DIVISION COURTS.

OFFICERS AND SUITORS.

CLERKS.—*Taxation of Costs—Witnesses Fees.*—By the 13th section of the Division Court Act, it is made the duty of Clerks to *tax* (that is, to fix or determine) the costs in every cause.

The 48th Rule is directory to Clerks in respect to the allowance of disbursements to witnesses, and lays down a certain rule for their guidance in taxation.

The Rule and Schedule to which it refers are as follows:—

Rule 48.—"On application made to him in that behalf, the Judge shall determine what number of witnesses shall be allowed on taxation of costs, the allowance for whose attendance shall be according to the scale in the Schedule, 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."

Form 14 —"Attendance per day in Court, 2s. 6d.

Travelling expenses, per mile, one way, 0s. 6d.

The Rule provides that the Judge, *on application* to him, shall determine what *number* of witnesses shall be allowed on taxation of costs. This enables a party interested to take the opinion of the Judge at the trial whether the several witnesses called were all *necessary witnesses*, or upon the materiality of their testimony, and may be used as a very proper check on parties who bring half a dozen witnesses, with a view of heaping up costs, one or two only being needed to prove the case or establish the defence. But Clerks' duties, only, under the Rule we would here notice.

"And *before* allowing disbursements," &c.,—that is as a condition precedent to the allowance of disbursements.

"Allowing *disbursements*," &c.,—that is money *paid out*, and shews that the witness must have been actually paid before the party on whose behalf he attended, can claim the allowance under the Rule and Schedule.

"Disbursements to *Witnesses*," &c.—The term *witnesses* would of course include a party examined as such before the Court, whether attending under a subpœna or voluntarily. Yet if a party attends, but not under a subpœna, and is not actually examined, it would seem that the Clerk cannot allow his fees as witness. Indeed to do so would be to open a door for fraud.

"The Clerk shall be *satisfied*," &c.—This implies matter to be submitted to the Clerk, and the exercise of a judgment thereon. Indeed the term "*tax*" as used in the 13th section of the Act of itself means to determine judicially; and it appears to be the obvious meaning of the rule that the Clerk shall have sufficient knowledge of the facts to enable him to apply the provisions of law to every such matter coming before him. This knowledge may be either in the evidence of his senses, or from testimony; if he *knows* that a witness attended, the number of miles he travelled, and *saw* him paid, the Clerk may certainly allow the fees without hesitation; and it may be that he would be justified in doing the same thing, if a witness in attendance personally admitted to the Clerk the receipt of his allowance as a witness. But in other cases it would seem that an affidavit should be put in evidencing to the Clerk the fact of payment; it is to be remembered that the Clerk exercises a *quasi* judicial duty, and he may not dispense with what the Judge would deem necessary in proof of matters of fact. The Rule says that the Clerk is to be *satisfied*: if we suppose this to be *morally* satisfied, it would be vesting an unsafe discretion in a subordinate officer; we conclude, therefore, it means duly satisfied—that is, satisfied on legal evidence.

"That the *Witnesses attended*," &c.—This we do not understand to mean that they must have been actually sworn and examined in the case, but that they were *bona fide* witnesses, and in attendance at the Court ready to be examined if called on.

"And that the *claim for fees is just*."—We take this to be an adoption of the principle which guides in the Superior Courts; and there the Taxing Officer is the sole judge of what witnesses should be allowed, and rejects or allows a claim according as he may be of opinion that the witness was a material witness, or that there was reasonable ground for supposing so, or the reverse—and the expenses must have been actually paid. The practice is to submit to the taxing officer an affidavit stating that certain persons (naming them) were necessary witnesses on the party's behalf—the time they attended as witnesses—the distance they travelled—and the sums, respectively, paid them therefor. In respect to the proper practice in Division Courts, even if not rendered necessary by the Rule, it seems safer and a better preventative against fraud on the unsuccessful party,* that payment to witnesses, and of the sum they are *entitled* to, should be evidenced to the Clerk by proof on

*Judge Gowan, in his published address on the Division Court Act and his own Rules, alludes to practice of this kind as follows:—"To prevent imposition "by parties obtaining allowances for Witnesses, without paying or intending "to pay them, a piece of chicanery I suspect sometimes practiced, this rule is "in force: that before allowing disbursements to witnesses the Clerk shall be "satisfied by the receipt of the witness, or by the affidavit of the party, that "satisfaction to the witness has been made. So the party obtaining a judg-"ment should at once settle with the witnesses and get their receipts for the "amount paid, or at any time before the execution is required an affidavit of "payment can be sent to the Clerk, who will allow what is fair according to "the scale." This rule, which of course has been done away with by the general rules, prescribed the evidence upon which the Clerk might allow the fees; *satisfaction* to the witness having been made.