time during office hours before the sitting of the Court the amount claimed, with costs, and thereupon demand and receive the promissory note on which the suit is brought—may call at the Clerk's office, tender the amount of claim and costs, and demand his note. If however the Clerk, who has parted with the note, in manner above stated, cannot give up the same to the Defendant, such Defendant may refuse to leave the money with the Clerk unless the note is delivered, and thereby place the Clerk in a very strange position. Should the Clerk carry that suit to Judgment, by which additional costs are unnecessarily caused, and the facts of the case be presented to the Judge, there is no doubt the Clerk would be censured, and probably the additional costs be disallowed. And if afterwards the Defendant should not at all pay the claim, and an execution be returned "Nulla Bona," the Plaintiff might bring an action for damages against the Clerk.

The other reason is, that the practice is connected with danger whereby the Clerk's responsibility is unnecessarily increased. The Clerk into whose custody the several promissory notes or other papers have been given for suit and for safe keeping, voluntarily and without authority parts with them by annexing them to the summons for service. By this method a promissory note may pass through several Post Offices before it reaches the Bailiff who is to serve the summons, the note is exposed to the danger of being lost, and this at the risk of the Clerk, who received it from the Plaintiff; or if the Bailiff who has often to travel through backwoods and remote settlements, where he can hardly find a bed to sleep in over night, should happen to lose any of such notes, or have his pocket book with the summonses stolen from him, it might become a question whether a Bailiff can be made responsible for the loss of a promissory note which was annexed to a summons, or only for such papers which he is *required* to receive if handed to him. A Bailiff is obliged to receive the summons *with a copy* of the account, demand or claim annexed, and likewise the copy summons to be served, with a like copy of account, demand or claim annexed and to make his return thereto in due time. If he effects a service, returns the summons, makes affidavit of service in due time, he has performed his duty so far as the Division Court Acts and Rules require him to do; even if it should happen that the promissory note which the Clerk had annexed to the statement of claim be missing.

And in a case where a Bailiff becomes a defaulter, neglects his business, makes no return at all, but withholds all papers handed to him, it is more than probable that if legal proceedings were instituted against such Bailiff and his sureties for the recovery of the value of certain promissory notes which the Clerk has annexed to the summonses that were handed to such Bailiff for service, that the sureties would defend the suit on the plea that they are not responsible for any other acts of the Bailiff than those which he is required to perform by virtue of his office as such Bailiff, and that the safe keeping of promissory notes is not his duty, except under the 64th, 89th and 90th sections of the Division Courts Acts of 1850, but which do not apply to this case.

But even supposing a Bailiff could be made responsible for such promissory notes so handed to him,—would it be prudent to subject him to such unnecessary responsibility, when in general he has no other plan for their safe keeping than his pocket, and where he so frequently is exposed in his travels?

It may not here be out of place to state two instances which occurred in this Division about ten years ago.

The two Bailiffs who at that time were appointed for this Division became of unsteady habits and in consequence thereof were dismissed; since which time I have only had one, but a model Bailiff. The one of the two Bailiffs, while out in the country serving summonses had to stay over night in a tavern, where he got drunk and was robbed of his pocket book with the summonses and executions in it; the other Bailiff got so careless that he made no return at all, and had either mislaid or lost the greater portion of the summonses and executions. Upon a consultation which I had with the Judge on these subject it was deemed advisable to issue new summonses and executions, and hand them to the new Bailiff with instructions not to levy where he found proof that the former Bailiff had received payment. I found no difficulty in issuing new summonses, since I had all the original notes in my possession, of the book accounts I obtained new copies from the Plaintiffs, and in a short time the matters were arranged. The pocket book of the first mentioned Bailiff was however found some days afterwards, minus the money which had been in it, and the papers were handed to me; the thieves probably on finding that there was no value in the papers, had thrown them away, in consequence whereof they were subsequently found; but if the promissory notes had been attached to the summonses I very much doubt whether I ever should have seen them again.

If, gentlemen, these remarks should operate as a caution to those Clerks who are in the habit of annexing promissory notes to summonses before they hand them to the Bailiff or transmit them for service, the object of the writer will be accomplished, who begs to remain,

Respectfully yours,

OTTO KLOTZ.

[Our correspondent, Mr. Klotz, usually gives a fair statement of the arguments which bear *pro. and con.* on the question about which he happens to write but in the present instance he has not done so, and probably because the matter does not admit of discussion. There can be no doubt as to the correctness of his view of the subject, and we can hardly imagine on what grounds any Clerk could justify to himself such a practice as that of parting with the evidences of debt left in his custody. It might possibly be urged that defendants sometimes pay the claim against them to the Bailiff on his serving the summons, and that in case of its being on a note, the party would have a right to require to have it handed over to him, but our answer to this, in which we go rather further than Mr. Klotz, is that we consider a Clerk is not justified in parting with a note left with him for collection, to any one without an order from the Judge. When a note is paid by the maker, its possession cannot be any object to him, and it should, in our opinion, properly remain in Court with the papers, in the cause where it would always be found should any one wish to inspect it, or should any question respecting it afterwards arise. If paid by an endorser he has a right to get it as the prior endorser (if any) or the maker is liable to him but a judge's order should in every instance be required before the Clerk parts with it, as it is no part of his duty to investigate the right of a party applying, which in fact would be assuming the office of the Judge. And it would be highly necessary for the prevention of fraud, that a clear right to the possession of any record of the Court or any document in the possesion of the Clerk, should first be shewn before it is parted with.—EDS. L. J.]

To the Editors of the Law Journal.

Milton, 13th Nov., 1853.

GENTLEMEN:—In looking over, from time to time, your own remarks and instructions, with answers to questions of intelligent correspondents, on the subject of Division Court practice, I must acknowledge that I am indebted for some valuable information, and I hope to acquire further light from your columns, on matters which still seem to be, to some extent, open questions.

Encouraged by the kind manner in which you receive remarks, and the willingness you evince to afford information, I am induced to trouble you with the following remarks and questions—arising from the practice of a small Division during four years.