

by shifting the place of sitting 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.

#### CORRESPONDENCE.

*To the Editors of the Law Journal.*

GENTLEMEN,—In a certain Division Court East of Kingston, a judgment was given upon a state of facts, which I shall detail, upon which judgment your opinion would be read with pleasure by the parties interested, and others.

The facts condensed are these: A. hands a note to B. a lawyer, to collect. B. notifies D. the defendant; D. goes to a bailiff of the court and gives a confession. B. hands in the claim to the clerk of the court for suit. The clerk issues a summons, and the defendant is sued in the usual way.

The case comes on for trial—the judge decides that the bailiff had no right to take such confession under the statute; but notwithstanding having taken it the clerk should not have issued a summons but should have annexed the claim when it came for suit to it, and then have treated it as an ordinary confession of judgment—gives judgment for the plaintiff, the clerk and bailiff each to pay a moiety of the costs for blundering. Who, think you, blundered—the judge, the clerk, the bailiff, or did they all do so? What think you of the judgment?

Yours truly,

D.

[The 117th sec. of the Act respecting Division Courts, 22 Vic. ch. 19, provides, that "any bailiff or clerk before or after suit commenced may take a confession or acknowledgment of debt from any debtor or defendant desirous of executing the same," and we apprehend that in the case mentioned by our correspondent, the bailiff had this provision in view, and if he complied with the directions given in the rule regulating the practice in such cases, he certainly was justified in taking the confession.]

The 31st rule provides, that "every confession of debt taken before suit commenced must show thereon, or by statement thereto—attached at the time of taking them, of the particulars of the claim or demand for which it is given" &c., and also that "unless application for judgment on such confession or acknowledgment 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 rendered without an affidavit by the plaintiff or his agent that the sum confessed, or some and what part thereof remains justly due, and application for judgment shall be made at a court holden for the Division wherein the confession or acknowledgment was taken."

The intention of the Legislature is evidently to afford the debtor every facility for avoiding the payment of costs, but although approving of the motives, we doubt the wisdom of the provision on account of the evident difficulties in the way of carrying it into effect so as to insure the intended benefit to the debtor. However, the discussion of the merits of the enactment is foreign to the question before us at present, although we should be glad to return to it again in that aspect if any of our correspondents would take it up.

In the case put by our correspondent, if we assume (as we have a right to do, nothing being said to the contrary.) that the bailiff in taking the confession followed the practice prescribed by rule 31 in respect to annexing a proper statement of claim thereto, we must allow that he acted within the

bounds of his duty; and it became the duty of the clerk to receive the confession and claim and await the action of the creditor thereon, and his mode of proceeding in such a case is clearly pointed out by the above rule.

Unless "D." has overlooked or neglected to state some material fact, we do not see how any blame could attach to the bailiff, and if it did not, then the action of the clerk in issuing a summons was clearly wrong. Instead of doing so he should have made the plaintiff or his agent when putting in the claim, aware of the fact that a confession had been already given.

If the bailiff took the confession without the required formality, it seems to us that the clerk might be excused for thinking himself justified in treating it as a nullity, although it might happen that legally he was not so.—Eds. L. J.]

November 28, 1861.

*To the Editors of the Law Journal.*

GENTLEMEN,—A. holds a judgment, on which execution has been returned "no goods," against B., who afterwards absconds. C. swears out an attachment against the goods of B., hunts up and seizes property. At the next sittings of the Division Court, as soon as C. recovers judgment, A. directs the clerk to issue an alias execution on his judgment. The clerk makes out both executions and hands them to the bailiff at the same time. The bailiff, having read the endorsement on C.'s execution first, marks it 1, and A.'s 2. The property attached is then sold, and the proceeds paid into court. To which party, A. or C. is the clerk to pay over the money?

An answer in the next *Journal* will much oblige

A DIVISION COURT CLERK.

[Our correspondent is referred to the clauses of the Division Courts Act regulating the proceedings against absconding debtors, where he will find that the proceeds of the sale of the absconding debtor's goods and chattels in such cases, are to be ratably distributed amongst such of the creditors as have obtained judgment against the debtor, in proportion to the amount really due upon such judgments.]

A. seems in this case to be in the same position as he would have been if he had commenced proceedings but had not obtained a judgment before the attaching creditor. The return of his execution *nulla bona* and the *fi. fa.* having been as it were received after C.'s writ would, we think, deprive him of any advantage of priority his prior judgment might have given him. The Absconding Debtors Act allows any person who may have had process served before an attachment issued to have the full benefit of his execution if he obtains one before the attaching creditor, but this provision is not found in the Division Court Act, and even if applicable thereto, would not we think, change the aspect of the present case, as A. had no execution in force when C.'s was issued.—Eds. L. J.]

## U. C. REPORTS.

### QUEEN'S BENCH.

*Reported by CHRISTOPHER ROBINSON, Esq., Barrister-at-Law.*

#### HENDERSON V. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

*Horses escaping on Railway—Plaintiff's possession of close.*

The plaintiff owning land adjacent to the railway, permitted one D. a servant of the company living within their fences, to cultivate a small piece free of rent. He made a gate in the railway fence to give him access to this land, and the plaintiff's horses passed through it to the railway track and were killed. Held, affirming the judgment of the county court, that the plaintiff was sufficiently in possession of the close from which the horses escaped to entitle him to recover.

(E. T., 24 Vic.)

This was an action in the County Court of the United Counties of Frontenac, Lennox and Addington, to recover damages from