

Correspondence.

THE JUDGMENT SUMMONS CLAUSES OF THE DIVISION COURT ACTS.

To the Editor of THE CANADA LAW JOURNAL:

As your JOURNAL is considered by lawyers a standard authority on the construction of Division Court law, and one in which I have years ago frequently written, please favour me with your views as to the proper construction of the two following clauses, which are in my opinion not legally carried out by some judges:—

Section 186, under old Act—under Revised Statutes, sec. 244, p. 595: “Any person imprisoned under the 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 the order and all subsequent costs, shall, upon the certificate of the Clerk of the Court or by leave of the Judge of the Court in which the order of imprisonment was made, be discharged out of custody.”

1. Now the question is, is not the payment of the instalment due, and costs, a condition precedent to, or a necessary qualification of the power to discharge, either under the Clerk's certificate or the Judge's order—or has either the Clerk a right to give his certificate, or the Judge the right to discharge the prisoner of their own motion, without the plaintiff's knowledge or consent? 2. Is there any distinction between the power of the Clerk and the Judge; or can the latter of his mere will—*ipse dixit*—*nolens volens* as to the plaintiff, and without his knowledge, take upon himself to discharge a debtor in goal under an executed warrant without the payments named?

Secondly. Section 245 of the revised Acts as to the power of the Judge cannot apply as to the abuse clause, as it presumes the act there mentioned to be done in open court. It says the Judge “before whom the summons is heard may rescind,” etc. Now as to the sec. 245, some Judges take it upon themselves to construe this section as giving them as it were a “legal *carte blanche*” to do just as they please, in or out of Court, without any notice to the creditor who is interested.

1. Do you think this “legal *carte blanche* construction” correct, or does not the law contemplate that the plaintiff should be present to object, or re-examine his debtor, or is the Judge supposed to do as he pleases in the absence of the creditor? 2. Does not the section mean that the “think fit” “rescind or alter” is done on the hearing of same after summons in Court, or at least on notice to the creditor of some kind. The latter I think ought to be done in all cases, even if not heard in Court; yet I think the meaning is a proceeding in Court.

Will you please give me and many others interested your opinion on these two sections, and oblige.

Toronto, Dec. 2, 1889.

CHARLES DURAND.