b*) Insert "under sec. 161 or 165."

(116.)—LIST OF UNCLAIMED MONEYS VERIFIED.

List of unclaimed moneys paid into Court, or to me as Clerk thereof, which remain unclaimed for six years, ending on the 31st day of December last past.

For whom or on whose account money paid.	When paid.	Style and No. of Suit.	Amount. $ cts.

I, X. Y., Clerk of the Division Court in the County of , make oath and say that * the foregoing return is full and correct in every particular * (*or if no moneys remain unclaimed, instead of the matter between the asterisks say,* "no such moneys paid into Court, or to me as Clerk thereof, remain unclaimed for six years next before 31st day of December last past.")

Sworn, &c.

X—— Y——, Clerk.

BAILIFF'S FORMS.

(117.)—REPLEVIN BOND.

Know all men by these presents, that we, A. B., of, &c., W. B., of, &c., and J. S., of, &c., are jointly and severally held and bound to V. W., Bailiff of the Division Court in the County of in the sum of $, to be paid to the said Bailiff, or his certain attorney, executors, administrators or assigns, for which payment, to be well and truly made, we bind ourselves, and each and every of us in the whole our and each, and every of our heirs, executors and administrators, firmly by these presents, sealed with our seals, and dated this day of , A.D. 18 .

The condition of this obligation is such, that if the above bounden A. B. do prosecute his suit with effect, and without delay, against C. D. for the taking and unjustly detaining (*or* unjustly detaining, *as the case may be*) of his cattle, goods and chattels, to wit: (*here set forth the property distrained, taken or detained*), and do make a return of the said property, if a return thereof shall be adjudged, and also do pay such damages as the said C. D. shall sustain by

the issuing of the writ of replevin, if the said A. B. fails to recover judgment in the suit; and further, do observe, keep and perform all orders made by the Court in the suit; then this obligation shall be void, or else remain in full force and effect.

Signed, sealed and delivered, in the presence of } A. B. [L.S.] W. G. [L.S.] J. S. [L.S.]

(118.)—FORM OF ASSIGNMENT TO BE ENDORSED, IF REQUIRED.

Know all men by these presents, that I, V. W., Bailiff of the Division Court for the County of , have, at the request of the within named C. D. (*the defendant*), assigned over this replevin bond unto the said C. D., pursuant to the statute in such case made and provided.

In witness whereof I have hereunto set my hand and seal of office this day of 18 .

Signed, sealed and delivered, in the presence of } V. W. [*Seal.*]

(119.)—BAILIFF'S RETURN TO WRIT OF REPLEVIN.

In the Division Court in the County of .

BETWEEN A——— B———, *Plaintiff*,

AND

C——— D———, *Defendant*.

(*a*) In pursuance of sec. 11 of 22 Vic., cap. 20, and sec. 5 of 23 Vic., cap. 45, I have taken from said plaintiff a bond, conditioned as by said Acts required, made by him and two sureties, namely, of the of in the County of , yeoman (*or as the case may be*), *or*, of the same place (*or as the case may be*), which bond bears date the day of , 18 , and is witnessed by .

And by virtue of the annexed writ to me directed, I have seized and delivered to the plaintiff the goods mentioned in said writ, that is to say (*describing the goods by number, quantity and quality, or if only a part have been replevied*, say a portion of goods in writ mentioned, that is to say (*describing them*), and I cannot make replevin of the residue of said goods, namely (*shortly describing them*), as by said writ commanded, by reason of the same having been eloined out of this country by the defendant (*or as the case may be*).

(120.)—INVENTORY OF GOODS SEIZED OR REPLEVIED.

An inventory of property and effects by me this day seized (*or* replevied) in the *Township* of , by virtue of a writ of (*as the case may be*), issued by A. B., Clerk of the Division Court of the County of (*or as the case may be*), on behalf of E. F. against C. D.: that is to say, one lumber waggon, etc. (*stating* all the articles seized).

Dated this day of A.D. 18 .

V——— W———, Bailiff, etc.

(*a*) Insert "In pursuance of sec. 11, Rev. Stat., cap. 53, I have taken," &c.

(121.)—APPRAISER'S OATH ON ATTACHMENT CASES.

You, and each of you, shall well and truly appraise the property and effects mentioned in this inventory (*holding it in his hand*) according to the best of your judgment. *So help you God.*

(122.)—APPRAISEMENT TO BE ENDORSED ON INVENTORY.

We, B. B. and B. D., being duly sworn by the Bailiff, V. W., to appraise the property and effects mentioned in the within inventory to the best of our judgment, and having examined the same, do appraise the same at the sum of

Witness our hands this day of , A.D. 18 .

B. B.
B. D.

(123.)—NOTICE OF SALE.

By virtue of an execution issued out of the Division Court for the County of , and to me directed, against the goods and chattels of , at the suit of , I have seized and taken in execution, one bay horse, &c.

All which property will be sold by public auction at , on the day of 18 , at the hour of o'clock in the noon.

V. W., Bailiff.

Dated day of , 18 .

(124.)—RETURNS TO EXECUTIONS, &c.

(*a*) *Nulla bona.*—The within defendant (*or* plaintiff) hath no goods or chattels in the said County of whereof I can make the moneys to be levied, as within commanded.

V. W., Bailiff.

Dated day of A.D. 18 .

(*b*) *Feci.*—By virtue of the within execution, I have made of the goods and chattels of the defendant (*or* plaintiff) the moneys within mentioned, and have paid the same to the said Clerk, as within commanded.

V. W., Bailiff.

Dated day of A.D. 18 .

(*c*) *Part made.*—By virtue of the within execution, I have made of the goods and chattels of the defendant (*or* plaintiff) $, and have paid the same to the said Clerk, and the defendant (*or* plaintiff) hath no more goods or chattels in the said County of whereof I can make the residue of the said moneys, or part thereof.

Dated day of A.D. 18 V. W., Bailiff.

WHEN RENT LEVIED BY BAILIFF.

(*d*) By virtue of the within execution, I have made of the goods and chattels of the plaintiff (*or* defendant) $, part whereof, $, I have paid to O. B., landlord of said plaintiff (*or* defendant), for one quarter's rent in respect of premises when levy made; and a further part, $, I have retained as fees on execution. The residue, $, I have paid to the said Clerk, as within commanded.

Dated day of A.D. 18 . V. W., Bailiff

(125.) BOND ON SEIZURE OR SALE OF PERISHABLE PROPERTY.

In the Division Court in the County of .

BETWEEN A——— B———, *Plaintiff*,

AND

C——— D———, *Defendant*.

Know all men by these presents, that we, A. B., of (*insert place of residence and addition*) the above-named plaintiff, E. F., of, &c., and G. H., of, &c., are, and each of us is, jointly and severally held and firmly bound to C. D., the above-named defendant, in the sum of $ to be paid to the defendant, his certain attorney, executors, administrators, and assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, and each, and every of us, binds himself, his heirs, executors, and administrators, firmly by these presents.

Sealed with our respective seals, and dated this day of A.D. 18 .

Whereas the above-named plaintiff hath sued out of the said Court (*or* from a Justice of the Peace) a warrant of attachment against the goods and chattels of the defendant, and hath requested that certain perishable property, to wit (*specify property*) belonging to the defendant, may be seized, and forthwith exposed and sold, under and by virtue of the said warrant of attachment [*or* whereas certain perishable property to wit , belonging to the defendant, hath been seized under and by virtue of a warrant of attachment, issued out of the said Court (*or* by a Justice of the Peace) in the above-named cause, and hath been duly appraised and valued at the sum of $ and is now in the hands of the Clerk of the said Court; and whereas the plaintiff hath requested the said Clerk to expose and sell the said goods and chattels as perishable property] according to the form of the statute in that behalf.

Now, the condition of this obligation is such, that if the said plaintiff, his heirs, executors or administrators, do repay to the said defendant, his executors or administrators, the value of the said goods and chattels, together with all costs and damages that may be incurred in consequence of the seizure and sale thereof, in case judgment be not obtained by the plaintiff, according to the true intent of the 214th section (*a*) of the Division Courts Act, then this obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

A. B. [L.S.]
E. F. [L.S.]
G. H. [L.S.]

(*a*) Now the 205th section.

(126.)—FORM OF BAILIFF'S RETURN.

N.B.—This form is to be used in making returns under the 93rd General Rule, which rule is to be read and understood in connection with the provisions of the Division Courts Act, touching the execution and return of Writs of Execution, and with Rule 94. As the return is made and sworn to every Court day, the dates are to be filled in as noted, viz.: (*a*) the day next before the last Court day; (*b*) the day on which return made; and note further, (*c*) when process is other than a Writ of *Fieri Facias*, it should be so noted; (*d*) in this column is to be set down the particular return made, with any other information necessary to shew the due and faithful discharge of duty by the Bailiff in respect to each case.

RETURN OF V——— W———, Bailiff of the Division Court in the County of , made in pursuance of the Rules of Practice touching all Warrants, Precepts and Writs of Execution, acted on or in hand, between the (*a*) day of , A.D. 18 , and the (*b*) day of A.D. 18 .

Numbers.	Style of Cause.	When Writ of *Fieri Facias* received. (*c*)	Amount to be levied.	Amount levied.	When levied.	Amount of Bailiff's charges.	Amount paid to Clerk.	When paid.	Remarks. (*d*)
		A.D. 18 .	$ cts.	$ cts.	A.D. 18	$ cts.	$ cts.	A.D. 18	

I, V——— W———, above named, make oath and say, that the foregoing return is full, true and correct in every particular.

Sworn before me at , in the County of , this day of , A.D. 18 .

X——— Y———, Clerk.

V——— Y———, Bailiff.

N.B.—The foregoing Return will serve as a guide for the form and mode of ruling "The Bailiff's Process Book"

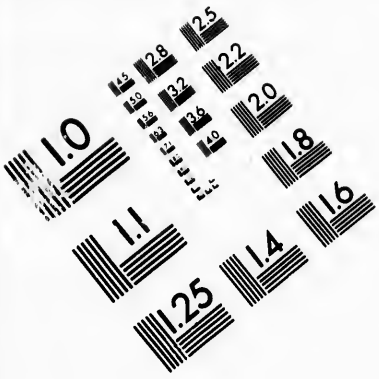
(127.) SCHEDULE OF CLERK'S FEES. (*a*)

	$ c.
Receiving (*b*) claim, numbering and entering in Procedure Book	0 15
Issuing summons with necessary notices or warnings thereon, or judgment summons (*c*)	
Where claim does not exceed $20	0 30
" " exceeds $20 and does not exceed $60	0 40
" " exceeds $60	0 50
Copy of process, (*d*) of claim, or set-off, or other paper required for service or transmission to Judge, each	0 20
Summons to witness (*e*) with any number of names thereon	0 10
For every copy to serve (*f*)	0 05
Receiving and entering Bailiff's return to process or Judge's order (*g*)	0 10
Entering (*h*) notice of set-off, plea of payment, or other defence, requiring notice to the plaintiff, or notice of admission (*i*) as to payment	0 20
Taking confession of judgment	0 10
Drawing every necessary affidavit and administering oath	0 25
Every notice required (*j*) to be given by Clerk to any party to a cause or proceeding, or to the Judge in respect to the same, and mailing	0 10
Entering every judgment, or order made at the hearing (*k*) or final order made by the Judge, or final judgment entered by the Clerk	0 40
Summons for each juryman, when called by the parties	0 10
(Only 25c. in all to be allowed for a Judge's Jury.)	
Order of reference, attaching order, or other order drawn and entered by the Clerk	0 15
Transcript of judgment (under secs. 139 or 142)	0 25
Every writ of execution, (*l*) warrant of attachment or warrant for arrest of delinquent	0 40
Every bond, when necessary, including affidavit of justification	0 50
For necessary entries in the debt attachment book in each case (in all)	0 20

	$ c.
Transmitting papers for service (*m*) to another Division or to Judge, on application to him, including necessary entries, but not postages	0 20
Receiving papers from another Division for service, (*n*) entering same, handing to the Bailiff, receiving his return, and transmitting same (if return made promptly, not otherwise.)	0 30
Search by person not party to the suit or proceeding (*o*) to be paid by the applicant, 10c.; search by party to the suit or proceeding where service is over one year old, 10c. (No fee is chargeable for search to a party to the suit or proceeding, if the same is not over one year old.)	

(128.) SCHEDULE OF BAILIFFS FEES.

Service of summons, order, or other process (*p*) on each person (except summons to witness and summons to juryman) where claim does not exceed $20	0 20
" " exceeds $20 and does not exceed $60	0 30
" " " $60	0 40
Service of summons on witness or juryman, or service of notice	0 10
Taking confession of judgment, and attending to prove	0 10
Enforcing every writ of execution, (*q*) warrant of attachment, or warrant against the body, each	
Where claim does not exceed $20	0 40
" " exceeds $20 and does not exceed $60	0 60
" " " $60	0 80
(Executing summons in replevin, including service on defendant, same charge.)	
Every mile necessarily travelled (*r*) to serve summons or process, or other necessary papers, or in going to seize on attachment, or in going to seize on a writ of execution, where money made or case settled *after levy* (*s*)	0 11
(In no case is mileage to be allowed for a greater distance than from the Clerk's office to the place of service or seizure.)	
Mileage to arrest delinquent (*t*) under a warrant to be at 11 cents per mile, but for carrying delinquent to prison, including all expenses and assistance, per mile	0 20



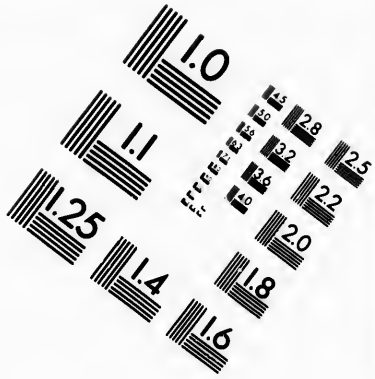
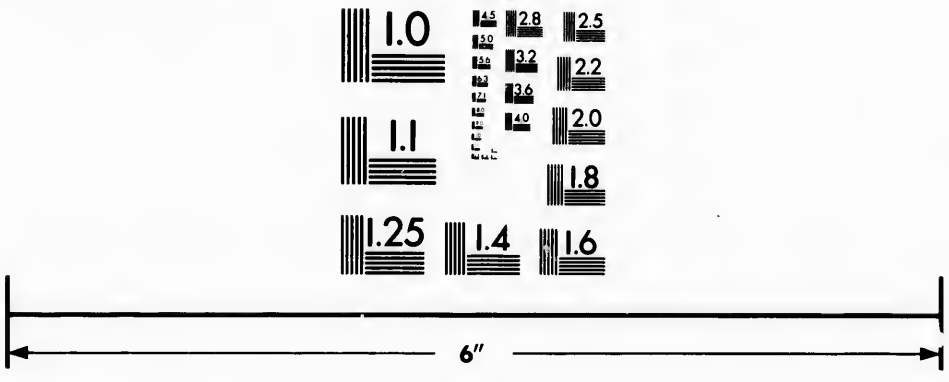
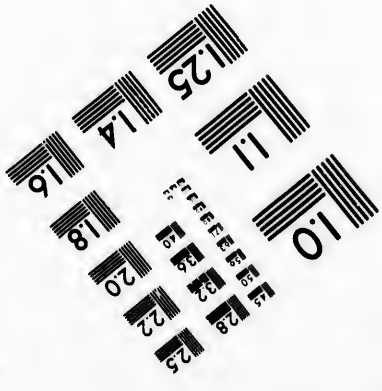


IMAGE EVALUATION TEST TARGET (MT-3)





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	$	c.
Every schedule of property seized, attached, or replevied, including affidavit of appraisal, when necessary		
Not exceeding $20	0	30
Exceeding $20 and not exceeding $60	0	50
Exceeding $60	0	75
Every bond, when necessary, including affidavit of justification	0	50
Every notice of sale, (*u*) not exceeding three, under execution or under attachment, each	0	15
There shall be allowed to the Bailiff, for removing or retaining property seized under execution or attached, reasonable and necessary disbursements and allowances, to be first settled by the Clerk, (*v*) subject to appeal to the Judge.		
There shall be allowed to the Bailiff five per cent. upon the amount realized from the sale (*w*) of property under any execution, but such percentage not to apply to any overplus thereon.		

(*a*) It is not the purpose of the author, or within the scope of this work, to discuss the propriety or inadequacy of the fees established by this tariff. In many cases duties are cast upon Clerks and Bailiffs of an onerous and important character for which no compensation is allowed. Responsibilities are imposed and services required without the slightest recognition of a pecuniary nature. This should not be, and it is respectfully submitted that the true principle (if such a tariff is to be continued) is, that compensation should be made for every substantial act of an officer for which the law casts on him a responsibility. So far as Clerks are concerned, we think a tariff might be framed by which less doubt would exist of the fees properly chargeable by them, by adopting a scale, *in round figures*, proportionate to the amount of the claim and the different stages or steps in the cause. This would, to a very great extent, do away with the complaints so frequently made of the improper exaction of fees by Division Court officers, and of the abuses of the Division Court system. Some change in this direction is much required, and would be hailed by all honest Clerks, and suitors generally, as a much-needed reform.

But our purpose now is simply to take the tariff as it stands, and, if possible, to point out by the light of authority, or, if that be wanting, by a fair discussion of the different items, what reasonable interpretation should be given to these items. The tariff prescribes *all* that a Clerk or Bailiff has any right to take (*Dartnell* v. *The Quarter Sessions of Prescott and Russell*, 26 U. C. R. 430), and to exceed anything there prescribed would be a wilful violation of the law and subject him to dismissal from office: Rule 164 and section 219. No counsel or attorney's fees of any kind are taxable in the Division Courts: 10 U. C. L. J. 258-260. In Dartnell's case, Hagarty, J., at page 434 of 26 U. C. R., in speaking of Clerks of the Peace, says that they "do a great deal of work for nothing, but that we cannot help." The same may, with equal propriety, be said of Division Court officers.

(*b*) By Rule 2, sub-section 15, the words "the claim" shall mean "the demand or the subject matter for which any suit or proceeding is brought or instituted in a Division Court." In ordinary claims on the commencement of

suits there can be no question about this item; but a practice has been adopted in some places of making this charge on the issuing of all judgment summonses and summonses after default, and of charging, not only the fifteen cents under the first item of the tariff for each of such proceedings, but for the application or "minute in writing," (which, under Rule 7, the execution creditor has entered with the Clerk) *as an order*. A liberal interpretation of the tariff, in our opinion, entitles the Clerk to the fee of fifteen cents on entering the claim on these summonses, but the charge of forty cents on the "minute in writing," or application to the Clerk for the judgment summons, *as an order*, is wholly indefensible, and is the emanation of too suggestive a mind. When an "order" is mentioned in the tariff it means some command or direction of the Judge. A party to a suit certainly cannot make an order. It is submitted that this latter charge should, where hitherto made, be discontinued. As well might any other direction to the Clerk be considered an order. The only difference is, that as the judgment summons is calculated to affect the liberty of the subject and is highly penal in its consequences, the law very properly requires that a *written* request be made for its issue, so that a debtor may see that the proceeding is taken by some one having authority to do so.

(*c*) See notes to Rule 3, and especially section 68.

(*d*) In every summons against one defendant there is only chargeable one copy of summons and one copy of claim: see notes to section 68 and remarks there made, and Rule 3. This includes all notices or warnings on such copy, because it would not be a complete copy without them. The Clerk is also entitled to charge for a copy of any paper "required for service," that is where *by law* service is required. Whenever it is necessary to transmit papers to the Judge, the Clerk is, under this item, also entitled to twenty cents for every copy required. In an application for new trial, for instance, a "copy of the claim and other papers requisite to the proper understanding of the case," under Rule 142 (*b*) must be sent to the Judge. "What are *necessary* papers must depend on the circumstances of each particular case and the grounds of application, and no general rule can be laid down:" 2 U. C. L. J. 22. It is submitted that a copy of summons and claim *each* should at least be sent to the Judge, and of any other papers that might be reasonably required. If the Clerk should, to save trouble, send the originals instead of the copies, he could not charge anything for copies under this item. As remarked by Galt, J., in *Ross* v. *McLay*, 26 C. P., at page 199, "it is sufficient to say that he has charged the plaintiff for services which he did not render, and therefore the charges must be disallowed." Should the Act or Rules of Court, or the Judge, require the Clerk to transmit a copy of any other paper to the Judge, he would also be entitled to his fee for such copy. The Judge would, of course, see that the Clerk did not create an abuse by sending unnecessary copies of any papers.

(*e*) The names of all a party's witnesses should be inserted in the original subpœna; but in a case where a witness was required who was not known to the party at the time of issuing the subpœna, and whose evidence was material, the costs of a second subpœna for him should be allowed: see notes to sections 96 and 97, and Form 112.

(*f*) If made out by the Clerk, this fee is chargeable, but a party is not bound to take copies of a subpœna from the Clerk. He may, in strictness, make them out himself, but parties usually allow the Clerk to furnish the copies.

(*g*) "Process shall mean any summons, writ, or warrant, issued under the seal of the Court or Judge's summons or order:" Rule 2. If by law the Bailiff is bound to make a return of any paper, within the definition given in that Rule, then the Clerk is entitled to this fee.

(*h*) This charge is only allowable where notice is *by law required* to be given to the plaintiff.

(*i*) Sometimes this charge is made for notifying the plaintiff that the amount of debt has been paid into Court, and for him to call and get it. Such a charge is entirely unauthorized. By Rule 95, if any "Clerk shall receive money for any party by virtue of his office, he shall, *without charge therefor*, forthwith notify the party entitled thereto, or the Clerk from whom he received the transcript." The "notice of admission" referred to in this item probably has reference more particularly to such a case as that referred to in Rule 132.

(*j*) It must be a notice *required by law* to be given by the Clerk. Those given by him through courtesy are not taxable against the unsuccessful party, but must be governed by any arrangement made between the Clerk and the party to or for whom given: *The Cor. of Lambton* v. *Poussett*, 21 U. C. R. 472; *Dartnell* v. *The Q. S. of Prescott and Russell*, 26 U. C. R. 430.

(*k*) This item has been the subject of much discussion, and great differences of opinion have existed, and now exist, concerning it. On the one hand, it is argued that every judgment rendered for the plaintiff at the trial entitles the Clerk to this fee, as well for entering the judgment as for entering the order of the Judge for payment of debt and costs. It is contended that every such proceeding consists in the Judge's decision of the cause and the order for payment, and for *each* of which the Clerk is entitled to the fee of 40 cents, mentioned in this item of the tariff. In support of this view, it is argued that the order made by the Judge is not the "judgment" of the Court, and that it does not become a judgment until duly entered in the Procedure Book. Those upholding this view further argue that the "decision" which the Judge pronounces under the 106th section is "*the judgment*" of the Court, and the "*order*" for payment under the 107th section is for the purposes of the tariff, quite distinct from the "decision" of the cause. We will examine the authorities in favour of this view of the case. It seems to be established that the judgment or decision of the Judge does not become a *judgment of the Court until entered* by the Clerk in the Procedure Book. As remarked at page 112 of 5 U. C. L. J., "the Clerk needs no express direction from the Judge to make entry in the Procedure Book. He records, as a matter of course, every *decision* of the Judge, as is done in other Courts. *Endorsements by the Judge have no legal value, the entries in the Procedure Book alone are evidence.*" In the case of *Stratton* v. *Johnson*, to be found at page 141 of 7 Local Courts' Gazette, Mr. Pitt Taylor, the learned author of Taylor on Evidence, sitting as County Court Judge in England, took the same view of the law, and *held* that the record of judgment was not complete until the decision of the Judge was duly entered in the proper book by the Clerk, and signed by him on every page. In *Reg.* v. *Rowland*, 1 F. & F. 72, Bramwell, B., *held* that the *only* way of proving a County Court judgment was by the signed entries, such as provided for by section 37 of our Act. In the year 1858, the same point, as it appears to the author, in effect, arose in the County of Wentworth, on the question of money payable to the Fee Fund under the old tariff. The words on which the following opinion was founded were these: "*Every order or judgment (not to be charged when the defendant has given a confession of judgment.*") In a letter addressed to the then Attorney-General for Upper Canada, Hon. (now Sir) John A. Macdonald, on the question of the proper amount of stamps to affix, the following opinion was given:

"Office of the Attorney-General, U. C.,
"Toronto, 14th September, 1858.

"Sir,—I have the honor, by desire of Mr. Attorney-General Macdonald, to acknowledge your letter of the sixth instant, referring to the difference in

practice of the Division Courts as to the interpretation of the scale of fees for every order or judgment.

"I am to inform you that the Attorney-General is of opinion that the Clerks should collect a fee on every order in addition to the judgment fee. Every judgment for debt, damages or costs, necessarily involves an order to pay the amount, but where the plaintiff is nonsuited without costs, or a judgment is given for the defendant without costs, it is a simple judgment, and no order is chargeable. A judgment in a Division Court stands on a different footing from a judgment in the Superior Courts: see Division Courts Act, 1850, secs. 53 and 84; Division Court Extension Act, 1853, sec. 3; also Division Court Rule 51. Such is the practice of the County of Simcoe and some other counties, and the Attorney-General thinks it desirable that your Courts should adopt this as a uniform procedure. I have the honor to be, &c.,

"Your obedient servant, "H. BERNARD."

These are the views and authorities, so far as we have been able to discover, in favour of the right of the Clerk to the second forty cents on a judgment at the trial for the plaintiff with costs, payable in such time as the Judge orders.

On the other hand, it is argued that the decision of the cause and the order for payment of debt and costs are *one judgment*, that there is only one entry, and can only be one fee attached to it. This view is strongly supported by the authority of *Ely* v. *Moule*, 5 Ex. 918, and *Robinson* v. *Gell*, 12 C. B. 191. In the former case, the question arose whether a *verbal* order made at the decision of a County Court case was only an order of the Judge, requiring service before being acted upon, or formed part of the judgment of the Court. At page 925, Parke, B., says: "What is here called an order is, in truth, a part of the judgment." At page 926, Platt, B., says: "Although it is called an order, it is neither more nor less than a judgment pronounced on the hearing of the plaint." In the above mentioned case of *Robinson* v. *Gell*, Williams, J., says, at page 197 of 12 C. B.: "The 94th section of the 9 & 10 Vic. c. 95, shews that the terms 'order for the payment of money,' and 'judgment,' are used synonymously." At page 200, Jervis, C. J., says: "The order for payment is in this case, therefore, a part of the judgment."

These conflicting opinions are shared by County Judges generally; some taking the view that the Clerks are entitled to the second fee, others being of a contrary opinion. Which of these views is the correct one we cannot pretend to say. The reasons are strong on both sides. If the Crown was entitled to this additional fee during the time the Fee Fund tax was in force, we can see no reason for withholding it from the Clerks now. If every decision of the Judge in favor of a plaintiff for an amount, together with costs, was properly *held* both a "judgment" *and* an "order" for Fee Fund purposes, we cannot resist the conclusion that the Clerk was entitled to a fee for the entry of *each* under the tariff of Clerk's fees as well. We, therefore, think that until this item of the tariff is amended, so as to leave the question no longer in doubt, a Clerk would be warranted in acting on the Attorney-General's opinion. It will be observed that such fee would not, in any view of it, be chargeable on judgments entered by default on special summonses, or in many other cases that might be mentioned. It would only apply to a "decision" of the Judge, and an "order" being made for payment at such "time or times" as he might direct. The words "or final order made by the Judge" would have reference to a case where the Judge did not make the order at the hearing, but afterwards made a final disposition of the case. The Clerk's right to the second fee, if it exists at all, would in such a case arise.

(*l*) At page 320 of 12 L. J. N. S., the Editor expresses the opinion that the Clerk is not entitled to any fee on renewal of warrant of execution. With all due respect we differ from the learned Editor, and express the opinion that the Clerk is entitled to the *same fee* for a renewal as he is for any original writ or warrant under this item. By section 163, the execution "may from

time to time be renewed by the Clerk . . . *in the same manner and with the same effect* as like writs from the Courts of Record may be renewed." By Rules 101 and 102, warrants of commitment may be renewed. For the moment, losing sight of the fact that the law as to renewal is assimilated to that of Courts of Record, in which Courts the costs of renewal are expressly given, we may inquire what a "renewal" is Worcester defines it to be "the act of beginning again," "recommencement," "repetition." The word "renew" he defines to be, "To make or cause to be made again," "To begin again." If the writ has been *acted upon*, it cannot be renewed (*per* Draper, C. J., in *Neilson* v. *Jarvis*, 13 C. P. 176), so that the question of priority of an *existing* execution, when goods seized under it, does not arise. If the renewal is to be considered as the "beginning again" or "recommencement" of execution, it is submitted that there is no difference between making an indorsement in a particular form *on* an execution, without which such execution would become *effete*, and drawing up a fresh writ in identical words. The renewed writ has to be entered by the Clerk in the Procedure Book just in the same way as would a separate writ be entered. It is submitted, therefore, that a reasonable construction of the tariff (and acting on the principle of allowing compensation for work done) sustains the view that the Clerk has a right to be paid the same fee for a renewal of a writ of execution as for one originally issued. Before the change in the Superior Courts tariff about renewals, the practice was for Clerks of the Crown and their deputies to insist on the Fee Fund stamps for renewal of *fi. fas.* being affixed. This strengthens the view just expressed. It may be questioned whether a judgment debtor can be charged (if chargeable at all) with renewal fee. Certainly not for renewals at the pleasure of the creditor.

(*m*) Some Clerks charge for transmitting a transcript of judgment, under the 161st section, to the Clerk of another Court, for the purpose of having proceedings taken upon it in that Court. The words are not merely "transmitting papers," but they must be transmitted "*for service.*" "Service" of papers has a well understood meaning. It is quite distinct from the execution of a writ of *fi. fa.* How it can be contended that sending a transcript to another Court for the purpose of execution can be construed as "transmitting papers for service" the writer can scarcely imagine. The words here employed mean transmitting papers for the service of these very papers so transmitted, and do not mean transmitting certain papers, upon which in some other Court certain other papers may issue (such as a garnishee summons) requiring service there. Transmitting an execution to the Bailiff of another Court for his execution of it, and similar cases, would clearly *not* be within this item of the tariff. Such charges as we have just mentioned would, with all due regard for liberality of interpretation, be quite outside of a reasonable construction of the words here employed. We think it would be reasonable to allow a fee for the transmission of all papers from one Court or officer to another, but it is enough to say that the present tariff does not, in our opinion, authorize it.

(*n*) The next previous note applies to this also. It will at once be seen that the receiving, entering and handing to the Bailiff, all refer to papers which were received from another Division, and the retransmission has reference to the same class of papers. The reference to the forfeiture of fees is also in support of this view.

(o) A party to a suit (which also means any person acting for him and with his authority) has a right to search without charge, if the suit or proceeding is over a year old; after that he must pay as a stranger. A question often arises whether a Clerk is entitled to charge for a search in addition to a fee for a proceeding taken in consequence of that search. For instance, a suit is three years old, and the person entitled to execution desires to issue a fresh execution or judgment summons upon it, if he gives an order to the Clerk, by reference to which the latter can readily find in the Procedure Book the particular

suit in which the proceeding is required, then it is submitted that the Clerk would not be entitled to charge for search. The case of *Ross* v. *McLay*, 26 C. P. 190, has an important bearing on this question. The plaintiff contended in that case that the defendant, as Registrar, had overcharged him for searches made in his office and brought an action for their recovery. The defendant contended that the plaintiff did not give him such a description of the instrument as enabled him to give plaintiff the desired information, and that he (the defendant) had to search for the same. Hagarty, C. J., at page 199 says: "I think he (the person searching) is of course bound to give such a reasonably clear description of the instrument he desires to see as will enable the Registrar to find it." Again he says: "I am not concerned with the question whether the Registrar may have first to look at the alphabetical index to ascertain the number, and then to find and produce the instrument. *The amount of his trouble is not the question, but the legality of his fee. Of course, if the applicant could not reasonably identify the instrument he wished to see, it would be different.*"

Should the applicant not give such information as would reasonably enable the Clerk to find the particular suit, and the latter had to make search for that purpose, he would be entitled to the fee for it. We cordially endorse the following remarks in the Law Journal: "The tariff expressly allows a fee of ten cents to be charged for 'every search for a party to a suit when the proceedings are over a year old,' but we are inclined to think that this cannot be construed to mean, as in the case put by our correspondent, that where a plaintiff, after the expiration of a year, orders out executions on his suits, the Clerk may charge him with a search in each case. A plaintiff may be fully aware of the position of his suits, and not in need of any information respecting them. The Clerk, in order to issue the executions, must necessarily refer to his books, and so long as the plaintiff asks no information to be derived from such reference, he cannot complain of any extra loss of time or extra work. The Clerk is not compelled, then and there, to refer to the suits, and give the plaintiff any information about them, and again have recourse to his books when he wants to make out the executions; all he is required to do is to receive a list of the cases in which executions are to be issued, and to issue them as usual at the proper time. If the plaintiff, when ordering executions to issue, makes any enquiry as to the position of certain suits, in respect to which information is then and there given him, the search could, of course, be charged for, even if the Clerk, without closing the book at once, issued the execution, and thereby save himself the necessity of a second reference; but where the plaintiff merely orders execution in certain cases to issue, we do not think the Clerk justified in charging for a search:" 9 U. C. L. J. 234, 235. The search is referred to as made "by party to the suit or proceeding." It is submitted that the opposite party could not be charged for such search, it being merely for the information or benefit of person searching.

(*p*) This includes the service of all notices, warnings, particulars of claim or demand, or other necessary memoranda, attached to, or indorsed on, the summons or copy.

(*q*) Bailiffs are not entitled to any fee on execution when returned *nulla bona*. "There is nothing in the tariff of fees to warrant the charge:" 9 U. C. L. J. 148. The same rule would apply to warrants of attachment or warrants against the body when returned unexecuted.

(*r*) No mileage is chargeable on an execution in cases where the money is not "made or case settled after levy:" 3 U. C. L. J. 122; 4 U. C. L. J. 82. "We think the Bailiff is not entitled to mileage as against the defendant for going to make the seizure which he did not effect:" 5 U. C. L. J. 61. "It (the tariff) gives mileage 'where' certain things are done. The expression of one thing excludes any other which is not expressed. So there can be no mileage where money is *not* 'made,' nor can there be mileage where neither is money made nor the case 'settled *after the levy.*' But in either of these events

there will be mileage:" 5 U. C. L. J. 181. "It is clear, as we before stated, that a Bailiff can only charge mileage where service has been effected, but it is not so clear as to the number of trips he is in duty bound to make for the purpose. We do not see how any strict rule could be laid down as a guide in such cases. He is bound to exercise due diligence, and use every reasonable exertion to effect a service. If on his first trip he cannot find the person to be served, he can usually ascertain whether the absence is for the purpose of avoiding service or not. He ought, at least, to try and find this out. In any case, he ought, if possible, without interfering with his other duties, to try a second time before the next sittings of the Court for which suit entered. If he does not then succeed, he may be able, having left the summons at defendant's house or place of abode, to make such an affidavit as may satisfy the Judge that the party is evading service, and that the summons had most probably come to his knowledge. A Bailiff has generally to go into the same part of his division more than once between each sittings of the Court, and can often make two or three attempts to effect a service without much inconvenience. He may, certainly, in some cases, have much more trouble than he can get paid for, but this cannot be avoided; and any mitigation of the rule allowing mileage only in case of service would be a far greater evil. The same rule applies to services in the Superior Courts:" 9 U. C. L. J. 235; see also 4 U. C. L. J. 36.

In reference to the above remark about the Judge's authorizing proceedings when a defendant evades service, we may say that we are not aware of any provision of the D. C. law analogous to section 20 of the C. L. P. Act.

Where two papers are placed at the same time in a Bailiff's hands for service or execution against the same defendant, a question sometimes arises whether or not the Bailiff is entitled to mileage on each. On this point the Law Journal says: "It is the common practice to charge mileage on *both*, and such is also the practice in Sheriffs' offices generally:" 2 L. C. G. 96; see *The Corporation of Haldimand* v. *Martin*, 19 U. C. R. 178, and especially at page 189; *Davidson and the Chairman of Q. S. Waterloo*, 24 U. C. R. at page 70.

(*s*) It is submitted that the word "levy" here must be construed with reference to the preceding words, and that the construction placed on that word by Erle, C. J., in *Miles* v. *Harris*, 12 C. B. N. S. p. 558; by Wilson, J., in *Buchanan* v. *Frank*, 15 C. P. 198, and by Morrison, J., in *Ross* v. *Grange*, 25 U. C. R. 396, cannot be given here. In the last case the learned Judge says that the meaning to be attached to the words "have levied the moneys and interest" is, "that these words include two acts on the part of the Sheriff—a seizure and a sale." It is submitted that the word "levy" here means, where goods are seized upon but not sold, and that where the money is made or the case is settled after such seizure, the Bailiff is entitled to his mileage. The distance is not to be measured "as the crow flies," as was done in *Moulet* v. *Cole*, L. R. 8 Exch. 32, and the other cases cited in the notes to section 63, but by the nearest usual travelled road: *Martin* v. *The Corporation of Haldimand*, 19 U. C. R. 178; *Meyers* v. *London & S. W. Ry. Co.*, L. R. 5 C. P. 1. If a Bailiff should receive a summons against three defendants residing at different places, he could not charge mileage from the Clerk's office to each defendant, but only the actual distance travelled by the usual and nearest travelled road, commencing with the nearest defendant, and so on to the one furthest off; the whole distance travelled to the defendant furthest off in the manner mentioned, and as if made in one continuous journey, would be the proper measure of the mileage: *Martin* v. *Corporation of Haldimand*, 19 U. C. R. 178; *Davidson and the Chairman of Q. S. Waterloo*, 24 U. C. R. 66. It appears to be the practice only to charge mileage as for one trip to a defendant's house, though several journeys may have been made in attempting to effect service: 4 U. C. L. J. 36; 9 U. C. L. J. 235; see also previous note and notes to section 76.

(*t*) "The item in the schedule of Bailiff's fees is quite clear on the point. The officer is allowed 10 (now 11) cents per mile till he arrests the delinquent; after the arrest is made, then for bringing him to prison 20 cents per mile. Thus, if a party is arrested at his residence, say 10 miles off, and is brought from there to gaol 10 miles, the fees would be $3. In the case put by our correspondent the Bailiff is entitled to mileage to arrest delinquent: ten miles, $1; carrying delinquent to prison, &c., six miles, $1.20; total, $2.20:" 6 L. C. G. p. 63.

(*u*) The Bailiff is, as will be observed, entitled to fifteen cents for *each* notice: see 7 U. C. L. J. 96.

(*v*) It is feared that charges unwarranted are often made by Bailiffs under this item of the tariff. The Clerk should exercise a careful supervision over charges of the nature here provided for, and see that no injustice is done the unfortunate debtor. He should allow the Bailiff "reasonable and necessary disbursements." What are such must be determined with reference to the circumstances of each case. The same expense would not be attendant on the removal of a horse as would be on a lot of pigs, or household furniture, or unthreshed grain, so that the Clerk should keep in view *the nature* of the property in settling the amount under this item. The term "allowances" is one under which various charges may be made. It is difficult to define it. Should a Bailiff after seizure, say of live stock, feed them at his own place, for this he would properly be entitled to an "allowance." The Clerk should carefully scrutinize all charges and expenses under this head, for it is an item under which there might be, and undoubtedly has been, considerable overcharging.

(*w*) We cannot help thinking that the wording of this item, and the necessary construction to be placed upon it, work in many cases a great injustice to a Bailiff. At one time a Sheriff was much in the same position, and not entitled to poundage unless the money was *actually made* on execution (*Buchanan* v. *Frank*, 15 C. P. 196; *The Auburn Exchange Bank* v. *Hemmingway et al.* 2 L. J. N. S. 264); but it is not so now: *McRoberts* v. *Hamilton*, 13 L. J. N. S. 107, and *Mortimore* v. *Cragg*, 3 C. P. D. p. 220, and cases there cited; *Bissicks* v. *Bath Colliery Co.*, 3 Ex. D. 174. This item of the tariff appears to admit of but one construction, namely, that there must be a "*sale*" of the "property" before a Bailiff is entitled to poundage: 3 U. C. L. J. 214. We see no reason why the same rule should not apply as to Bailiffs as Sheriffs, and allow them poundage where the money is made through their instrumentality, though the property may not be sold; but the following remarks in the Law Journal have great appositeness to the question: "The feeling of the public against any increase in Bailiff's fees is much enhanced by the fact that many Division Court Clerks are either unaware of or derelict in the discharge of their duties as taxing officers of Bailiff's fees, and that some of our Judges are not sufficiently alive to the importance of preserving their Courts and officers from the suspicion even of corruption or extortion. It cannot be denied that one Bailiff will make a large income out of a certain number of suits from which another Bailiff, equally and probably more efficient, would make a bare subsistence. This should not be, and the honest Bailiff, who cannot be paid to falter in the path of duty, and who rigidly adheres to the tariff of fees laid down in the Act, may, with some show of reason, in dull times complain that his office is not what it once was, or not sufficiently remunerative to enable him to gain an honest livelihood. We do not say that a premium should be offered for dishonesty and extortion; and though, so long as human nature is what it is, such things will be, it is, nevertheless, quite possible that an earnest effort on the part of Judges and Clerks, aided, of course, by information from the public, would materially conduce to a lessening of the evils complained of. The innocent must always, more or less, suffer for the guilty, and, unless some effectual means is otherwise devised for putting all Bailiffs and fee-takers upon an equal footing, it will be useless to attempt, by making a sweeping increase in the fees, to put conscientious officers in a position of equality with their less particular brethren:" 2 L. C. G. 132.

AN ACT RESPECTING WITNESSES & EVIDENCE.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :

Short title.

1. This Act may be cited as "*The Evidence Act.*"

COMPETENCY OF WITNESSES.

Witnesses not to be incapacitated by crime or interest.

2. No person offered as a witness shall hereafter be excluded by reason of any alleged incapacity from crime or interest from giving evidence either in person or by deposition, according to the practice of the Court, on the trial of any issue joined or of any matter in question, or on any inquiry arising, in any civil suit, action or proceeding, in any Court, or before any Judge, Jury, Sheriff, Coroner, Justice of the Peace, officer or person having, by law or by consent of parties, authority to hear, receive and examine evidence. 33 V. c. 13, s. 2.

Such persons admitted to give evidence.

3. Every person so offered shall be admitted to give evidence on oath or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person has an interest in the matter in question, or in the event of the trial of any issue, matter, question or inquiry, or of the suit, action or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness has been previously convicted of any crime or offence. 33 V. c. 13, s. 3.

Evidence of parties to a suit, &c.

4. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any civil suit, action, or other proceeding in any Court of Law or Equity in this Province, or before any person having, by law or by consent of parties, authority to hear, receive and examine evidence,

the parties to such proceedings, and the persons in whose behalf any such suit, action or other proceeding, is brought or instituted, or opposed, or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the Court, on behalf of themselves or of either or any of the parties to the suit, action or proceeding; and the husbands and wives of such parties and persons shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action or proceeding. 33 V. c. 13, s. 4; 36 V. c. 10, s. 1.

Evidence of husband and wife.

5. Nothing herein contained shall render any person compellable to answer any question tending to criminate himself or to subject him to prosecution for any penalty. 33 V. c. 13, s. 5 (*d*).

Questions tending to criminate need not be answered.

6. & 7. (*Have no reference to D. C. actions.*)

8. No husband shall be compellable to disclose any communication made by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage. 33 V. c. 13, s. 5 (*c*); 36 V. c. 10, s. 2.

Communications made during marriage.

9. On the trial of any proceeding, matter or question, under "*The Liquor License Act*," or under "*The Municipal Act*," or under "*The Assessment Act*," or under any other Act of the Legislature of Ontario, or on the trial of any proceeding, matter or question before any Justice or Justices of the Peace, Mayor, or Police Magistrate, in any matter cognizable by such Justice or Justices, Mayor, or Police Magistrate, not being a crime, the party opposing or defending, or the wife or husband of such person opposing or defending, shall be competent and compellable to give evidence in such proceeding, matter or question. 36 V. c. 10, s. 4.

Evidence in trials under Rev. Stat. cc. 181, 174, 180, or other Acts of Ontario.

10. In a suit by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the suit shall not obtain a verdict, judgment,

In suits by or against representatives of a deceased

person, the evidence of the opposite party must be corroborated.

or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated (*a*) by some other material evidence. 36 V. c. 10, s. 6.

In suits by or against lunatics etc, evidence of opposite party to be corroborated.

11. In a suit by or against a person found by inquisition to be of unsound mind, or being an inmate of a lunatic asylum, an opposite or interested party shall not obtain a verdict, judgment, or decision therein, on his own evidence, unless such evidence is corroborated by some other material evidence. 36 V. c. 10, s. 7.

(The other sections of the Act are either referred to in other parts of the work or have no application to Division Court actions).

(*a*) Under the English Bastardy Act (35 and 36 Vic. c. 65, s. 4), the evidence of the mother of the child must, as to its paternity, be "corroborated in some material particular." It is submitted that there is no substantial difference in the meaning to be given to the words used in the English Statute and our own. The second section of the English Act, 32 and 33 Vic. c. 68, s. 2, requires in actions for breach of promise of marriage that the evidence of the plaintiff shall be "corroborated by some other material evidence in support of such promise." In an action for breach of promise, the evidence of the plaintiff was that the defendant had seduced her, and had repeatedly promised to marry her. The plaintiff's sister swore that at an interview she had with the defendant, when she discovered her sister's condition, she upbraided him for the ruin and disgrace he had brought upon the plaintiff, when he said "he would marry her, and give her anything; but I must not expose him." The sister further stated that after the plaintiff's confinement, she overheard a conversation between the plaintiff and the defendant, in the course of which the plaintiff said to the defendant, "You always promised to marry me, and you don't keep your word," when the defendant said he would give her some money to go away. *Held*, this was "material evidence in support of the promise:" *Bessela* v. *Stern*, 2 C. P. D. 265. Upon the hearing of a complaint in bastardy, under the Act above mentioned, the statement of the mother as to the paternity of the child would be sufficiently corroborated by the evidence of acts of familiarity between her and the defendant, although these acts might have taken place at a time before the child could have been begotten; for evidence of that kind is a corroboration of the mother "in some material particular:" *Cole* v. *Manning*, 2 Q. B. D. 611. In *Bessela* v. *Stern*, Cockburn, C. J., says, at page 271 of 2 C. P. D., "the evidence given in corroboration need not go the length of establishing the contract; if the evidence support the promise, it is enough." Brett, L. J., says, at page 272 of the same report, "the evidence need not prove a promise; all that is wanted is corroborative evidence of it." What is sufficient corroboration under our statute of the evidence of the surviving party to a transaction in an action against the representatives of the other party thereto, was considered and acted on in *Birdsell* v. *Johnson*, 24 Grant, 202; also where the evidence was corroborative in an action by a representative in *Findley* v. *Pedan*, 26 C. P. 483. A similar question arose under the Act relating to forgery in *Reg* v. *Bannerman*, 43 U. C. R. 547. It will be seen that in all these cases, as well in the English Courts as our own, the tendency of decision has been in favour of considering the corroborative evidence as sufficient. See also *Reg.* v. *Pearcy*, 17 Q. B. 902, note (*a*); *Lawrence* v. *Ingmire*, 20 L. T. N. S. 391; *Hodges* v. *Bennett*, 5 H. & N. 625; *Harris* v. *Harris*, L. R. 2 P. & D. 77.

RULES GOVERNING THE PRODUCTION OF TESTIMONY.

The following are the general rules governing the production of testimony:

1. The evidence adduced in any case must substantially correspond with the allegations; it must be confined to the points in issue. The burthen of proving a proposition at issue lies on the party holding the substantial affirmative; and the best evidence of which the case in its nature is susceptible must always be produced: Taylor on Ev. ss. 172–238.

2. The evidence must be confined to the points in issue: Taylor, ss. 239–336.

3. The burthen of proof lies on the party who substantially asserts the affirmative of the issue: Taylor, ss. 337–362.

4. The *best* evidence of which the case in its nature is susceptible should always be presented: Taylor ss. 363–397.

5. Secondary evidence is inadmissible until it be shewn that the production of primary evidence is out of the party's power: Taylor, ss. 398–497.

6. That degree of evidence is obviously most satisfactory to the mind which is afforded by our senses: Taylor, ss. 498–506.

7. Hearsay, or what is termed second-hand evidence, is a species of proof which, with some exceptions, cannot be received in judicial investigation. These exceptions may in a general way be stated as—

(1) Cases relating to matters of public or general interest; (2) those relating to pedigree; (3) those relating to ancient possession; (4) declarations against interest; (5) declarations in the course of office or business; (6) dying declarations: Taylor, ss. 507–652.

8. Admissions are received as a *substitute* for the ordinary and legal proof, but the whole statement containing the admission must be taken together, yet it does not follow that all the parts of the statement should be regarded as equally deserving of credit: Taylor, ss. 653–788.

9. The law excludes or dispenses with some kinds of evidence on grounds of public policy, such as communications between husband and wife; between client and his Counsel, Solicitor or Attorney; nor are Judges, Arbitrators or Counsel compelled to testify as to certain matters in which they have been judicially or professionally engaged. Secrets of State are also excluded, so also is evidence of mistake or misbehaviour on the part of a jury, unless such can be given from outside sources; evidence of that which is indecent or offensive to public morals, or injurious to the feelings of third persons, the parties themselves having no interest in the matter except what they have impertinently created, is also excluded: Taylor, ss. 829–868.

10. As a general rule, parol testimony cannot be received in suits between the parties to the instrument and their representatives, to contradict, vary or subtract from the terms of a valid written instrument; but evidence is receivable to show that the instrument is altogether void or that it never had any legal existence or binding force, either by reason of forgery or fraud, or for the illegality of the subject-matter, or for want of due execution and delivery. So also is parol evidence receivable to prove that the contract was made for objects forbidden by statute or common law: that the writing was obtained by duress, or that the party was incapable of binding himself by reason of infancy, coverture, idiotcy, insanity or intoxication, or that the instrument came into the hands of the plaintiff without any absolute and final delivery by the obligor or party charged, or in the case of a simple contract that it was made without consideration: Taylor, ss. 1031–1113.

STATUTES, *or parts of Statutes, affecting or referring to Division Courts or their jurisdiction, and not specially referred to in other parts of the work.*

Rev. Stat. cap. 6, ss. 19–22.—Establishment of Division Courts in the Provisional County of Haliburton.

Rev. Stat. cap. 7, ss. 18–22.—Establishment of Division Courts in the Territorial Districts of Muskoka, Parry Sound and Thunder Bay.

Rev. Stat. cap. 33, s. 18.—In cases of appeal under the Drainage Act, Division Court Clerks to issue execution.

Rev. Stat. cap. 48, s. 7.—Judge of County or other Court, and officers of any Court of Justice exempt from service as jurors.

Rev. Stat. cap. 50, ss. 312, 316, 318.—Have reference to garnishee proceedings in Superior and County Courts for amounts within D. C. jurisdiction.

Rev. Stat. cap. 59, s. 351.—What costs recoverable in actions against Clerks and Bailiffs.

Rev. Stat. cap. 61, sec. 1, *et seq.*, and 42 Vic., cap. 16.—Limitation of Actions.

Rev. Stat. cap. 62.—The Evidence Act.

Rev. Stat. cap. 62, s. 38, *et seq.*—Reception of Affidavits, &c., made out of Ontario.

Ib., s. 48.—Proof of copies of telegrams, &c.

Rev. Stat. cap. 63. Appointment of Commissioners for taking Affidavits.

Rev. Stat. cap. 68, s. 16.—Division Court attachment superseded by attachment from Superior or C. C.

Rev. Stat. cap. 90, s. 9, *et seq.*—Establishment of Division Courts in unorganized tracts, and their jurisdiction.

Ib., s. 45.—Action by or against Stipendiary Magistrate may be brought in D. C. adjoining his District.

Rev. Stat. cap. 119, s. 18.—In Territorial Districts chattel mortgages to be registered with the D. C. Clerk.

Rev. Stat. cap. 120, s. 12.—Proceedings for recovery of mechanic's lien to be taken in D. C. in certain cases.

Rev. Stat. cap. 144, s. 24.—Penalty for improperly practising as a dentist may be recovered by suit in D. C.

Rev. Stat. cap. 149, s. 22; cap. 150, s. 38; cap. 152, s. 52; cap. 153, s. 37; cap. 155, s. 10; cap. 157, s. 46; cap. 158, s. 1; cap. 164, s. 23; cap. 165, s. 27.—Where joint stock and other companies and societies may enforce payment of calls.

Rev. Stat. cap. 149, s. 43; cap. 150, s. 60.—Service of process on such companies.

Rev. Stat. cap. 168, s. 16.—How fines imposed by Mechanics' Institutes recoverable.

Rev. Stat. cap. 174, s. 136.—Penalty for voting twice recoverable in D. C.

Rev. Stat. *Ib.*, s. 207.—Penalty for corrupt proceedings recoverable in D. C.

Rev. Stat. cap. 180, s. 61.—Costs of appeal from Court of Revision may be enforced by execution from D. C.

Rev. Stat. cap. 198, s. 8.—Award made under Line Fences Act enforceable in D. C.

Rev. Stat. cap. 199, s. 10. 41 Vic., cap. 12.—Award made under Act respecting Ditches and Watercourses enforceable in D. C.

41 Vic., cap. 8, s. 6.—Amending sec. 54 of the "Division Courts Act."

42 Vic., cap. 19, s. 8.—Defines jurisdiction of Stipendiary Magistrate holding Division Courts in certain parts of Thunder Bay and Nipissing.

42 Vic., cap. 19, s. 9.—Exceptions to their jurisdiction.

42 Vic., cap. 19, s. 10, s-s. 2.—On vacancy occurring, Clerk of First D. C., Thunder Bay, to be *ex officio* Deputy Clerk.

DIVISION COURT CLERKS AND THEIR P. O. ADDRESS.

Inspector—JOSEPH DICKEY, P. O. Box 50, Toronto.

[NOTE.—The information here contained cannot long be relied on. Death, removal and resignation bring so many changes that, after the present year, it would be advisable to consult "The Canadian Almanac" as well, where annually a complete list of Clerks is given. It has after consideration been considered unnecessary to insert the boundaries of the different Divisions. All necessary information in Division Court matters can be better obtained from the Almanac above referred to, or a map, than from the mere statement of the boundaries, which also are the subject of change. Proximity to a Division Court office can best be ascertained by reference to a good map. When we learned that a map, shewing the boundaries of all the Divisions in the Province, was being published by Miles & Co., of Toronto, the inutility of publishing the boundaries here became more apparent. A mark in red ink at the post office address of the Clerks in an ordinary post office map will be found of great service.]

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