

McLEAN, J., The affidavit of service of the master is sufficient if the affidavit of the clerk was made and presented at the time of the clerk's application for examination.

The time of such application is not mentioned in the statute and must depend on the rules of the Law Society, and if by those rules the application for examination is considered as made on the first day of term, then Mr. Allan should receive the usual certificate, but if it is considered as made fourteen days before term, then the statute is imperative, and the affidavit of Mr. Allan on the first day of this term is too late.\*

**REGINA V. THE TRUSTEES OF SCHOOL SECTION NO. 27, IN THE TOWNSHIP OF TYENDINAGA, IN THE COUNTY OF HASTINGS.**

*School Trustees—Mandamus—Attachment—Practice.*

A mandamus nisi having been issued to school trustees to levy the amount of a judgment obtained against them, no return was made, and a rule nisi for an attachment issued. In answer to this rule one trustee swore that he had always been and still was desirous to obey the writ, and had repeatedly asked the others to join him in levying the rate, but that they had refused. Another swore that owing to ill health, with the consent of his co-trustees and the local superintendent, he had resigned his office before the writ was granted.

The court, under these circumstances, discharged the rule nisi as against these two, on payment of costs of the application, and granted an attachment against the other trustees, who had taken no notice either of the mandamus or rule.

(H. T., 1861.)

On the 18th of October, 1860, a writ of mandamus was issued from this court, directed to these school trustees, commanding them to levy and collect, or cause to be levied and collected, from the freeholders and householders of the school section No. 27, in Tyendinaga, a sum of money sufficient for the payment and satisfaction of two certain judgments recovered against the trustees of the said school section by one John Waterhouse, for the building the school-house for the said school section, or to show cause to the contrary on the first day of Michaelmas Term then next. The writ had been ordered in Trinity Term, 1860.

Copies of this writ, it was sworn, personally served on the 23rd of October last, upon William Cross and James Glass, two of the trustees of the said school section, and upon Robert Gillespie, another of the trustees, the original writ of mandamus being shewn to each at the time of service.

In Michaelmas Term 1860, an affidavit was made that on search in the Crown office in Toronto, on the 26th of November, it did not appear that the writ of mandamus had been returned as filed. And the court, upon application of Mr. Sisson, the counsel for Waterhouse, ordered a rule to issue upon the trustees to shew cause why an attachment for contempt should not issue against them for not returning the writ.

In answer to this rule, during this term, Cross, one of the trustees, made an affidavit that he had always been and still was willing and desirous to levy the money necessary for satisfying the judgments obtained by Waterhouse, as commanded by the writ of mandamus, and had repeatedly requested Glass and Gillespie the other trustees, or either of them, to unite with him in making a rate for that purpose; that he had done this both before and after the mandamus came to him, but that they had always refused, and that he could not alone impose and levy the necessary rate. He made a return also to the writ, under the corporate seal, referring to his affidavit for his reason for not executing the command of the writ, and his affidavit and return were annexed to the mandamus.

James Glass, another of the trustees, in answer to the rule nisi for attachment, filed an affidavit to the effect that, being in very ill health at the time of the election of school trustees in January, 1860, he declined the office, protesting that he could not serve in it on account of the state of his health, but that he was nevertheless chosen; that his ill health continuing, he solicited permission to resign, not being able to discharge any of the duties; and he annexed a letter received from his co-trustees, Cross and Gillespie, dated the 9th of February, 1860, and allowing him to resign for

for the reasons given, and another letter from the local superintendent, dated the 14th of March, 1860, consenting to his being released from his duties as school trustee.

Mr. Glass, however, took no notice of the writ of mandamus till he made his affidavit on the 4th of February, 1861, nor Mr. Cross till he made his affidavit on the 9th of February, 1861.

Mr. Gillespie did not appear to have taken any notice of either the mandamus or the rule nisi for attachment.

Crombie appeared for the defendant Glass. O'Hare for defendant Cross.

ROBINS, W. C. J., delivered the judgment of the Court.

Both Cross and Glass failed to pay due obedience to the writ by returning to the court the reasons which had prevented their doing what they been directed to do. This may have arisen from their relying on the sufficiency of the reasons, and not being advised of the steps on which it was still incumbent on them to take.

As to them, therefore, we may discharge the rule nisi for attachment, on their paying the costs of the application.

As to the other defendant, Gillespie, we grant the attachmentment. We might have ordered a peremptory mandamus, when no return had been made in due time to the first; but an attachment being moved for it is proper to grant it against the member of the corporation (Gillespie) who has been guilty of the contempt of wholly disobeying the mandamus, neither doing the act, nor manifested any readiness to do so, nor assigning any cause for not doing it.

**CHAMBERS.**

(Reported by ROBT. A. HARRISON, Esq., Barrister-at-Law.)

**HENRY McDERMOTT v. JOHN STANLEY KEFLING.**

*Ejectment—Appearance of persons other than named in writ—Mortgage.*

Held, that a mortgage out of possession is entitled, under sec. 9 of C. in. Stat., cap. 27 (the act respecting ejectment), to be admitted to defend an action of ejectment brought against his mortgagee. (April 21, 1861.)

This was an action of ejectment. Mr. Harrison obtained a summons calling on the plaintiff, under and pursuant to sec. 9, cap. 2, of Con. Stats. of Upper Canada, to show cause why Alex. Thomas Montgomery should not have leave to appear and defend the action.

By sec. 8, cap. 27, of Con. Stats. of Upper Canada (the act respecting ejectment), it is provided that "the persons named as defendants in the writ, or any of them, may appear within the time appointed;" and by sec. 9 of the same act, that "any other person, not named in the writ, may, by leave of the court or a judge, appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant."

The summons was obtained upon affidavit of Montgomery in which he stated that the action was brought by the plaintiff, claiming title under a deed from Mary Gale, to recover possession of the rear part of lot 6, in the Maitland concession of the township of Goderich; that he (Montgomery) bought the land at sheriff's sale, under an execution against the lands of one William Mathieson, in or about the year 1854; that Mathieson bought the land from said Mary Gale; that there was some defect in the deed from Mary Gale (a married woman) and her husband to Mathieson; that on the 14th February, 1860, he (Montgomery) sold and conveyed the land to defendant Keeling, who went into possession; that defendant executed a mortgage on the land in favor of him (Montgomery), for £1,316, balance of purchase money; that at the time of the sale of the land from Montgomery to defendant, the plaintiff, McDermott, who is an attorney, acted as solicitor for himself (Montgomery) and defendant; that while so acting as such solicitor, he (McDermott) became aware of the defect in the deed from Mary Gale to Mathieson; that subsequent to the mortgage from defendant to Montgomery, plaintiff took and received from defendant a mortgage on the land; that some time after he took the last mentioned mortgage, he obtained from Mary Gale a deed of the land to himself, for the nominal consideration of four dollars, on which deed the action was brought: that he obtained the deed from Mrs. Gale by fraudulent misrepresentation; and that defendant was acting in collusion with plaintiff, in order to cut out his (Montgomery's) mortgage, and so destroy his security on the land.

\* It is by rule of the Law Society expressly declared that "all applications for certification of status for admission as attorney or solicitor, shall be by petition in writing, addressed to the Bench of the Society in convocation, and every such petition, together with the documents required by, and fees payable to this Society, shall be left with the secretary of the Society at Osgoode Hall, on or before the third Saturday next before the term in which such petition is to be presented." Mr. Allan's application, therefore, for admission during the present term failed.