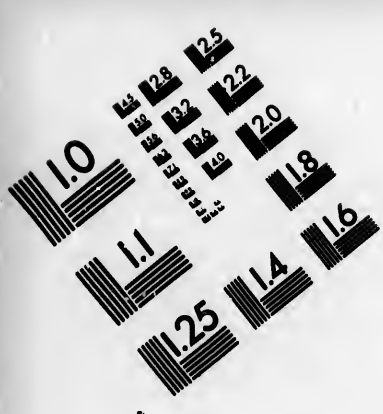

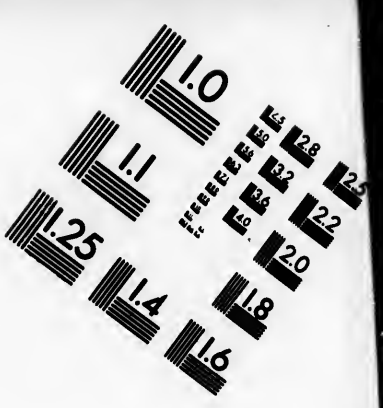

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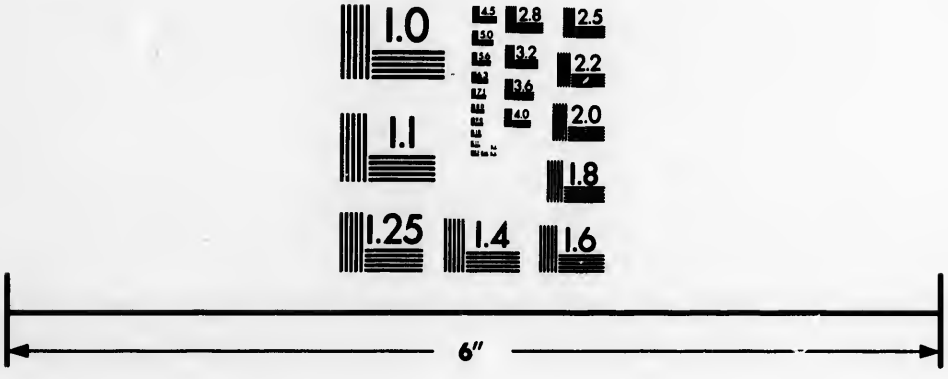

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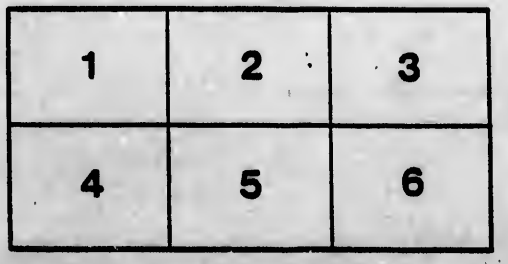

SINCLAIR'S

DIVISION COURTS ACT, 1880;

BEING A

FULL AND CAREFUL ANNOTATION

OF THE

DIVISION COURTS ACT, 1880.

AFTER THE MANNER OF

SINCLAIR'S DIVISION COURTS ACT,

WITH DIRECTIONS AND INSTRUCTIONS TO CLERKS AND BAILIFFS ON QUESTIONS MOST FREQUENTLY ARISING IN THE COURSE OF THEIR DUTIES UNDER THE NEW ACT, AND A FULL SET OF FORMS OF THE PROCEEDINGS INTRODUCED BY SUCH ACT, ALIKE USEFUL TO DIVISION COURT OFFICERS AND LAWYERS.

BY

J. S. SINCLAIR, Q. C.

JUDGE OF THE COUNTY COURT OF THE COUNTY OF WENTWORTH.

ASSISTED BY

E. E. WADE, ESQ.

BARRISTER-AT-LAW.

TORONTO:

HART & RAWLINSON, 5 KING STREET WEST.

1880.

TO

THE HONOURABLE

OLIVER MOWAT, Q.C.

ATTORNEY-GENERAL

FOR

THE PROVINCE OF ONTARIO,

THIS WORK

IS

WITH HIS PERMISSION

RESPECTFULLY INSCRIBED.

PREFACE.

When I wrote the annotation to the General Division Courts Act I did not anticipate the passage so soon of an Act in amendment of Division Court law of such length or importance as the Act of 1880 proved to be. After examining its many provisions, and considering the increased jurisdiction conferred by it—its alterations in many respects of the principles of practice as formerly understood, and its new features in regard to jurisdiction—I came to the conclusion that an annotation of the new Act was as necessary as of the former Statute. An examination of the Act itself, a consideration of the scope and object of many of its provisions—widening, as it does, very materially the basis of Division Court jurisdiction, extending the authority of the Courts, and giving them an importance not before known—rendered necessary a much fuller review of the law bearing upon the Statute than was at first supposed. The most useful and faithful discussion of legal questions is by the light of judicial authority. I have invoked that aid as the truest and best exposition of those parts of our law which this Act presents. Where questions were suggested which did not upon research appear to be settled by judicial decision, I have doubtingly hazarded an opinion or suggested a doubt as a warning to the unwary. The range of authority which was found necessary to consider will be found somewhat extensive; but, with an anxious desire to elucidate as fully as possible the different questions which the Act presented by the aid of decision, many cases will, no doubt, still be found to be omitted. In the forms which are given it is hoped that some assistance in the practical working of the Act will be found in these pages, and thereby that some time and labour may be saved to those actively engaged in Division Court work.

There is no doubt but that many errors, omissions and mistakes will be discovered; and for such I bespeak the kindly indulgence and forbearance of the reader, pleading as my excuse an earnest desire to be accurate, and that haste which the issue of some work of this nature appeared to me so urgently to require.

I have again to acknowledge the invaluable assistance that I have received in this work from Mr. Wade, of whose services I cannot speak in terms of too high commendation. I have also to thank Mr. F. J. Gibson, of Hamilton, for the careful index of cases which he has made for this book, and which, it is hoped, will be found of practical service.

J. S. SINCLAIR.

Hamilton, May, 1880.

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THE

DIVISION COURTS ACT, 1880.

CHAPTER 8.

An Act to Extend (a) the Jurisdiction and to Regulate the Offices of Division Courts.

[ASSENTED TO 5TH MARCH, 1880.]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "The Division Courts Act, 1880." Short title.

(a) The Legislature has by this Act materially extended the jurisdiction of the Division Courts. The extension, however, is not of a general character, but applies only to certain classes of cases, to which it is proposed hereinafter particularly to refer. This enlargement of the jurisdiction of these Courts has been anticipated by many people for some time past. Although we believe, as a whole, that the legal profession were averse to the change, yet the general desire for it has been gaining such strong ground among laymen, that the extension became inevitable. The opinion of the present Legislature appeared, too, to be very strong in favour of it, and the consequence has been the Act which it is now proposed to consider.

The right of appeal, too, has for the first time been conceded to litigants in the Division Courts, with what advantage time alone can tell. Perhaps the extended jurisdiction necessitated the right of appeal being given in the cases provided for in this Act. The propriety of an appeal from one Judge to another may well be doubted, no matter how eminent the latter Judge may be.

Whether the appointment of Clerks and Bailiffs by the Government will have the effect of correcting the abuses complained of under the old system has yet to be determined. It is feared that the system adopted by this Act will be fruitful of greater abuses than were ever charged as having been committed under the former law. Instead of efficiency being the qualification for the office of Clerk or Bailiff, partizanship and political zeal will probably be the best passport to such a position. There are, we believe, few Judges who are not glad to be relieved of the responsibility which has hitherto been imposed upon them in making these appointments; but we are much mistaken if the inadvisability of the change will not, before many years pass round, become apparent. Change, for its own sake, has often been the characteristic of legislatures. It is to be hoped that in this Province such cannot be said; but,

NEW JURISDICTION.

Jurisdiction extended.

2. The jurisdiction of the Division Courts is hereby extended (*b*) by adding to the fifty-fourth section of the Division Courts Act, Revised Statutes of Ontario, chapter forty-seven, the following sub-section after the word "dollars" in the second sub-section of the said fifty-fourth section:

"(3) All claims for the recovery of a debt or money demand, the amount or balance of which does not exceed two hundred dollars, and the amount or original amount of the claim is ascertained by the signature of the defendant or of the

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if anything is calculated to destroy or impair that stability which should properly attach, and which has hitherto attached, to our legal institutions in the minds of the people, it is in grasping the fitful opinions or ideas of the hour, and embodying them in inconsiderate legislation. No human system, we know, is perfect; but we will wait with patience to see whether the changes which have been made will be found to possess any advantage over the law as it formerly existed.

(*b*) The fifty-fourth section of the Division Courts Act will now read thus:

"The Judge of every Division Court may hold plea of, and may hear and determine in a summary way, for or against persons, bodies corporate, or otherwise;"

"1. All personal actions where the amount claimed does not exceed sixty dollars; and

"2. All claims and demands of debt, account or breach of contract or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed one hundred dollars."

"3. All claims for the recovery of a debt or money demand, the amount or balance of which does not exceed two hundred dollars, and the amount, or original amount, of the claim is ascertained by the signature of the defendant, or of the person whom, as executor or administrator, the defendant represents; and, except in cases in which a jury is legally demanded by a party, as hereinafter provided, the Judge shall be sole Judge in all actions brought in such Division Courts, and shall determine all questions of law and fact in relation thereto; and he may make such orders, judgments or decrees thereupon as appears to him just and agreeable to equity and good conscience; and every such order, judgment and decree shall be final and conclusive between the parties."

It will be observed that in the original part of the second sub-section the words used are, "claims and demands of debt, account, or breach of contract or covenant, or money demand;" while in the new sub-section the words employed are, "all claims for the recovery of a debt *or* money demand, the amount or balance of which *does not exceed* two hundred dollars, and the amount or *original* amount of the claim is *ascertained* by the *signature* of the defendant, or of the person whom, as executor or administrator, the defendant represents." As to what cases come within the first sub-section, with the jurisdiction increased to *sixty* dollars, reference is made to Sinclair's Division Courts Act, 60, *et seq.* Under the second sub-section all causes of action therein mentioned, where the amount does not exceed $100, whether the amount sued for is "*ascertained*" or not, can be sued for in the Division Court (*Morris* v. *Cameron*,

12 C. P. 422; *O'Brien* v. *Irving*, 7 P. R. 308); but, under the amendment of this subsection just made, the amount must not only be "*ascertained*," but it must be so "*by the signature*" of the defendant, or of the person whom, as executor or administrator, he represents. A somewhat similar provision is to be found in regard to the trial of Superior Court actions in the County Court: Rev. Stat. cap. 49, sec. 31. The "signature" is an essential element of jurisdiction: *McPherson* v. *McPherson*, 6 L. J., N. S. 266.

Cases within the Act.

Actions on bonds or covenants for the payment of money merely (*Branscombe* v. *Scarbrough*, 6 Q. B. 13), or on bills of exchange, promissory notes, or other money demand, in which the amount is determined and fixed by the signature of any of the persons mentioned in the sub-section, are within its provisions: see *Cushman* v. *Reid*, 20 C. P., at page 152, *per* Gwynne, J. Although a judgment debt was held a liquidated debt within the special endorsement clauses of the C. L. P. Act (*Hodsoll* v. *Baxter*, E. B. & E. 884), yet it would not be within this amendment, for the reason that the Statute imperatively requires the "*signature*" of the party. It will not be necessary that there should be a *promise to pay* contained in the paper, but the simple acknowledgment of a debt, as in the case of an I O U (*Fesenmayer* v. *Adcock*, 16 M. & W. 449) or a due bill (*Tyke* v. *Cosford*, 14 C. P. 64; *Gray* v. *Worden*, 29 U. C. R. 535; *Palmer* v. *McLennan*, 22 C. P. 258, in appeal at page 565; *Buck* v. *Hurst*, L. R. 1 C. P. 297; *Hinton* v. *Sparkes*, L. R. 3 C. P. 161; *Toms* v. *Sills*, 29 U. C. R. 497; *Taylor* v. *Nicholls*, 1 C. P. D. 242); under the signature of the proper party will be sufficient. It may be stated generally that any form of acknowledgment of a debt clear and explicit, whether as a balance of a larger sum or not, under the defendant's signature, or that of the person of whom the defendant is executor or administrator, would bring the case within the Statute. A guarantee to pay the amount of a debt certain would also be within it, but not if unascertained (Mayne on Damages, 3rd Ed., 278, *et seq.*), nor would a promise to give a guarantee: *Mallett* v. *Bateman*, L. R. 1 C. P. 163. It will be observed that the words here used, "debt or money demand," are the same as those employed in the 124th section of the Division Courts Act in respect of the primary creditor's claim in a garnishment proceeding; and it is submitted that where a claim, duly authenticated by the signature of the person, as this sub-section prescribes, would be the subject of attachment proceedings under that section, so also would it be suable under this amendment: see the cases cited at page 147, *et seq*, of Sinclair's D. C. Act, and *In re Newman, Ex parte Brooks*, 3 Chan. D. 494; *Dolphin* v. *Layton*, 4 C. P. D. 130; *Richardson* v. *Elmit*, 2 C. P. D. 9; *Stevens* v. *Phelips*, L. R. 10, Chan. 417; *Dent* v. *Dent*, L. R. 1 P. & D. 366; *Ex parte Hawker*, L. R. 7 Chan. 214; *Willcock* v. *Terrell*, 3 Ex. D. 323; *Sansom* v. *Sansom*, 4 P. D. 69. It is submitted that the debt may be either legal or equitable: *Wilson* v. *Dundas*, W. N. 1875, 232. Some difficulty may arise in determining whether a written acknowledgment of an amount due, on settlement of a claim for unliquidated damages, is within this sub-section or not. It is submitted that it is, and that such a claim is suable in the Division Court: *Cook* v. *Wright*, 1 B. & S. 559; *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449; *Macklin* v. *Kerr*, 27 C. P. 47. An acknowledgment of a debt where no debt was due, even though in writing, would, on that fact being shewn, disentitle a party to recover upon it (*Lemere* v. *Elliott*, 6 H. & N. 656; *Toms* v. *Sills*, 29 U. C. R. 497; *Palmer* v. *McLennan*, 22 C. P. 258, 565), for the acknowledgment presupposes the existence of a debt. It will further be observed that if the "original amount of the claim," no matter to what sum, is "ascertained" as the Act requires, any balance up to $200 is recoverable in the Division Court. For instance, a promissory note, bill of exchange, or covenant for the payment of

$5,000, upon which the sum of $4,800 has been paid, would, in a suit for the balance, be the subject of Division Court jurisdiction. A question will frequently arise as to what is the "signature of the defendant." In the case of a corporation there could not *literally* be the signature of the defendants, but it is laid down by Lord St. Leonards, in his work on Vendors and Purchasers, that "it is clear, both on principle and authority, that a corporation affixing their seal is tantamount to a signing and sealing by an individual." For this proposition the learned author cites *Doe* v. *Hogg*, 1 N. R. 306. In that case the words of the Statute were, that the party "shall agree by writing, signed with his, her or their name or names, mark or marks." It was argued by counsel that the sealing of a corporation did not come within the words of the Statute, but the Court observed that a corporation could only bind itself by its corporate seal, and, that as the seal of the corporation was affixed to the contract in question, that was a sufficient compliance with the words of the Statute. The cases of *Cooch* v. *Goodman*, 2 Q. B. 580, and *Jones* v. *Victoria Graving Dock Co.* 2 Q. B. D. 314, and Grant on Corporations, may also be referred to on this point. It may be urged that in certain cases corporations can bind themselves without the contract being under seal, which is undoubtedly the case (Addison on Contracts, 7th Ed., 83, 89); but in this case the principles of the cases establishing such liability cannot be invoked. The Statute renders a *signature* indispensable to the right to bring the action in the Division Court, and, as the seal is the signature of a corporation, it must, therefore, in cases under this sub-section, be affixed to the contract. Another question will arise, namely, whether the "signature" here mentioned is intended to be that of the party himself, or whether it may be affixed by an agent. It is submitted that an authorized agent may affix the signature to the acknowledgment, and that the maxim, that "he who does an act through the medium of another party is in law considered as doing it himself," clearly applies: *Bennett* v. *Brumfitt*, L. R. 3 C. P., at page 30, *per* Byles, J. This view cannot be better expressed than in the words of Sir Peter Maxwell in his admirable work on the Interpretation of Statutes, who says, "Although the presumption against an intention to alter the general law is usually restrictive in various ways, of the meaning of the language of a Statute, there are some few cases in which it has the opposite effect, and the language is read in a larger sense than would popularly be given to it. For instance, a Statute which requires something to be done by a person would be complied with, in general, if the thing were done by another for him and by his authority; for it would be presumed that there was no intention to prevent the application of the general principle of law that *qui facit per alium facit per se*, unless there was something, either in the language or in the object of the Statute, which shewed that a personal act was intended. On this ground an Act of Parliament, which requires that notice of appeal shall be given by churchwardens, is complied with if given by their attorney: *R.* v. *Middlesex*, 1 L. M. & P. 621; *R.* v. *Carew*, 20 L. J. M. C 44 (n); *R.* v. *Kent*, 8 Q. B. 315). So the Dramatic Copyright Act, 3 & 4 Will. IV. c. 15, which requires the written consent of the author of a drama to its representation, would be sufficiently complied with if the consent were given by the author's agent: *Morton* v. *Copeland*, 16 C. B. 517.

"The general principle is well illustrated by two decisions under the 6th and 7th Vic. cap. 18, which required that the person who objected to a voter should sign a notice of his objection, and deliver it to the postmaster. This was held to require personal signature, but not personal delivery or receipt. It was material that the person objected to should be able to ascertain that he really was objected to by the objector, which he could not so easily do if a signature by an agent was admitted; but there was no valid reason for supposing that the Legislature did not intend to give effect to the rule, *qui facit per alium facit per se*, in the case of the mere delivery: *Cuming* v. *Toms*, 7 M. & G. 29 and 88. The knowledge of the servant may be constructively that of the master within

the meaning of an Act, even when making the master penally responsible: *Core* v. *James*, L. R. 7 Q. B. 135, *per* Lush, J.; *R.* v. *Stephens*, L. R. 1 Q. B. 702. An Act (18 & 19 Vic. c. 121) which authorizes Justices to summon a person by whose act a nuisance arises, or, if that person cannot be ascertained, the occupier of the premises in which it exists, was held to authorize the summoning of the occupier, if the person who had actually done the act was his servant, since in law the act of the latter is that of the former: *Barnes* v. *Ackroyd*, L. R. 7 Q. B. 474). On the other hand, Lord Tenderden's Act, 9 Geo. IV., which requires an acknowledgement, "signed by the party chargeable thereby," to take a debt out of the Statute of Limitations, has been held to require personal signature, and not to admit of a signature by an agent: *Hyde* v. *Johnson*, 2 Bing. N. C. 778; see also *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301; *Williams* v. *Mason*, 28 L. Times, 232; *Barwick* v. *London S. Bank*, L. R. 2 Ex. 259. But this construction was based partly on the circumstance that another Statute of Limitations made express mention of an agent: Sup. p. 32. Where an Act required that notices should be signed by certain public trustees, or by their clerk, it was held that the signature of the clerk of their clerk, who had a general authority from his employer to sign all documents issuing from his office, was not a compliance with the Act: *Miles* v. *Bough*, 3 Q. B. 845;" Maxwell on Statutes, 86-88. At page 289, the same author says: "The 9 Geo. IV., c. 14, which admits of no acknowledgment of a debt to bar the Statute of Limitations, unless it be signed by "the party chargeable thereby," was held not satisfied by the signature of an agent, partly because other provisions spoke expressly of agents as well as of principals; and thus showed that the Legislature had not in its contemplation the maxim that *qui facit per alium facit per se*:" *Hyde* v. *Johnson*, 2 Bing. N. C. 776. So under this subsection, nothing anywhere appearing, either in the context or words of the Act, excluding the signature by an agent, or preventing the application of the well-known maxim, it must be held to apply.

A man's wife could be his agent for the purpose (*Emerson* v. *Blonden*, 1 Esp. 142; *Anderson* v. *Sanderson*, 2 Stark. 204), or a minor: Byles on Bills, chap. V. It is not necessary that the agent should be authorized in writing to sign the acknowledgment. It is only where a Statute requires the authority of an agent to be in writing that he cannot act without having it. But here the Statute makes no such prerequisite; and therefore the agent need not have his authority in writing: *Emmerson* v. *Heelis*, 2 Taunt. 38; *Coles* v. *Trecothick*, 9 Vesey, 234; *Graham* v. *Musson*, 5 Bing. N. C. 603; *Rucker* v. *Cammeyer*, 1 Esp. 105; *Heard* v. *Pilley*, L. R. 4 Chan. 548. A subsequent recognition of the authority of the agent would be sufficient: *Maclean* v. *Dunn*, 4 Bing. 722; *Fitzmaurice* v. *Bayley*, 6 E. & B. 868; *Ancona* v. *Marks*, 7 H. & N. 686; *Blake* v. *Walsh*, 29 U. C. R. 545. A letter acknowledging the debt under the signature of the person sued would be sufficient (*Buxton* v. *Rust*, L. R. 7 Ex. 1); or where a letter might be sent referring to goods purchased and stating the price: *Gibson* v. *Holland*, L. R. 1, C. P. 1. The authority might be by telegram (*Godwin* v. *Francis*, L. R. 5 C. P. 295; *McBlain* v. *Cross*, 25 L. T. N. S. 804; *Johnston* v. *Wilson*, 28 C. P. 432; *Murphy* v. *Thompson*, 28 C. P. 233; *Marshall* v. *Jamieson*, 42 U. C. R. 115; *Feaver* v. *Montreal Telegraph Co.*, 23 C. P. 150; s. c. 24 C. P. 258); but in that case the *original* telegram would have to be produced and proved (*Kinghorne* v. *Montreal Telegraph Co.*, 18 U. C. R. 60), or secondary evidence given of it in the ordinary way; or proof of it given under the Revised Statutes, chapter 62, section 48. The sender of the telegram would not be responsible for any mistake made in the transmission of it: *Henkel* v. *Pape*, L. R. 6, Ex. 7. A note made in Canada, promising to pay A. B. or order at Chicago $200 "in American currency," would be within the Act: *Third National Bank of Chicago* v. *Cosby*, 41 U. C. R. 402; s. c. 43 U. C. R. 58; see *Cushman* v. *Reid*, 20 C. P. 147; *Bettis* v. *Weller*, 30 U. C. R. 23; *Greenwood* v. *Foley*, 22 C. P. 352. The decisions in our Courts have varied

very much on the legal effect of a promise to pay in American money; but the most reasonable view appears to have been taken of it in the later cases in favour of its being considered a promissory note, but if what purported to be a promissory note were made, "with exchange on New York," it would be within the Statute; for although the paper would not be *a note* from the uncertainty of exchange (*Palmer* v. *Fahnestock*, 9 C. P. 172, and 20 U. C. R. 307), yet it would be a written acknowledgment of a debt payable forthwith, and as such suable under this section: *Grant* v. *Young*, 23 U. C. R. 387; *Wood* v. *Young*, 14 C. P. 250. A penalty under a by-law would not be recoverable under this section, nor in any other civil action: *L. & B. Railway Company* v. *Watson*, 4 C. P. D. 118. There is no reason why an assignee of a debt should not sue on it under this section: see Sinclair's D. C. Act, 56, and, in addition to the cases there cited, see *Ac[illegible]y* v. *Gore Dist. M. F. Ins. Co.*, 44 U. C. R. 261; *In re Haisley*, 44 U. C. R. [illegible]; *Lee* v. *B. B. N. A.*, 30 C. P. 255; *In re Freshfield's Trust*, 11 Chan. D. 1[illegible]; *Parker* v. *Lechmere*, 12 Chan. D. 256; 15 L. J. N. S. 205; *Jameson* v. *B. & S. Co.* (*Limited*), 4 Q. B. D. 208.

What is a Signature.

In Dart on Vendors and Purchasers, 5th Ed. 233, it is said, in speaking of the 4th section of the Statute of Frauds, "The signature to formal documents is of course usually found at the end of the document, but the Statute requires only a *signing*, and not a *subscribing*." The same can be said of this Statute, so that the signature would be sufficient if written on any part of the paper, and could reasonably be intended to form part of it. Thus, if a man writes his name in the body of the paper, in the first person, as "I, James Crockford," &c. (*Knight* v. *Crockford*, 1 Esp. 190; *Taylor* v. *Dobbins*, 1 Strange, 399; *Durrell* v. *Evans*, 1 H. & C. 174; *Propert* v. *Parker*, 1 R. & Myl. 625; *Bleakly* v. *Smith*, 11 Sim. 150; *Saunderson* v. *Jackson*, 2 B. & P. 238); or in the third person, as, "Mr. Stanley," &c. (*Lobb* v. *Stanley*, 5 Q. B. 574; *Johnson* v. *Dodgson*, 2 M. & W. 653), it would, it is submitted, be a sufficient "signature" under the Statute; but the signature must be so introduced as to authenticate and govern every material and operative part of it; *Caton* v. *Caton*, L. R. 2 H. L. 127. As remarked by Lord Chancellor Chelmsford in that case, at page 139, "The mere circumstance of the name of a party being written by himself in the body of a memorandum of agreement will not of itself constitute a signature. It must be inserted in the writing *in such a manner* as to have the effect of "authenticating the instrument," or "so as to govern the whole agreement," to use the words of Sir William Grant in the case of *Ogilvie* v. *Foljambe*, 3 Mer. 53; or, in the language of Mr. Justice Coleridge, in *Lobb* v. *Stanley*, "so as to govern what follows." In that case, although the whole memorandum was in the handwriting of the defendant, it was held that the signature could not be taken to govern it. The signature may be in pencil as well as ink (*Geary* v. *Physic*, 5 B. & C. 234); or by initials (*Chichester* v. *Cobb*, 14 L. T. N. S. 433); or the person's mark (*Baker* v. *Dening*, 8 A. & E. 94; *Hubert* v. *Moreau*, 12 Moore, 219; *Phillimore* v. *Barry*, 1 Camp. 513; *Hyde* v. *Johnson*, 2 Bing. N. C. 780; *Re Hinds*, 16 Jurist, 1161; *George* v. *Surrey*, 1 M. & M. 516); or by a stamp: *Bennett* v. *Brumfitt*, L. R. 3 C. P. 28; *Blades* v. *Lawrence*, L. R. 9 Q. B. 374. If, before the person signing has parted with the paper, and, while he has it in his possession, he changes his mind and draws his pen through his signature, it would not be sufficient under the Statute: *Cox* v. *Troy*, 5 B. & Ald. 474. If the signature should be printed, and recognized by or brought home to the person as having been printed with his authority, it is submitted it would be sufficient: *Saunderson* v. *Jackson*, 2 B. & P. 238; *Schneider* v. *Norris*, 2 M. & S. 288; *Blades* v. *Lawrence*, L. R. 9 Q. B. 374. The defendant might so conduct himself as to be estopped from saying the instrument was not signed by his authority; *Thompson* v. *Gardiner*, 1 C. P. D.

777; Sinclair's D. C. Act, 189 (i); *Wallace* v. *Fraser*, 2 Sup. R. 522–532. See also the cases cited at page 256 of Vol. 58, *Law Times*, in an able article there published on the question of Estoppel. Recognition of a previous signature would be sufficient, even though the paper was altered, if the alteration was assented to (*Stewart* v. *Eddowes*, L. R. 9 C. P. 311); but the person, at the time of assenting to the signature to the altered instrument, must certainly have *express knowledge* of the alteration (*Brook* v. *Hook*, L. R. 6 Ex. 89; *Turner* v. *Wilson*, 23 C. P. 87; *Westloh* v. *Brown*, 43 U. C. R. 402) in order to bind him. A clerk or traveller could not bind his principal by a signature under this Act unless he had express authority (*Blore* v. *Sutton*, 3 Mer. 237); but the principal may be bound by the acts of an agent whom he has allowed on other occasions to do similar acts in his name, even though he had no authority to do the act in question. "If the principal's representations or acts give to the agent the appearance of an authority larger than the agent actually possesses, the principal may be bound by such of the agent's acts as, although beyond the line of the agent's actual authority, are still within the margin of his ostensible or apparent authority, and this on the established and elementary principle, that untrue representations, on the faith of which a man induces a third person to act, bind the party making them:" Byles on Bills, cap. 5; *Babcock* v. *Lawson*, 4 Q. B. D. 394; *Erb* v. *G. W. Ry Co.*, 3 App. R. 446.

Signature of both parties not necessary.

It will be observed that the Statute only requires the amount to be "*ascertained* by the signature of the defendant," or the person whom he as executor or administrator represents, and not of the creditor as well. Such is the law under the 4th and 17th sections of the Statute of Frauds, and from the similarity of language used in this section to those sections, it is submitted that in this, and in many other respects, the cases decided under that Statute have a direct application here: see Agnew on the Statute of Frauds, 275; *Reuss* v. *Picksley*, L. R. 1 Ex. 342; *Beer* v. *L. & P. Hotel Co.*, L. R. 20 Eq. 423; *Buxton* v. *Rust*, L. R. 7 Ex. 279; *Parton* v. *Crofts*, 16 C. B. N. S. 22.

Signature by Partners.

If a "signature" is made under this section by one partner in the partnership name, it would bind the firm without the assent of the other partners, *provided it be within the scope of the partnership business*, but not otherwise: *Hedley* v. *Bainbridge*, 3 Q. B. 316; *Forster* v. *Mackreth*, L. R. 2 Ex. 163; *Baxendale* v. *Bennett*, 3 Q. B. D. 525; *Hogarth* v. *Latham*, 3 Q. B. D. 643; *Kendall* v. *Hamilton*, 3 C. P. D. 403; *Hovey* v. *Cassells*, 30 C. P. 230. After a partnership is proved, the admission of one partner that he signed in the name of the firm would be evidence against all (Chitty on Bills, 9th Ed. 627; *Nicholls* v. *Dowding*, 1 Stark. 81), even though made after the dissolution of partnership, if so made concerning a transaction which took place before the dissolution (*Wood* v. *Braddick*, 1 Taunt. 104); but not unless a joint responsibility be first proved: *Catt* v. *Howard*, 3 Stark. 3. A statement by one who became partner after the cause of action arose, would not be evidence against his co-partner who might be sued on the contract: *Tunley* v. *Evans*, 2 D. & L. 747. The name of the firm should appear on the face of the instrument, and an action could not be maintained against the firm when one partner signed his own name, although for partnership purposes. In Lindley on Partnership, 4th Ed. 340, it is laid down thus: "In order, therefore, that a bill or note may be binding on a firm, the name of the firm must be upon it; and if the names of one or more of the partners only are upon it, the others will not be liable to be sued upon the instrument, whatever may be their liability as regards the consideration for which it may have been given:" see *Nicholson* v. *Ricketts*, 2 E. & E. 497; *In re Adansonia Fibre Co.*, Miles' Claim, L. R. 9 Chan. 635. In the

absence of any express authority by the other members of the firm, it is submitted that other acknowledgments of debt under this section, besides bills and notes, must be governed by the rule above laid down: see the remarks of James, L. J., at page 644 of L. R. 9 Chan. The signature of a firm for the private debt of a partner is a badge of fraud, or such palpable negligence as amounts to fraud, which it is incumbent on the party who takes the security to remove by showing that the party from whom he received it, acted with the authority of his partners, or that he himself had good reason to believe so: *Leverson* v. *Lane*, 13 C. B. N. S. 278; *Heilbut* v. *Nevill*, L. R. 4 C. P. 354, L. R. 5 C. P. 478; s. c. "The liability of one partner for the acts of his co-partner is, in truth, the liability of a principal for the acts of his agent:" *per* Lord Cranworth, in *Cox* v. *Hickman*, 8 H. L. C. 304. A partner could not be bound by an acknowledgment made in the name of the firm *before* he became a member of it (Dicey on Parties to Action, 270), unless there was a new contract by novation (*Clements* v. *Norris*, 8 Chan. D. 129), or otherwise: see also *Bilborough* v. *Holmes*, 5 Chan. D. 255; *Rolfe* v. *Flower*, L. R. 1 P. C. 27; *In re U. P. & Gen. Ins. Co., Evens' Claim*, L. R. 16 Eq. 354.

Form of Signature by Agent.

In order to charge the principal, it must appear on the face of the instrument that the "signature" is that of the principal, and not that of the agent, for if the signature under this section should appear to be that of the agent individually, the principal would not be liable (*Nicholls* v. *Diamond*, 9 Ex. 154; *Mare* v. *Charles*, 5 E. & B. 978; *Long* v. *Millar*, 4 C. P. D. 450), and the "signature" must appear to have been placed there with the intention of creating a liability of the principal: *Hussey* v. *Horne-Payne*, 4 App. Cas. 311; *Denton* v. *Peters*, L. R. 5 Q. B. 475.

Plaintiff must prove Agent's Authority.

It devolves on one who accepts the "signature" of a person, within the meaning of this section, through an agent, to prove the agent's authority: *Poole* v. *Leask*, 9 Jur. N. S. 829; *Myles* v. *Thompson*, 23 U. C. R. 553; *Baines* v. *Ewing*, L. R. 1 Ex. 320; *Gore Bank* v. *Meredith*, 26 U. C. R. 237; *Gore Bank* v. *Crooks*, 26 U. C. R. 251; *Prince* v. *Lewis*, 21 C. P. 63; *Weir* v. *Barnett*, 3 Ex. D. 32; *Erb* v. *G. W. Ry Co.*, 42 U. C. R. 111. In Appeal, 3 App. R. 446, and cases there cited: *Poulton* v. *L. & S. W. Ry. Co.*, L. R. 2 Q. B. 534; *Edwards* v. *L. & N. W. Ry Co.*, L. R. 5 C. P. 445; *Allen* v. *L. & S. W. Ry Co.*, L. R. 6 Q. B. 65; *Walker* v. *S. E. Ry Co*, L. R. 5 C. P. 640; *Bolingbroke* v. *Swindon Local Board*, L. R. 9 C. P. 575; *Murphy* v. *Boese*, L. R. 10 Ex. 126; *Babcock* v. *Lawson*, 4 Q. B. D. 394. As this principle of law applies to all cases where a person is sued for something done through the agency of another, the writer has thought that a full citation of the leading authorities would be useful for reference in other cases as well.

Signature to one Paper only.

It is not necessary that the signature should, it is submitted, be to one paper only, as in itself containing the statutory acknowledgment; but if the paper to which the signature is attached *definitely refers* (*Boydell* v. *Drummond*, 11 East, 142) to another paper or papers, it or they too can be referred to in order to make out the acknowledgment: *Rochleau* v. *Bidwell*, Dra. R. 357; *Pierce* v. *Small*, 10 C. P. 161; *Williams* v. *Byrnes*, 1 Moore P. C. N. S. 154; *Ridgway* v. *Wharton*, 6 H. L. C. 238; *Campbell* v. *Dennistoun*, 23 C. P. 339; *Baumann* v. *James*, L. R. 3 Chan. 508; *Gibson* v. *Holland*, L. R. 1 C. P. 1; *Nene Valley Drainage Commissioners* v. *Dunkley*, 4 Chan. D. 1; Agnew on the Statute of Frauds, 244, 248.

Name of Creditor.

It is submitted that the creditor's name need not appear on the face of the instrument, as is required in a contract for the sale and purchase of lands under the 4th section of the Statute of Frauds (*Vanderbergh* v. *Spooner*, L. R. 1 Ex. 316), for the reason that in the latter case, the Statute makes the writing *the sole evidence of a legal contract*, which, upon well understood principles, must disclose the names of the parties, as an essential element of it, but here the contract can exist *independently* of the written instrument, which is only evidence of the determined and "ascertained" sum for which the action is brought: *Perry* v. *Attwood*, 6 E. & B. 691. It is submitted that it is more like the case of bought and sold notes, which do not constitute the contract, but are proper evidence of it: Agnew on the Statute of Frauds, 296.

When Acknowledgment made.

In order to entitle the person in whose favour the acknowledgment is made to maintain his action upon it, it must appear that the "signature" was affixed *before* action brought: *Bill* v. *Bament*, 9 M. & W. 36; *Walesby* v. *Goulston*, L. R. 1 C. P. 567; *Foster* v. *Usherwood*, 3 Ex. D. 1; *Osborne* v. *Homburg*, 1 Ex. D. 48; *Fricker* v. *Thomlinson*, 1 M. & G. 772; *Gibson* v. *Holland*, L. R. 1 C. P. 1.

Must not be conditional.

It is submitted that the instrument must not be in a conditional form: *Crossley* v. *Maycock*, L. R. 18 Eq. 180; *Smith* v. *Webster*, 3 Ch. D. 49; *Stanley* v. *Dowdeswell*, L. R. 10 C. P. 102. It may be argued that if the condition were shewn to have been complied with or performed, that the action would be maintainable upon the authority of such cases as *Rossiter* v. *Miller*, 5 Ch. D. 648, and *Winn* v. *Bull*, 7 Ch. D. 29, and the cases there cited. This can scarcely be considered a fair interpretation of the expressions here used. The amount is to be "*ascertained*" by the signature of the defendant. The fair meaning of these words surely is, that the ascertainment means of some certain and definite sum, and not to be subject to any contingency or condition which may never happen.

Particulars of Claim.

This being a special jurisdiction, and claims over $100 not ordinarily being cognizable in Division Courts, the right to take advantage of the extension thus conferred should clearly appear. The plaintiff's particulars of claim should shew an "ascertained" sum not exceeding $200 (see *Rogers* v. *Hunt*, 10 Ex. 476); but probably any defect in that way would be amendable on the authority of *Fitzsimmons* v. *McIntyre*, 5 P. R. 119; *In re Stogdale* v. *Wilson*, 8 P. R. 5.

Identification of the Debt.

As this subsection only provides for suing in the Division Court where, as it is submitted, *the evidence* of the debt is in a particular form, it is submitted further that the debt referred to in the acknowledgment may, if necessary, be identified by extrinsic evidence: *McMurray* v. *Spicer*, L. R. 5 Eq. 527; *Horsey* v. *Graham*, L. R. 5 C. P. 9; Agnew on Statute of Frauds, 234, *et seq.*

Fraud.

If the signature were obtained by fraud, any action upon the instrument could not of course be maintained, but the person signing it could only repudiate it by disaffirming the transaction in which it was given, and remitting the other party to his former state: *Clarke* v. *Dickson*, E. B. & E. 148; *Urquhart* v. *Macpherson*, 3 App. Cas. 831; *Robertson* v. *Furness*, 43 U. C. R. 143, and

cases cited at page 155 of last case. But there must be something to repudiate, for if there is nothing, of course the rule of law does not apply: *Waddell* v. *Jaynes*, 22 C. P. 212. The fraud must be repudiated within a reasonable time, and before the rights of third parties intervene: *Oakes* v. *Turquand*, L. R. 2 H. L. 325; *Babcock* v. *Lawson*, 4 Q. B. D. 394; *Tennent* v. *City of Glasgow Bank*, 4 App. Cas. 615; and at page 621, *per* Earl Cairns, L. C. Generally speaking, the fraud of the agent, in the course of his business, is the fraud of the principal: *Murray* v. *Mann*, 2 Ex. 538; *Barwick* v. *English J. Stock Bank*, L. R. 2 Ex. 259; *Mackay* v. *Commercial Bank of N. B.*, L. R. 5 P. C. 394. See a review of the authorities on this point in *Erb* v. *G. W. Ry Co.*, 3 App. R. 446. The Court, in the latter case, was equally divided. The case of *Babcock* v. *Lawson*, 4 Q. B. D. 394, had not then been decided, which appears favourable to the plaintiff's contention. Any surreptitious dealing between one principal to a contract and the agent of the other principal, is a fraud (*Panama, &c., Telegraph Co.* v. *India Rubber, &c., Co.*, L. R. 10 Ch. 515); so a bribe given to an agent to induce him to enter into a contract on behalf of his principal, will render the contract so entered into voidable at the option of the principal: *Smith* v. *Sorby*, 3 Q. B. D. 552; *Harrington* v. *Victoria Graving Dock Co.*, 3 Q. B. D. 549. As to contract induced by fraud, see *Moyce* v. *Newington*, 4 Q. B. D. 32. There is no estoppel against fraud: *Rogers* v. *Hadley*, 2 H. & C., 247, *per* Pollock, C. B.

No Variation.

As this sub-section requires a certain state of things to exist, and a formality to be observed, before an action can be brought in the Division Court, something different cannot be substituted. As remarked by Maule, J., in *Harnor* v. *Groves*, 15 C. B., 667–674, "The intention of the Legislature was that the writing should be the evidence, and the only evidence, of the contract, and that there should be no occasion to look beyond it." Parol evidence could not be admitted to explain the acknowledgment: *Holmes* v. *Mitchell*, 7 C. B. N. S. 361; *Hickman* v. *Haynes*, 10 L. R. C. P. p. 605, *per* Lindley, J. It has been held admissable to connect separate documents (*Baumann* v. *James*, L. R. 3 Chan. 508), but the correctness of this is disputed in Agnew on Stat. of Frauds, 265. The forbearance on the plaintiff's part would not be a variation: *Ogle* v. *Vane*, L. R. 3 Q. B. 272; *Hickman* v. *Haynes*, L. R. 10 C. P. 598.

Statute of Frauds.

It will be observed from the citation of authorities which has been made in the foregoing notes to this subsection, that the writer is of opinion that very many of the cases decided under the 4th and 17th sections of the Statute of Frauds, have peculiar application to this new Division Court jurisdiction. In the 4th section, relating to the sale of lands or any interest therein, it is declared that the agreement upon which the action shall be brought, "or some memorandum or note thereof, shall be in writing, and *signed* by the party to be charged therewith, or some other person thereunto by him lawfully authorised." The 17th section, relating to the sale of goods, declares that there shall "some note or memorandum thereof in writing of the said bargain be made and *signed* by the parties to be charged by such contract, or their agents thereunto lawfully authorised." Under both Statutes there must be a *signing* or *signature*, which we take to be the same thing. That the signature can, under both Statutes, be made by an agent—in the one by express provision, in the other by applying the well known rules of interpretation—is another point of similarity; and in the many minor points which are in the foregoing notes touched upon, the correctness of the view taken in this respect it is hoped will be apparent.

How Signature proved.

In case the signature is denied (which the defendant would do by simply filing a disputing notice under the 79th section), the plaintiff must, of course, produce evidence of it. That may be done in several ways, for instance, by calling a subscribing witness to the signature, or one who was present and saw the signature affixed; admissions made by the defendant, or in certain cases by those under whom he claims, or from a knowledge of the person's handwriting by having seen him write, or received letters from him in course of business, or by comparison of handwriting; or if the witness was dead, insane, or out of the country, by proof of his handwriting. The mode of doing so in the latter cases is aptly put by Patteson, J., in *Doe d. Mudd* v. *Suckermore*, 5 A. & E. 731, where reference is made to the leading authorities up to that date. He says: "That knowledge (that is of handwriting) may have been acquired either by seeing the party write, in which case it will be stronger or weaker, according to the number of times and periods, and other circumstances under which the witness has seen the party write; but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname; or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of these letters or documents, or having otherwise acted upon them by written answers, producing further correspondence or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate; or by any other mode of communication between the party and the witness, which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party. Evidence of the identity of the party being, of course, added *aliunde*, if the witness be not personally acquainted with him:" see also *Thompson* v. *Bennett*, 22 C. P. 393. Proof by comparison of handwriting is not an unfrequent way of establishing its genuineness. Documents not relevant to the issue, proved to be genuine, can be put in for the purposes of comparison (*Birch* v. *Ridgway*, 1 F. & F. 270; *Cresswell* v. *Jackson*, 2 F. & F. 24); but the disputed writing must be produced in Court, and the Statute authorizing this kind of proof does not apply to documents which are not produced: *Arbon* v. *Fussell*, 3 F. & F. 152. Where the question is as to the handwriting of a witness, and the witness in cross-examination is induced to write on a piece of paper, this writing may be used for comparison: *Cobbett* v. *Kilminster*, 4 F. & F. 490. It is, of course, questionable how far a writing obtained in that way, and probably written under excitement, is a fair test of the ordinary handwriting of the witness. If the genuineness of the document sought to be put in is disputed, that, being a collateral question, must be decided by the Judge (*Bartlett* v. *Smith*, 11 M. & W. 483; *Boyle* v. *Wiseman*, 11 Ex. 360), and must be so decided before comparison of the handwriting can be made (*Cooper* v. *Dawson*, 1 F. & F. 550); but if such document is proved to be genuine, the evidence given concerning it may be used in support of any issue: *R. C. Bank* v. *Brown*, 27 U. C. R. 41. The question whether or not the jury can themselves compare handwriting appears yet to be unsettled in our Courts: *King* v. *King*, 30 U. C. R. 26. It is necessary to give some evidence of the identity of the person signing, though slight evidence is sufficient. Unless a name is so common as to neutralize the inference of identity, or other facts appear to raise a doubt, identity of name is *prima facie* enough to charge the defendant: *Greenshields* v *Crawford*, 9 M. & W. 314; *Sewell* v. *Evans*, 4 Q. B. 626; *Hamber* v. *Roberts*, 7 C. B. 861. If the acknowledgment be lost or destroyed, its existence may be proved by secondary evidence, as to which see Taylor on Evidence, chap. V. In

person whom, as executor or administrator, (*c*) the defendant represents;"

Appeal.

(2) There shall be an appeal when the sum in dispute (*d*) on such appeal (*e*)—exclusive of costs—exceeds one hundred dollars, subject to the provisions of this Act.

R. S. O. c. 47, ss. 54 and 56 amended.

3. The word "forty," where it occurs in the first subsection of the said fifty-fourth section, and in the fifty-sixth section of the said Division Courts Act, is hereby repealed, and the word "sixty" (*f*) is substituted therefor.

Absconding Debtors' Act.

4. In the class of cases provided for by the second section of this Act, the increased jurisdiction conferred by the said

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Nathan v. *Jacob*, 1 F. & F. 452, a machine copy of a letter written by the plaintiff to a third person was read as an admission made by the plaintiff, though not admissible as a letter. So also may there be admissions by acquiescence (Roscoe's N. P., 14th Ed.; *Bassela* v. *Stern*, 2 C. P. D., at page 272), and by receipts and from the acts of the party: Taylor on Evidence, sec. 729; *Attorney-General* v. *Halliday*, 26 U. C. R. 397. The admissions of a next friend, appointed under Rule 126, in an action by an infant would not bind the latter: *Cowling* v. *Ely*, 2 Stark. 366; *Eccleston* v. *Speke*, 3 Mod. 258; *Webb* v. *Smith*, Ry. & M. 106. The admissio. made by one who has a direct or implied authority as agent for the purpose of making an admission is good evidence against his principal. So, after *prima facie* evidence of partnership has been given, the declaration of one partner is evidence against his co-partners as to partnership business: Roscoe's N. P. The admissions of a wife are not in general evidence against the husband, unless where the wife can be considered the agent of her husband, in which case they would be evidence: see *Lindus* v. *Bradwell*, 5 C. B. 583.

(*c*) As to the evidence of corroboration necessary in an action against an executor or administrator for the alleged liability of the testator or intestate in his lifetime, see Sinclair's D. C. Act, 347, 348; *Hill* v. *Wilson*, L. R. 8 Chan. 888; *T. & L. Company* v. *Clarke*, 3 App. R. 429-434; *Steed* v. *Cooper*, W. N. 1879, 212.

(*d*) It is difficult to give an exact meaning to the words "sum in dispute." *Prima facie* the amount sued for, if upwards of $100, would be the subject of appeal; but a mere simulated claim for upwards of $100, and not *bona fide*, would not, it is submitted, be within the language here used. The amount should be *honestly and reasonably* in dispute: *Mayer* v. *Burgess*, 4 E. & B. 655; *Dreesman* v. *Harris*, 9 Ex. 485; see also the notes to section 17 and following sections.

(*e*) As to the cases in which appeal properly lies, and the proceedings necessary to be taken in such cases, see section 17, *et seq.*

(*f*) It will be observed that, not only in actions for damages merely under the first subsection of section 54, but under section 56 of the Division Courts Act, in actions of replevin, the jurisdiction is extended to $60. For the general law of replevin in Division Courts, see Sinclair's D. C. Act, title, "Replevin." In actions of replevin now, where the value of the property is upwards of $40 and not exceeding $60, the affidavit for order (Sinclair's D. C. Act, 236, 237) for the writ will require to be altered to meet the circumstances of each case.

second section shall apply to claims and proceedings against absconding debtors under section 190, and subsequent sections of the Division Courts Act (*g*); and in such cases the attachment may issue and proceedings may be had on a claim of not less than four dollars, and not more than two hundred dollars.

Order in which suits to be tried.

5. The Clerk shall place all suits in which the sum sought to be recovered exceeds one hundred dollars, at the

(*g*) This section extends the increased jurisdiction under the second section to proceedings against absconding debtors. It will be observed that, while the 190th section of the Division Courts Act can be invoked in cases arising within its provisions, for a sum not exceeding $100 nor less than $4, "for any debt or *damages* arising upon *any* contract, express or implied," this section allows an attachment to issue *only* on claims suable in the Division Court under section 2 of this Act. This distinction must be kept in view. For the general law in attachment proceedings, see Sinclair's D. C. Act, 199 to 213. In cases under this section, the affidavit for attachment (Sinclair's D. C. Act, 285) will require to be drawn up in regard to the claim according to circumstances. Unless the affidavit *clearly* makes out a case under the 2nd section of this Act, the creditor, and probably the clerk, if a seizure were made, could be held responsible as trespassers: *Quackenbush* v. *Snider*, 13 C. P. 196. In addition to the cases cited in note (*b*) to section 190, in Sinclair's D. C. Act, on the question of "Who is an absconding debtor," the reader is referred to the further authorities of *Ex parte Gutierrez; In re Gutierrez*, 11 Chan. D. 298; *Butler* v. *Rosenfeldt*, 16 L. J. N. S. 54. In the former case, it was held that in the case of a foreigner who was in England for a merely temporary purpose, and was preparing to return home, there was no presumption (as there might be in the case of a domiciled Englishman going abroad) that he was going away with the intention of avoiding the payment of a debt. The Master of the Rolls, at page 301, in speaking of an Act in some respects similar in its provisions to ours, says, "The Act is aimed at absconding debtors. A man who goes away does not *necessarily* abscond. * * * I must say it appears to me that the process of the Court of Bankruptcy has been abused, by which I mean that it has been knowingly used for an improper purpose, contrary to the plain meaning of the Act and the justice of the case."

The necessity for the affidavit being duly made will more strongly appear by a reference to the cases of *Morgan* v. *Hughes*, 2 T. R. 225; *Stevens* v. *Clark*, 2 M. & Rob. 435; *R.* v. *Hughes*, 4 Q. B. D. 614; in addition to *Caudle* v. *Seymour*, and the other cases cited at page 201 of Sinclair's D. C. Act. As to the necessity for the Justice of the Peace filing the affidavit upon which he issues a warrant of attachment, as remarked upon in note (*p*) at page 203 of the work just referred to, a further reference may be made to the cases of *R.* v. *Armytage*, L. R. 7 Q. B. 773; *James* v. *S. W. Ry Co.*, L. R. 7 Ex. 287; and Maxwell on Statutes, 347, 348. An attachment would be set aside if issued for money lent, the affidavit not stating by whom: *McKenzie* v. *Bussell*, 3 O. S. 343; see also *Handley* v. *Franchi*, L. R. 2 Ex. 34. In the absence of any form setting out the particular cause of action, as given in Form 11, the affidavit should follow as nearly as possible the common affidavit of debt for arrest: *Anon*, 2 O. S. 292. If the promissory note or other cause of action is fully set out, the indebtedness of the defendant would be alleged with sufficient certainty: *Wakefield* v. *Bruce*, 5 P. R. 77. The Judge has an inherent right to set aside an attachment improperly issued: see *Howland* v. *Rowe*, 25 U. C. R. 467.

foot of the trial list, (*h*) and the other suits on the list and business of the Court shall be disposed of before entering upon the trial of any of such first mentioned suits, unless the Judge shall, for special reason or reasons, (*i*) otherwise order. The Judge shall, in such cases, when no agreement not to appeal has been signed and filed, take down the evidence in writing, and shall leave the same with the Clerk of the Court, but in the event of an application for a new trial it shall be forwarded to the Judge by the Clerk for the purposes of such application.

Evidence to be taken down.

Parties may agree not to appeal.

6. No appeal (*j*) shall lie to the Court of Appeal if before the Court opens, (*k*) or if without the intervention of the Judge before the commencement of the trial, (*l*) there shall

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(*h*) The Clerk usually makes out a list for the Judge and one for the use of the professional gentlemen and others having business in Court. Hereafter the suits for over $100, whether commenced by attachment or not, shall be placed at the foot of such list, unless the Judge otherwise orders. The section leaves all replevin suits, and those personal actions where the full amount claimed does not exceed $60, to be placed on the list the same as before.

(*i*) It will be observed that it is imperative on the Judge to dispose of the ordinary business of the Court first, leaving the actions for sums of upwards of $100, and not exceeding $200, to be disposed of last, "*unless* the Judge shall, for *special reason or reasons*, otherwise order." In every case the "reason" for deviating from the general rule must be determined according to its own particular circumstances. The change should not be made unless the Judge, in the exercise of a judicial discretion, should determine, on the facts before him, that a reason or reasons existed for not disposing of the ordinary business of the Court first. As to the exercise of judicial discretion, see Maxwell on Statutes, 100-104; *Lee* v. *Bude & Torrington J. Railway Co.*, L. R. 6 C. P. 576; *Macbeth* v. *Ashley*, L. R. 2 Scotch App. 352.

It is also *imperative* on the Judge to take down the evidence *in writing* where there is no agreement not to appeal. It is suggested, in view of the fact that the Judge in appeal may refuse to consider any question not raised before the Judge below (*Williams* v. *Evans*, L. R. 19, Eq. 547, and notes to section 17), that the Judge should take as full a note, not only of the evidence, but of all points of law arising at the trial, or of questions respecting the reception or rejection of evidence, or of the Judge's charge to the jury, or of the decision upon any motion for nonsuit, or otherwise, as fully as Judges usually take notes of trials at *nisi prius*. The interests of suitors will be best conserved by this course, and a Judge's decision better and more fairly considered on appeal. There will then be no reason to question what actually occurred at the trial, or the view which the Judge took of the case on any of the questions raised.

(*j*) The clauses regulating appeals under this Act will be found in sections 17 to 22 of this Act, inclusive, and the general law bearing on the same in the notes to those sections.

(*k*) The Court is considered open when the Bailiff has made proclamation, as is referred to at page 35, note (*q*), of Sinclair's D. C. Act.

(*l*) The evident intention of this part of the clause is to prevent the Judge in any way making any suggestion, or using persuasion against the right of appeal.

be filed with the Clerk, in any case, an agreement in writing not to appeal, signed by both parties, or their Attorneys or agents, and the Judge shall note in his minutes whether such agreement was so filed or not, and the minutes shall be conclusive evidence upon that point.

Security by Clerks and Bailiffs.

7. The Judge shall require (*m*) such additional security to be given by the Clerks and Bailiffs of the Division Courts within his County as shall, in his opinion, afford sufficient security to any and all persons being parties in any legal

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He should be perfectly indifferent as to either course, and leave the parties free to choose which they deem best. The "commencement of the trial" is a term of somewhat uncertain meaning. A trial would certainly have commenced if the Jury was sworn, or in a case tried by the Judge, if any evidence was given, whether oral or otherwise. The Court would then most certainly have become seized or possessed of the case, so as to prevent the agreement then being entered into. The agreement must be "in writing," and duly signed and filed with the Clerk. Should the parties, however, agree not to appeal, and the signed agreement be omitted or overlooked, it is submitted that they would be bound by it: *In re Burrowes*, 18 C. P. 493; *Cornish* v. *Abington*, 4 H. & N. 549; *R.* v. *Hughes*, 4 Q. B. D. 614, and cases there cited; *Wallace* v. *Fraser*, 2 Sup. R., at page 532; *Thomas* v. *Brown*, 1 Q. B. D. 714; 58 Law Times, 256, and cases there cited; *Young* v. *Taylor*, 25 U. C. R. 583. The Clerk should duly "*file*" the agreement: see Sinclair's D. C. Act, 25 (*r*). It may be in this form:

In the Division Court for the County of .

A. B., Plaintiff, v. C. D., Defendant.

We hereby agree not to appeal in this cause to the Court of Appeal against any decision of the Judge at any time made herein.

Dated this day of , A.D. 188 .

A. B.
C. D.

If the parties have neither Attorneys nor agents, the agreement must be signed by themselves; but if they have, or either of them has such, then such Attorneys or agents, or the Attorney or agent for either party, can sign the agreement for their clients respectively, adding for which party such Attorney or agent so signs. It will be observed that the foregoing form of agreement prevents an appeal against "*any* decision." It is questionable if an agreement without some such words would apply to a second trial in the event of a new trial being granted, and it will be better to save all such questions by having a clear understanding about it in the first place: see *Bross* v. *Huber*, 18 U. C. R. 282, on this point; *Deadman* v. *Agriculture & Arts Ass.*, 6 P. R. 176; and *contra*, *Doe Wetherell* v. *Bird*, 7 C. & P. 6. This agreement would not, of course, interfere with the right of either party to move for a new trial, or take any other proceeding which he would be entitled to take in an ordinary case. By the 68th section of this Act. this and the General Act are to be read as one. The noting by the Judge of the signing of the agreement is made *conclusive* evidence on that point.

(*m*) The words here used are imperative, and seem to mean that "additional security" *must* be given, leaving the extent of it to be governed by the opinion of the Judge, a due regard being had by him "to the increased jurisdiction"

proceedings in the said Court, having regard to the increased jurisdiction by this Act conferred, and the increased business in the Courts. Nothing in this Act contained shall release or discharge (*n*) from liability in whole or in part any Clerk or Bailiff or any surety for any Clerk or Bailiff upon or by virtue of any bond or covenant heretofore given or entered into by such Clerk or Bailiff, or surety, under the provisions of the Division Courts Act.

Place of trial, and change of venue.

8. Where the debt or money payable (*o*) exceeds one hundred dollars, and is made payable by the contract of

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conferred by the Act, and the increased business in the Courts. The increase of business will be proportionately larger in commercial centres than in country places, and the security must necessarily be increased in the former places in proportion. The officer could either file a fresh covenant or guarantee bond for the full amount of the original *and* additional security in one sum, or give fresh security in either shape for the additional sum only. For the covenant and forms of affidavits, see Sinclair's D. C. Act, 23, 24, 235. The indorsement by the Judge on the covenant under this Act, and section 27 of the Division Courts Act, or on the guarantee bond under that section, and section 24 of chapter 15 of the Revised Statutes, may be in these words:

"I hereby approve of and declare the within covenant (or guarantee bond) sufficient in and for the sums therein mentioned, this day of 188 .

Judge."

(*n*) It is probable that this provision, declaring a continuance of liability on any bond or covenant given or entered into before this Act, is only precautionary legislation. It is submitted that the liability would not be affected without this provision: see Sinclair's D. C. Act, 25, 27, 29. On the general question of the liability of Clerks, Bailiffs, or their sureties, in addition to the authorities cited at pages 20 to 29 of the last mentioned work, the reader is referred to De Colyar on Guarantees, 199, *et. seq;* R. & J's Digest, 610; *Rainbow* v. *Juggins*, 5 Q. B. D. 138; *Board of Education of Paris* v. *Citizens' Insurance and Investment Co.*, 30 C. P. 132; *Webster* v. *Petre*, 4 Ex. D. 127; *Austin* v. *Gibson*, 4 App. R. 316; *Molson's Bank* v. *Girdlestone*, 44 U. C. R. 54; *Protector E. L. and Annuity Co.* v. *Grice*, 5 Q. B. D. 121. As to the liability of a Bailiff for not executing a writ of execution, where the defendant's estate had been placed in insolvency, see *Nerlich* v. *Malloy*, 4 App. R. 430.

(o) *Debt or Money Payable.*

The words used in this section, "debt or money payable," are not identical with those used in the second section of this Act. Substantially the same meaning must, however, be given to them. It is only in cases where the claim *exceeds* $100 that the provisions of this section will apply; and as such are only suable in the Division Court where "'ascertained' by the signature of the defendant, or of the person whom, as executor or administrator, the defendant represents," it follows as a consequence that this section will only apply to actions brought under the amendment made by the second section of this Act. As to what is a "debt or money payable," the reader is referred to Sinclair's D. C. Act, 99 and 147, *et seq.*, and the notes to sections 2 and 65 of this Act.

the parties at any place (*p*) named therein, the action may (*q*) be brought thereon in the Court holden for the division in which such place of payment (*r*) is situate, subject however

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(*p*) *Place of Payment.*

Any words employed by the parties which reasonably indicate a particular place of payment would be within this section. For instance, if a bill of exchange or promissory note were made payable "at the Bank of Montreal in Toronto," or at the office of the payee or any other person in any particular place, without further words of designation, it would be within the section. The fifth and sixth sections of chapter forty-two of the Consolidated Statutes of Upper Canada, still in force and unrepealed (as they only could be by the Dominion Parliament, under the 91st section, subsection 18, of the B. N. A. Act), do not affect this question. These sections declare that if bills of exchange and promissory notes are made payable at a certain place, without the use of the words, "only and not otherwise or elsewhere," they are payable generally. But these sections, and those in the English Act from which they were taken, were only intended for the protection of the makers of promissory notes and acceptors of bills of exchange, in compelling presentment to be made at such place (*Selby* v. *Eden*, 3 Bing. 611; *Gibbs* v. *Mather*, 8 Bing. 214), or possibly to the party himself: *Com. Bank* v. *Johnston*, 2 U. C. R. 126; *Bank U. C.* v. *Parsons*, 3 U. C. R. 383; *McLellan* v. *McLellan*, 17 C. P. 109. If a maker or acceptor uses such words, it is quite clear that payment cannot be compelled of him until presentment has been made at the particular place designated. It will therefore appear plain that what the Legislature has here meant, in regard to "*place*" of payment, must be understood in its popular sense, and, wherever that place may be, the claim would be suable under this section in the Court holden *for* the Division in which such place of payment was situate. Should the money be made payable, for instance, "at the City of Toronto" (which is no doubt an unusual form of contract), it would be difficult to say in that case which of the two divisions in that city the claim could be sued. Probably the suit could be entered and tried in the Court holden for either division, at the election of the creditor. Some difficulty may arise in a case of this kind. There is a debt in existence which, by the agreement of the parties, is made payable at a certain place. An I O U, or other acknowledgment, is given for it so as to render it suable in the Division Court under section 2 of this Act, but without any place of payment being designated in such acknowledgment. *Query*—Is it necessary in such a case that the place of payment should be designated *on the face* of the acknowledgment to render it suable under this section, or could the evidence of that fact be given otherwise? Should such a claim as is mentioned in this section be sued in a division other than that in which the place of payment is situate, the parties could nevertheless agree to give the Court jurisdiction under section 10, or, if jurisdiction should not be excepted to under section 14, the right of the Court to try the case, as if it had complete jurisdiction, would, under that section, be conferred.

(*q*) *Where Action may be Brought.*

The clause says the action "may be brought" in a particular Court. The plaintiff has the option of doing so if the circumstances concur to give him that right: Rev. Stat., cap. 1, sec. 8, sub.-sec. 2; *R.* v. *Bishop of Oxford*, 4 Q. B. D., at page 554; see *Cameron* v. *Wait*, 3 App. R. 175, *per* Harrison, C. J. The general jurisdiction of the Court is otherwise unaffected by this section, and actions could be brought under sections 62 to 66, inclusive of the general Act or any section of this Act, as if this clause had never been passed.

(*r*) The "place of payment" here referred to is the particular bank, office, counting-house, or other place, or even municipality, at which the debt or

to the place of trial being changed to any other division in which the Court holden therein has jurisdiction (*s*) in the particular case;

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money may, by "the contract of the parties," be made payable; that is, where the debtor has agreed to pay the debt, and where the creditor has agreed to accept his money.

(*s*) *Jurisdiction.*

Jurisdiction has always been a difficult subject in dealing with Division Court matters. Power is here given to change the place of trial in such a case to any other division in which, independently of this section, the claim would be suable. As to the jurisdiction of Division Courts generally, the reader is referred to the cases cited at pages 84 to 90 of Sinclair's D. C. Act. Since then, however, several decisions have taken place on this much vexed question. In *Hagle* v. *Dalrymple*, 16 L. J. N. S. 54, 8 P. R. 183, it appeared that the defendant, residing at Port Elgin, in the County of Bruce, had written to the plaintiff, at Toronto, a letter, instructing him to take certain legal proceedings, which were so taken at Toronto. The plaintiff sued the defendant for his costs in the First Division Court of York, at Toronto. It was held that the defendant was entitled to a writ of prohibition to the Division Court at Toronto, on the ground that the *whole* cause of action did not arise at Toronto. This case appears to conflict with the authority of *Newcomb* v. *DeRoos*, 2 E. & E. 271, but reconcilable with *Green* v. *Beach*, L. R. 8 Ex. 208. In *Holland* v. *Wallace* (reported in 8 P. R., p. 186), Hagarty, C. J., lately decided a very important question under the garnishee clauses of the Division Courts Act. There was an application for a prohibition to the First Division Court of York. The Division Court summons was served on Hallum, the garnishee, on 30th August, and on Wallace, the primary debtor, on the 17th September. Both the plaintiff and Hallum live in Toronto, Wallace in Lindsay. The Division Court was held at Toronto on the 30th September. Wallace was advised not to appear, on the ground that sufficient notice had not been given. Judgment was rendered against him, and he applied for prohibition on the ground that sufficient notice was not given, and that Hallum was not a real garnishee, but inserted to give the Court jurisdiction. On this ground the judgment chiefly proceeds. It was held that in garnishee matters, before judgment to give jurisdiction to a Division Court where it does not otherwise exist, there must be a *real* garnishee, and plaintiff must take the risk of establishing such fact, otherwise a prohibition will be granted. The order was made for prohibition. A defendant not raising the question of jurisdiction on the first trial, is not prohibited from doing so on the second trial, a new trial having been granted: *Deadman* v. *Agricultural and Arts Association*, 6 P. R. 176; *Bross* v. *Huber*, 18 U. C. R. 282. As to acquiescence in jurisdiction, see *Re Smart and O'Reilly*, 7 P. R. 364, and abandonment of excess, *In re Stogdale and Wilson*, 8 P. R. 5. On an application for prohibition after judgment and execution, where the question of jurisdiction depends upon disputed facts, as, whether the person by whom the bargain sued upon was made, acted as the plaintiff's or defendant's agent; if the Division Court Judge has decided this question on evidence, and found in favour of his jurisdiction, the Court will not interfere with his finding; but where there is no such decision, and the want of jurisdiction was clearly established by the affidavits, a prohibition was granted: *Stephens* v. *Laplante*, 8 P. R. 52. The defendant, who resided within the limits of the 10th Division Court of York, drew a cheque, in the plaintiff's favour, within the limits of the 1st Division Court of the same county, upon a bank situate in the 10th division. The cheque being dishonoured, the plaintiff sued on it in the 1st Division Court. *Held*, that the

(2) To procure such change an order to that effect is to be obtained by the defendant from the Judge of the County in which the action is brought; (*t*)

(3) The application (*u*) for the order is to be made within eight days from the day on which the defendant who makes

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action was improperly brought there, as the whole cause of action did not arise in that division: *King* v. *Farrell*, 8 P. R. 119. The carrying on business, for the purpose of jurisdiction, must not be of a temporary character, nor for the purpose of fulfilling a contract to do certain work, even though workshops and counting-houses were erected, and clerks employed for the purpose: *Gorelett* v. *Harris*, 29 L. T. 75. It is submitted that a municipal corporation "resides or carries on business," within section 62 of the Division Courts Act, at the place within the municipality [Har. Mun. Manual, 170] at which the council sittings are held. See also note (*x*) to this section.

(*t*) *The Application—by whom made.*

The application is to be made by the defendant, or if there be more than one, then by or on behalf of all. It is to be made to "the Judge of the County in which the action is brought," that is, in which the first process in the suit issued: Rules 9 to 17. In applying, under section 64 of the general Act, it is different: see Sinclair's D. C. Act, 89 and 265, and Rule 123. The Clerk would be entitled to the same fees, of and about the order, as he would in other matters.

(*u*) *When and how made.*

Difficulty will frequently arise as to the meaning of the words "application for the order," and when such can be said to have been made. Should the Judge be at home no difficulty would generally arise; but should he be away from home until after the time expires, within which the application should be made, a difficulty might thereby be occasioned. The application must be made "within eight days" *from* the day of service, when the defendant, or one of the defendants, resides in the County in which the action is brought, but if none of the defendants so reside in such County, then within twelve days *after* the day of service. The words "from" and "after" bear here the same meaning, and both exclude the day of service: Sinclair's D. C. Act, 100 (*b*). For instance, if a summons was served on the *tenth* day of any month, the *eighteenth* and *twenty-second* days of the same month would respectively be last days for applying for this order. If the last of such days fell on a Sunday, then the application should be made not later than the day previous; Monday would be too late: *Rowberry* v. *Morgan*, 9 Ex. 730; *Peacock* v. *The Queen*, 4 C. B. N. S. 264; *Wynne* v. *Ronaldson*, 12 L. T. N. S. 711; *Ex parte Ferrige, In re Ferrige*, L. R. 20 Eq. 289; *Ex parte Viney, In re Gilbert*, 4 Chan. D. 794; *Ex parte Saffery, In re Lambert*, 5 Chan D. 365. But should the defendant not be able to apply on the last day, owing to the absence of the Judge, he would not be debarred of his right. It would be sufficient for him to leave the papers, on which he rested his application, at the Judge's chambers within the proper time, and then his application could be considered as "made." In the case of *R.* v. *Allan*, 4 B. & S. 915, the point was, whether an application was made in time under the Statute 13 Geo. II. cap. 18, sec. 5, which declared that no *certiorari* should be granted to remove any conviction, &c., before a Justice of the Peace, "unless such *certiorari* be moved or applied for within six calendar months next after such conviction, &c., shall be so had or made." In that case the latest day allowed for the *certiorari*, under that Statute, was Saturday the

the application was served (*v*) with the summons, where the service is required to be ten days before the return; or within twelve days after the day of such service, where the service is required to be fifteen days or more before the return; (*w*)

(4) The application is to be on an affidavit (*x*) that the applicant intends to defend the suit, that he has a good

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22nd of August, and it appeared that the clerk to the London agent left the affidavits with the Judge's clerk on the 21st, stating his object, and called on the Saturday intending, it would seem, to take away the fiat with him, thinking it was an *ex parte* proceeding. It was held that the application was virtually, made on the 22nd of August. At page 926 of the report of that case, Mellore Justice, is reported as saying: "As to the next point, it would be hard if w, could not find a way of giving effect to Statute 13, Geo. II. cap. 18, sec. 5, without depriving a party of the *certiorari*, when he had brought the papers upon which his application was founded, to the Judge's clerk, to be delivered to the Judge in good time, simply because the Judge was not in attendance on the particular day, which was the last for making the application. It is no fault of the party that a Judge does not attend at chambers every day during the long vacation; *and that circumstance should not shorten the time allowed by the Statute for application:*" see also *Berridge* v. *Fitzgerald*, L. R. 4 Q. B. 639; *Bain* v. *Gregory*, 14 L T. N. S. 601; *Lewis* v. *Calor*, 1 F. & F. 306; *Hughes* v. *Griffiths*, 13 C. B. N. S. 334; *Mumford* v. *Hitchcocks*, 14 C. B. N. S. 361. At page 333 of the report of the case of *Hughes* v. *Griffiths*, Erle, C. J., says: "It seems to me that the distinction between a thing which is to be done by the Court and a mere act of the party is maintainable." Should the Judge in any way be pecuniarily interested in the subject matter of the suit he could not make the order, or do any other judicial act in it: see Sinclair's D. C. Act, 17; *Baird* v. *The Village of Almonte*, 41 U. C. R. 415, 428; *R.* v. *Hammond*, 9 L. T. N. S. 423; *R.* v. *Milledge*, 4 Q. B. D. 332; *R.* v. *Huntingdonshire (Justices)*, 4 Q. B. D. 522; *Vashon* v. *Corporation E. Hawkesbury*, 30 C. P., at page 203.

(*v*) As to how and when service of summons may be made, see Sinclair's D. C. Act, 93 to 95. Service on one of two partners is not sufficient to warrant a judgment against both, and in any case to warrant a judgment by default, on a specially endorsed summons, there should be a "strict affidavit of service:" *Pollock* v. *Campbell*, 1 Ex. D. 50; W. N., 1875, page 248.

(*w*) As to the time within which the application must be made, see note (*u*) to this section. When proceedings are taken vexatiously in two Courts at the same time, for the same cause, the plaintiff will be put to his election as to which he will proceed in, and the other will be stayed: see *Frith* v. *Guppy*, L. R. 2 C. P. 32; and generally a second action will be stayed until the costs of a previous unsuccessful action are paid: *Cobbett* v. *Warner*, L. R. 2 Q. B. 108; *Cannot* v. *Morgan*, 1 Chan. D. 1; *Nicholson* v. *Coulson*, 6 P. R. 65. But see *Davis* v. *Weller*, 5 P. R. 150; *Doolan* v. *Martin*, 6 P. R. 319.

(*x*) *Affidavit.*

This application for changing the place of trial must be founded on "an affidavit," to be made by the defendant, or in certain contingencies by his Attorney or agent. The formal requirements of affidavits generally in Division

defence upon the merits, that the cause of action did not wholly arise in the division in which the action is brought, and that the witnesses for the defence, or some of them, reside within the division in which the defendants, or one of them, resided or carried on business, at the time the action was brought, and that such application is not made for the purpose of delay; the date of the then next two sittings of the Court to which he seeks to have the cause transferred is also to be shewn;

Court proceedings are regulated by the 133rd Rule of Court. The difference between affidavits in the Division Court and other Common Law Courts is, that in the former case the Judge "shall not be bound to reject as insufficient" any affidavit not in accordance with the rule (No. 133); but in other Courts an informal affidavit cannot in certain cases be used at all: Har. C. L. P. Act, 680. The usual formalities at least, if not the necessities, of affidavits are so well understood by professional gentlemen, and others having to do with Division Court proceedings, that an extended reference to the general law on the subject is considered quite unnecessary. The reader is referred to note (*d*), at page 269, of Sinclair's D. C. Act for the works treating on that subject; and, in addition, to Arch. Pract., 13th Ed., 1287 to 1304. The form of jurat in the case of an illiterate deponent will be found at 326 of Sinclair's D. C. Act. A Clerk or Commissioner, in taking an affidavit, should subscribe, not only his name, but the word "Commissioner" or "Com.," or "Clerk," as the case may be: *Pawson* v. *Hall*, 1 P. R. 294; *Brett* v. *Smith*, 1 P. R. 309; *Babcock* v. *Mun. Council of Bedford*, 8 C. P. 527. In the Division Courts, all affidavits can be taken by the persons mentioned in the 105th section of the Division Courts Act (Sinclair's D. C. Act, 134), and in the 138th section of chapter 62 of the Revised Statutes. Should the parties be described in the summons by initials, or even by a wrong name, the affidavit may also use such initials (*De Forrest* v. *Bunnell*, 15 U. C. R. 370), or wrong name: *Sims* v. *Prosser*, 15 M. & W. 151; *Hodgson* v. *May*, 7 D. & L. 4; *R.* v. *Sheriff of Surrey*, 8 Dowl. 510; *Beauchamp* v. *Cass*, 1 P. R. 291. An irregularity in the affidavit may be waived by appearance or otherwise: *Ex parte King*, L. R. 7 C. P. 74. The deponent should sign his usual signature; and if he does so, it is no objection that it does not correspond with the name given in the affidavit; *Folger* v. *McCallum*, 1 P. R. 352; *Hands* v. *Clements*, 11 M. & W. 816. The signature may be in a foreign character: *Nathan* v. *Cohen*, 3 Dowl. 370. If an affidavit be resworn, it need not be signed a second time: *Liffin* v. *Pitcher*, 1 Dowl. N. S. 767. If sworn in a foreign country, and that fact duly certified to, the absence of the signature of the deponent has been held no objection: *In re Howard, In re Ashcroft*, L. R. 9 C. P. 347. Exhibits attached to the affidavit must be specifically referred to: *Re J. Allison*, 3 W. R. 62. The Judge may in general order an inspection of an exhibit (*Tebbutt* v. *Ambler*, 7 Dowl. 674), or may order it to be brought into Court: *Attenborough* v. *Clark*, 2 H. & N. 588. An affidavit purporting to be sworn on a day which has not arrived is void: *In re Robertson et al.* 5 P. R. 132. The jurat of an affidavit may be referred to to explain the date of a fact deposed to in the affidavit: *Lyman* v. *Brethron*, 2 Cham. R. 108. An affidavit purporting to be "sworn before at," &c., omitting the word "me," held sufficient: *Martin* v. *McCharles*, 25 U. C. R. 279. The presumption of law is that an affidavit is in the same state as when it was sworn, as to alter it is an act of fraud and misconduct, which will not be presumed: *R.* v. *Gordon*, Dears C. C, 586.

(5) The affidavit must (*y*) be by the defendants, or one of them, or by their or his Attorney or agent in case satis-

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The following is given as a form of affidavit on application to change the place of trial:

In the Division Court for the County of .

A. B., Plaintiff, *against* C. D., Defendant.

I, C. D., of the Township of in the County of and Province of Ontario, make oath and say:

1. That I am the above-named defendant in this cause, and was served with the summons herein on the day of instant (or last past).

2. That I intend to defend this suit; that I have a good defence to this action upon the merits; that the cause of action herein did not wholly arise in the division in which this action is brought; and that the witnesses for the defence (or "some of the witnesses for the defence") reside within the division in which I resided [or "carried on business" or "resided and carried on business," as the case may be] at the time this action was brought, namely (here set out the names and residences of such witnesses), and that the application to be made hereon is not to be so made for the purpose of delay.

3. That at the time this action was so brought I resided (or "carried on business," or "resided and carried on business," as the case may be) within the limits of the Division Court for the County of , and that the next two sittings of the said last mentioned Court will be held at on the (here give the dates particularly, and, if possible, the hour of opening of the Court), and that I desire to have this cause transferred to that Court, and tried at one of such sitings.

Sworn, &c.

[Should the affidavit be made by one of several defendants, or by an attorney or agent, it can easily be adapted].

It will be observed that the above form is somewhat wider than the Statute requires the affidavit to be. By adopting it, however, information will be given which will be of service to the Judge in making the order, facilitate the duties of the Clerk, and be of advantage to the opposite party.

As to where a cause of action can be said to "wholly arise," see Sinclair's D. C. Act, 84 to 87: *Hagle* v. *Dalrymple*, 16 L. J. N. S. 54; *Taylor* v. *Nicholls*, 1 C. P. D. 242; *Taylor* v. *Jones*, 1 C. P. D. 87, and note (*s*) to this section.

As to what constitutes the "residence" of a person, see Sinclair's D. C. Act, 86 *et seq.*, and cases there cited; and, in addition, *Roberts* v. *Williams*, 2 C. M. & R. 561; *Blackwell* v. *England*, 8 E. & B. 541; *Attenborough* v. *Thompson*, 2 H. & N. 559; *Ablett* v. *Basham*, 5 E. & B. 1019; *Thorpe* v. *Browne*, L. R. 2 H. L. 220; *Beal* v. *Ford*, 3 C. P. D. 73; *R.* v. *St. George*, 4 B. & S. 108. As will be seen from these cases, the meaning of the term "resident," much depends on the scope and object of the statute in which it is used, but, as a general rule, the place of business will not be regarded as the place of residence or abode: *R.* v. *Hammond*, 17 Q. B. 772.

"The time the action was brought" of course refers to the date of issue of the first process in the cause: Rule 10. If the affidavit is not made by the defendant, or if there are several defendants, by one of them, it must shew explicitly why it is not so made. The affidavit need not, under this section, disclose the merits, as is required in some cases. See Sinclair's D. C. Act, page 101 (*g*).

(*y*) It is imperative on the defendant, or one of the defendants, if several, to make this affidavit (*Herschfeld* v. *Clarke*, 11 Ex. 712; *Christopherson* v.

factory reasons are given why the affidavit is not made by a defendant;

Lotinga, 15 C. B. N. S. 809; *Barwick* v. *DeBlaquiere*, 4 P. R. 267; *Tiffany* v. *Bullen*, 18 C. P. 91; *Frederici* v. *Vanderzee*, 2 C. P. D. 70), *unless* for "*satisfactory reasons*" given to satisfy the mind of the Judge, he sees proper to allow it to be made by the attorney or agent. As the statute primarily requires the defendant, or one of them, to pledge his oath to the contents of this affidavit, for the reason that the facts are best known to him, the Judge should not dispense with it except for very good cause. As remarked by Grove, J., in the last mentioned case (2 C. P. D. 71), "It is one thing for the plaintiff (here defendant), who may be presumed to have a knowledge of his rights, to make an affidavit, and another for his solicitor, or some other person to do so." The "satisfactory reasons," which it will be necessary to show before dispensing with the necessity of the defendant's own affidavit, must of course depend on the circumstances of each particular case. It is submitted that such reasons should be shewn as would amount to a case of impossibility to obtain the defendant's affidavit, at the time it was required, by the exercise of reasonable efforts. A slight inconvenience would not be sufficient. The affidavit should either shew the impossibility of getting the defendant's affidavit, or that all reasonable efforts to obtain it had been exhausted. It is to be observed that the language of this section does not extend to the case of corporations, as is to be found in the 156th and 169th sections of the Common Law Procedure Act. The better opinion would seem to be on the authority of *Frederici* v. *Vanderzee*, 2 C P. D. 70: and the *Bank of Montreal* v. *Cameron*, 2 Q. B. D. 536; doubting the case of *Kingsford* v. *G. W. Ry Co.*, 16 C. B. N. S. 761, that such defendants could not make application under this section. Being a corporation, they could not make the affidavit, and no officer of theirs is specially authorised by the statute to do so for them. It is submitted that the attorney or agent of a defendant or defendants can only make the required affidavit in cases where the defendant, or one of the defendants, could himself make it if present. See the notes under section 62 as to substitutional service. In view of the language used in the sections of the C. L. P. Act just referred to, it would appear as if the absence of similar language in this section was intentional. There are many reasons which could be suggested for not subjecting a plaintiff to the necessity of trying an action against a corporation where it "resided or carried on business." More especially would this be so in actions against municipal corporations. See also *Muirhead* v. *Direct U. S. Cable Co.* (*Limited*), 27 W. R. 708; *Begg* v. *Cooper*, 40 L. T. N. S. 29.

Summons to shew Cause.

The Statute does not expressly or impliedly state that the order can be made *ex parte*. It is submitted therefore that the plaintiff must first have an opportunity of shewing cause. As remarked by Willes, J., in *Thorburn* v. *Barnes*, L. R. 2 C. P. p. 401: "It is one of the first principles of justice that no man's rights shall be adjudicated upon without giving him an opportunity of being heard in support of them;" Maxwell on Statutes, 325; Sinclair's D. C. Act, 31, 127, 141; *Fisher* v. *Keane*, 11 Chan. D 353; *Ex parte Tucker; In re Tucker*, 12 Chan. D. 308; *R.* v. *Law*, 27 U. C. R. 260. Compare sections 17 & 19 of chapter 49, and sections 158 & 304 of chapter 50 of the Revised Statutes of Ontario with this section.

The summons may be in this form:

In the Division Court for the County of .

A. B., Plaintiff, *v.* C. D., Defendant.

Upon reading the affidavit of the defendant, and upon hearing him by his Attorney (or agent), let the above-named plaintiff, his Attorney or agent,

(6) The order shall direct at what sittings of the Court the suit shall be tried, subject to all rights of postponement as in other cases, and shall be attached to the summons and other proceedings in the suit by the Clerk, who shall forthwith transmit (*z*) the same to the Clerk of the Court in

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attend me at my Chambers, at on the day after the day of service hereof, at of the clock in the forenoon of the same day, or at such other time and place as Chambers may be held, to shew cause why the place of trial of this cause should not by order be changed to the sittings of the Division Court for the County of pursuant to the eighth section of the Division Courts Act, 1880; and why such order should not direct the trial of this cause to be had at the (next) sittings of that Court, to be held on the day of next, subject to all the rights of postponement.

Dated at Chambers this day of A.D. 188 .

Judge.

On the return of the summons, which with an affidavit of service should be produced to the Judge, the application could be heard and disposed of. No special provision is made for the costs of this application, so that the only costs which would be allowable would be the ordinary fees of the Clerks and Bailiffs under the tariff. As to the postponement of the trial of cases, see Sinclair's D. C. Act, 106 & 270. The general powers conferred on a Judge under the General Act and the Rules of Court can, under the 68th section of this Act, be invoked in all proceedings under it.

The following is a general form of order:

In the Division Court for the County of .

A. B., Plaintiff, *v.* C. D., Defendant.

Upon reading the affidavit of the defendant herein, and upon hearing the parties by their Attorneys (or agents),

I do order that the place of trial of this cause be changed to the sittings of the Division Court of the County of pursuant to the eighth section of the Division Courts Act, 1880; and I further order and direct that this cause shall be tried at the (next) sittings of that Court, to be held on the day of next, subject to all rights of postponement.

Dated at Chambers this day of A.D. 188 .

Judge.

(*z*) The Clerk is forthwith to transmit the order to the Clerk of the Court in which the suit is ordered to be tried, together with the other proceedings in the suit. The duty of the Clerk in this respect is imperative; and his wrongful refusal could be followed by *mandamus* (*R.* v. *Fletcher*, 2 E. & B. 279; *In re Linden and Wife* v. *Buchanan*, 29 U. C. R. 1), and it would probably be granted with costs (Rev. Stat. 730; *R.* v. *Langridge*, 24 L. J. Q. B. 73); but the Clerk would not be bound to do so until all his costs and disbursements were first paid him. The defendant would not be liable for these costs. It will be observed that under subsection (9) it becomes the duty of the defendant obtaining the order "*forthwith* to serve it, or cause to be served," a copy of it on the plaintiff or his agent in the same manner as summonses are required to be served. We would suggest that a convenient practice to observe would be for the defendant to have the order served on the plaintiff at once, and then to deliver the order and an affidavit of service of it to the Clerk of the Court, for him to transmit with the other papers to the Clerk to whose Court the trial has been changed. It will be observed that both proceedings are to be done forthwith,

which the suit is by such order directed to be tried, and shall enter (*a*) a minute thereof in his procedure book;

(7) Upon receipt of such order and other papers by the Clerk of such last mentioned Court, he shall enter the suit and proceedings in his procedure book;

(8) All the papers and proceedings in the cause thereafter, shall be entitled and had and carried on as though the suit had originally been entered in the said last mentioned Court; (*b*)

(9) It shall be the duty of the defendant obtaining the order forthwith to serve, or cause to be served, (*c*) a copy

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which means "prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case:" *per* Cockburn, C. J., in *R.* v. *Berkshire* (*Justices*), 4 Q. B. D. 471; Sinclair's D. C. Act, 15, 103.

(*a*) On receipt of the order and other papers by the Clerk of the Court to which the place of trial has been changed, he should carefully enter the suit in his procedure-book, with the names of all the parties as they appear in the original summons. On this being done, all subsequent proceedings are to be had and taken in that court "as though the suit had originally been entered" there. The plaintiff must prepay or become responsible for the clerk's costs, otherwise he would not be obliged to enter the suit without such being done: Sinclair's D. C. Act, 39.

(*b*) Some difficulty may arise as to the rights of the parties after the cause has been transferred. It is submitted that in general the defendant would have the same time for giving notice disputing the plaintiff's claim, of set-off, or other statutory defence, as he would have had if the summons had been issued or served on him from that Court, but it is also submitted that a Judge would have the power of imposing terms upon the defendant in the order, as by prescribing the time within which the defendant should give any of such notices, or otherwise, as might appear to him reasonable. It will be necessary to keep in view the propriety of applying immediately for an order under this section, for, if refused, the defendant might, by lapse of time, be prejudiced in his defence in not having given the necessary notices, or the like.

(*c*) As to the meaning of serving the order "forthwith," see note (*z*) *supra*. Should the defendant not take out the order, or serve it as the statute requires, he would be taken to have abandoned it: *Kenny* v. *Hutchinson*, 6 M. & W. 134; *Belcher* v. *Goodered*, 4 C. B. 472; *Normanby* v. *Jones*, 3 D. & L. 143; *Herr* v. *Douglass*, 26 U. C. R. 357, S. C. 4 P. R. 102; *Morley* v. *B. B. N. A.*, 10 U. C. L. J. 128; *Ferguson* v. *Elliott*, 7 P. R. 7; Lush's Prac., 3rd Ed. 953. If no one can be prejudiced by not serving an order, delay in serving it is not a ground for setting it aside (*Wilkes* v. *McMillan*, 10 U. C. R. 292); but in cases under this section, every day's delay would probably prejudice a plaintiff. Should the order be waived or abandoned, it is not necessary to move to set it aside: *Re Wilson and Hector*, 9 U. C. L. J. 132. The order should be properly entitled in the cause and Court in which originally entered: *Chamberlain* v. *Wood*, 1 P. R. 195. Should one of the parties die during the consideration of the application, the Judge could still make the order, dating it as of the day of the argument: *Ward* v. *Vance*, 3 P. R. 210.

of the same upon the plaintiff or his agent in the same manner (*d*) as summonses are required to be served under the Division Courts Act.

When money made payable out of the Province.

9. When the debt or money payable (*e*) exceeds one hundred dollars, and is by the contract of the parties (*f*) made payable at any place out of (*g*) the Province of Ontario, the action may be brought thereon in any Division Court, subject, however, to the place of trial being changed upon the application of one or more of the defendants, as provided by the next preceding section. (*h*)

Trial may by consent be in any Division.

10. Notwitstanding anything in the Division Courts Act contained, any suit within the jurisdiction (*i*) of the Division Court may be entered, tried and finally disposed of by the consent of all parties (*j*) in any Division Court.

(*d*) As to the "manner" of serving summonses "under the Division Courts Act," the reader is referred to Sinclair's D. C. Act, 92, 93. This, it is submitted, simply means as to the *act* of service only. Care must be observed in serving the proper person as "agent" of the plaintiff, for if an unauthorised person should be served, the order might be considered as abandoned if the right person should not afterwards be served in proper time.

(*e*) As to the meaning of the term "debt or money payable," see note (*o*) to section 8.

(*f*) As to what is the contract of the parties, see notes (*p*) and (*r*) to section 8.

(*g*) In the case, for instance, of a promissory note being made payable in Montreal, it would be suable in any Division Court in this Province, provided the amount of it exceeded $100 and did not exceed $200.

(*h*) The proceedings necessary to obtain the change will be found fully discussed in the notes to the next preceding section.

(*i*) This section, it will be observed, only applies to "any suit *within* the jurisdiction of the Division Court." It is somewhat anomalous that jurisdiction may be conferred on a Division Court, under section 14, by a defendant simply doing nothing, perhaps even in cases where the amount is in excess of the jurisdiction of the Court; yet, under this section, parties cannot consent to the Courts entertaining *any* case not within the jurisdiction.

(*j*) It will frequently become a question *when* and in what cases this consent can validly be given. Before this Act was passed, parties could not, expressly or otherwise, confer jurisdiction if the want of it appeared on the face of the proceedings. As remarked by Patteson, J., in *Jones* v. *Owen*, 5 D. & L. 669, "there was a total want of jurisdiction, which no assent could cure." Now that can be done under this section in the cases first mentioned. It has more especial reference to cases sued in the wrong Division, in which the parties may by consent give the Court the right to try and dispose of them as if properly entered. The English Statute of 19 & 20 Vic. cap. 108, section 23, declares that in certain cases, "if both parties shall agree *by a memorandum, signed by*

them or their respective Attorneys, that any County Court named in such memorandum shall have power to try such action, such County Court shall have jurisdiction to try the same." This section does not prescribe a written consent, and therefore such is unnecessary: *R.* v. *Salop* (*Justices*), 4 B. & Ald. 626; *R.* v. *Surrey* (*Justices*), 5 B. & Ald. 539; *R.* v. *Huntingdonshire* (*Justices*), 19 L. J. M. C. 127; *R.* v. *Lincolnshire* (*Justices*), 3 B. & C. 548. Contrast section 6. *R.* v. *Nichol*, 40 U. C. R. 76.

It will frequently become a question what amounts to a "consent." It may be said that a consent can be given under this section in writing, in words, or in acts or conduct. Consent in writing, signed by the parties or their Attorneys, would in all cases be the best course to pursue. But, as already remarked, the *verbal* consent of the parties would be equally as efficacious, though more difficult of proof if afterwards disputed. But consent can also be given by the conduct of the parties. In *Siggers* v. *Evans*, 5 E. & B. page 374, Erle, J., says "assent" is an ambiguous word: it may mean an external act or a resolution of the mind." Should a defendant be aware of the want of jurisdiction, and not take any objection to the right of that particular Court (it being suable in some Division Court) to hear the case, but allow the case to proceed, notwithstanding such knowledge, he would be taken to have consented to the jurisdiction. He could not consent until he saw that the decision was against him, and then object for want of jurisdiction. Not having objected when it was his duty to do so, his conduct in that respect would be taken *as a consent*. As remarked by Martin, B., in *Caine* v. *Coulton*, 1 H. & C., at p. 768, "It is a rule of Common Law as well as of common sense to look at what is done, not at what is said;" *Turcotte* v. *Dawson*, 30 C. P. 23; Taylor on Evidence, ss. 729 to 741; *Bassela* v. *Stern*, 2 C. P. D., at page 272; *Carr* v. *L. & N. W. Railway Co.*, L. R. 10 C. P. 307; *Stevens* v. *Buck*, 43 U. C. R. 1; *McArthur* v. *Eagleson*, 43 U. C. R., at page 419; 3 App. R. 577, s. c.; *Atty.-Gen.* v. *Tomline*, 7 Chan. D. 388. Formerly jurisdiction could be questioned at any time: *In re Brown* v. *L. & N. W. Ry. Co.*, 4 B. & S., at page 333, *per* Wightman, J. Should a defendant be ignorant of the fact that jurisdiction did not exist until it appeared in evidence, and then make the objection promptly, he would not be taken to have consented under this section. It is submitted that *knowledge of the fact* would be an essential element in such a case to bind the defendant by his conduct: *Westloh* v. *Brown*, 43 U. C. R. 402; *In re Collie*, 8 Ch. D., at page 817; In *Johnson* v. *Credit Lyonnais Co.*, 3 C. P. D., Cockburn, C. J., sitting in Appeal, says, at page 40, "In all the cases decided on this principle (estoppel by conduct), in order that a party shall be estopped from denying his assent to an act prejudicial to his rights, and which he might have resisted, but has suffered to be done, it is essential that knowledge of the thing done shall be brought home to him;" see also *Crossman* v. *Shears*, 3 App. R. 583; *Wallace* v. *Fraser*, 2 Sup. R. 532; *Polak* v. *Everett*, 1 Q. B. D. 669. Whether or not "consent" has been given is a matter of fact, and not of law: *Mason* v. *Farnell*, 12 M. & W. 674. It was remarked by Quain, J., in *R.* v. *Lock*, L. R. 2 C. C. 14, that "mere submission by one who does not know the nature of the act done cannot be consent."

Another question will arise as to when this consent may be given. The writer sees no reason why it might not be made before the suit is entered, or even on the face of the contract sued on. In the latter case it might be considered as a *continuing* consent, and as speaking from the time it was made, and repeating that consent, until after the entry of the action. Both parties must consent; but the plaintiff's consent may be presumed from the fact of his suing in a particular Court, or taking a security with such a consent as the section requires appearing on the face of it.

Should the parties desire to give a consent (which, the writer thinks, will be very seldom done in any case), the following is given as a form in writing:

When suit entered in wrong Court by mistake.

11. If by mistake or inadvertence (*k*), a suit shall be entered in the wrong Division Court (*l*) which might properly have been entered in some other Division Court of the same or any other (*m*) county, the cause shall not abate (*n*) as for want of jurisdiction, but on such terms (*o*)

In the Division Court for the County of .

A. B., Plaintiff, v. C. D., Defendant.

We hereby consent to this cause being [entered], tried, and finally disposed of, under the tenth section of the Division Courts Act, 1880.

Dated this day of A.D. 188 .

A. B. }
C. D. } (*or by their Attorneys or agents*).

(*k*) It is not in every case that a Judge would be warranted in transferring a cause to another Court. It is only in cases where a plaintiff, honestly believing that he had a right to sue in a particular Court, and inadvertently or through mistake sued there, that the section applies. If the plaintiff knew that the particular Court had no jurisdiction, then a transfer should not be made. A great deal must depend on the circumstances of each particular case. An attorney practising in a place should be assumed to know more of the limits of Division Courts in his neighbourhood than a stranger or one engaged in any other profession, or than people in business, and a greater particularity in this matter would be required of him than of others. Knowledge by the attorney or agent would be knowledge by the plaintiff in such a case. But should the facts relative to jurisdiction be unknown to a plaintiff, or to his attorney or agent, and, without negligence in making proper inquiry, a suit should be brought in the wrong Court, then a transfer should be made. In view of section 14 necessitating a defendant's disputing jurisdiction, it is important to see that any improper attempt to gain an advantage by suing in a wrong division is discountenanced, and the plaintiff made to pay his own costs by a refusal to transfer.

(*l*) It has always been a subject fruitful of discussion under the English County Courts Act and our Division Courts Act, what the proper district or division was in which to sue. We refer the reader to the notes to section 62 in Sinclair's D. C. Act, and to section 8 of this Act, for the cases on that oft-recurring question.

(*m*) As the Bill was originally introduced, the right of transfer was only given to some other Court "of the same County." The Act, as passed, is not so, but the cause may be transferred to any Division Court "*having jurisdiction in the premises.*" This the Judge must find out before ordering the transfer.

(*n*) As to the right to costs when a suit abates for want of jurisdiction, see Sinclair's D. C. Act, 45, 51, 179.

(o) It is impossible, even in a general way, to mention the many cases that may require the Judge to impose terms on the plaintiff. Payment of a defendant's costs of attending or bringing witnesses to the trial might be a reasonable condition to impose in such a case. Whether, in view of the fact that jurisdiction was the chief ground of objection, witnesses were necessary or not, would be a question. Should a plaintiff, notwithstanding the notice of want of jurisdiction under the 14th section, insist on going on to trial, it is submitted that he should be visited with costs, as one of the terms of a transfer being made, nor should the defendant pay more costs than if the action had originally been brought in the proper division. A defendant could not be sure that his objection was good until decided by the Judge, and he would be justified in coming prepared for the other contingency—a trial. The proceeding will be somewhat

as the Judge shall order, all the papers and proceedings in the cause may be transferred to any Division Court having jurisdiction in the premises, and shall become proceedings thereof as though the cause were at first properly entered therein, and the same shall be continued and carried on to the conclusion thereof as though the suit had originally been entered (*p*) in the said last mentioned Court.

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analogous, so far as terms are concerned, to putting off a trial or an amendment of proceedings, in both of which cases the general rule is to impose the payment of costs: Arch. Pract. 12th Ed. 1491, 1560; Sinclair's D. C. Act, 106. It may be argued that, as the defendant contests the jurisdiction, he is not entitled to costs, on the authority of *In re Lawford* v. *Partridge*, 1 H. & N. 621, and the other cases cited at pages 51 and 179 of Sinclair's D. C. Act, yet, as the plaintiff has brought the defendant into a wrong Court, it would only be reasonable and just that the defendant should obtain his costs incurred through the plaintiff's mistake. The writer submits that there is a marked distinction between the cases above referred to and this. There the Court never became "possessed" of the case, but this section *preserves the existence* of the suit in the event of transfer, and that being so, the Judge has a general jurisdiction over the costs. See also *In re Sutton's Trusts*, 12 Chan. D. 175; and cases cited; *In re Haycock's Policy* 1 Chan. D. 611; *In re Hill*, 10 Ex. p. 731, *per* Alderson, B., and Sinclair's D. C. Act, 45, 51, 179. The costs could be fixed by the Judge without the necessity of taxation: *Tomlinson* v. *Bollard*, 4 Q. B. 642; *Wall* v. *Lyon*, 9 Bing. 611. It is to be regretted that the legislature did not remove the doubt which exists in view of late authorities, and give a Judge the right to impose costs on a plaintiff who has brought a defendant into a wrong Court.

(*p*) A special statutory authority is given to the Court to which the cause is transferred, to "carry it on to the conclusion thereof," in the same manner and with the same rights as if it had originally been entered in that Court. The Clerk of the Court in which the suit might be improperly entered should be paid his costs before he transmits the papers, nor would the Clerk of the Court to which the transfer is made be obliged to enter the suit until his costs were paid: Sinclair's D. C. Act, 39 (*k*). The order of transfer should be charged for under the 17th item of the tariff, not under the 13th. It need hardly be said that each clerk would only be entitled to charge for the proceedings taken in his Court. The Clerk of the Court in which the action was commenced should send a detailed statement of his costs to the other clerk. As remarked above, the defendant should not be obliged to pay double costs through the plaintiff's mistake, so that, it is submitted, the order should make provision in that respect.

The following is given as a form of order:

In the Division Court for the County of .

A. B., Plaintiff, *v.* C. D., Defendant.

I hereby order that all papers and proceedings in this cause be transferred to the Division Court for the County of , in pursuance of section eleven of the Division Courts Act, 1880, upon the terms ["that the defendant shall in no case have taxed against him or pay more costs than if he had been originally sued in such last-mentioned Court, and that the plaintiff do pay to the defendant forthwith the sum of $ as fees for the attendance of himself and his witnesses at this Court," as the case may be, or any other terms the Judge may think proper to impose].

Dated this day of , 188 . Judge.

Court where suit may be tried to have full power.

12. When it is by this Act provided that a claim or suit may be entered, (*q*) or an action brought, (*r*) or that any person or persons may be sued (*s*) in any Division Court, or that a suit may be transferred (*t*) or changed (*u*) to any other Court, such Court (*v*) shall have jurisdiction in the premises, and all proceedings may be had and taken both before and after judgment in or relating to any such claim or cause as may now be had, and taken in or relating to any claim or cause which has been lawfully entered (*w*) in the Court holden for the division in which the cause of action arose, or in which the defendant or any one of several defendants resided or carried on business at the time the action was brought.

Endorsement upon summons.

13. There shall be endorsed upon every summons a notice (*x*) informing the defendant that in any case in which an order may (*y*) be made changing the place of trial, application must be made to the Judge within eight days after the day of service thereof, (*z*) (where the service is required

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(*q*) As to the entry of a suit, and what is necessary for a plaintiff to do in that respect, see Sinclair's D. C. Act, 90–239.

(*r*) The issue of the first process, and the service of it, may be considered "bringing an action."

(*s*) As to what claims may be sued for under this Act, not formerly the subject of Division Court jurisdiction, see sections 1, 9, 10.

(*t*) Suits may be "transferred" under the next preceding section, as to which, see the notes thereto.

(*u*) The place of trial may be changed under section 8. For the cases in which that may be done, and how the application is to be made, see the notes to that section.

(*v*) The expression here used, "*such* Court," refers to the Court in which a claim or suit may be entered, or an action brought, or in which a person can be sued, or to which a suit may be transferred or changed, under the provisions of this Act.

(*w*) This section covers part of the ground of the next preceding section. The object is to give full and complete jurisdiction to every Court on which is conferred by this Act any new jurisdiction; to entertain, try and dispose of all cases arising thereunder, as fully as could have been done in cases under the 62nd section of the general Act, as to which, see Sinclair's D. C. Act, 84 and subsequent pages.

(*x*) The object of this notice is to inform the defendant within what time he must apply to have the place of trial changed.

(*y*) As to when an order may be made "changing the place of trial," and how done, see the notes to section 8.

(*z*) The "eight" and "twelve" days respectively within which the application is to be made are to be reckoned as "clear" days; but if the last day happens to fall on a Sunday it is included as one of them: see note (*u*) to section 8.

to be ten days before the return), or within twelve days after the day of such service (where the service is required to be fifteen days or more before the return).

Notice where jurisdiction of Court disputed to be given in garnishee cases.

14. In all cases where a defendant, primary debtor or garnishee intends to contest the jurisdiction (*a*) of any Division Court to hear or determine any cause, matter or thing in such Court, he shall leave with the Clerk of the Court (*b*), within eight days after (*c*) the day of service of

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The notice may be in this form:

"Warning No. 3. The defendant is required to take notice that in any case in which an order may be made changing the place of trial, application must be made therefor to the Judge of this Court within ["eight" or "twelve," as the case may be], days after the day of service hereof."

(*a*) Hitherto much expense has been incurred and inconvenience occasioned by the practice then open to defendants of first questioning the jurisdiction of a Division Court at the trial of a cause. No notice of want of jurisdiction was at all necessary though sometimes given. The defendant could spring the question on the plaintiff at the last moment, which was sometimes done after he had unsuccessfully resisted the claim on the merits. The effect of this was to make the plaintiff bear the costs of the abortive proceedings and sue afresh. It was generally held that the effect of it also was to prevent any costs being awarded to the defendant: but see Sinclair's D. C. Act, 51, and the notes to section 17, "Costs." The object in view by this section is the establishment of a more just and reasonable practice by compelling a defendant, primary debtor, or garnishee, to give notice of the want of jurisdiction if he intends to question it. It warns the plaintiff or primary creditor of the objection which he has to meet; so that he may, if he finds it well founded, abandon his action or contest the point, as he may be advised. There is nothing in this section to prevent the defendant, primary debtor, or garnishee, setting up any defence as well, which he would be entitled to if the Court had jurisdiction. Indeed that would frequently be necessary, for, should he fail on the question of jurisdiction, he should be prepared to meet the case on the merits. If a defence were staked on the question of jurisdiction, and failed, it is doubtful if any adjournment would be granted in any case to allow of merits being shewn. The reason of the thing would seem to be that, although this notice could not be considered as of the same effect as the notices mentioned in the 20th Rule (Sinclair's D. C. Act, 243), yet that no judgment could be entered by the Clerk after such notice and until disposed of by the Judge. Should the defendant, primary debtor, or garnishee, not give this notice within the required time, then he would be taken to have admitted the jurisdiction of the Court to "hear or determine" the "cause, matter or thing," and could only rely on the merits of his defence in the same way as he could have done in a suit properly entered and triable in that Court.

(*b*) Should the Clerk of the Court be away from his office on the last day for giving this notice, and no person be left there to do business for him, the defendant would not thereby be deprived of his rights. On doing all that reasonably could be done to leave the notice with the Clerk, and having failed, he could leave it with him the first opportunity afterwards: see section 8, note (*u*); *Berridge* v. *Fitzgerald*, L. R. 4 Q. B. 639. Clerks usually charge defendants twenty cents and postage for filing this notice and giving notice to the plaintiff.

(*c*) The days mentioned in this section for doing certain things and taking certain proceedings all mean *clear* days. For a full reference on this point, see Sinclair's D. C. Act, 100, and the notes to section 8 of this Act.

the summons on him (where the service is required to be ten days before the return), or within twelve days after the day of such service (where the service is required to be fifteen or twenty days before the return), a notice to the effect that he disputes the jurisdiction of the Court, (*d*) and such Clerk shall forthwith (*e*) give notice thereof to the plaintiff, primary creditor, or their Attorney or agents in the same way (*f*) as notice of defence is now given, and in default of such notice disputing the jurisdiction of such Court, (*g*) the same shall be considered as established and

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(*d*) The notice need not be in any particular form. If it substantially expresses the defendant's intention to dispute the jurisdiction, that would be sufficient: see *Harpham* v. *Child*, 1 F. & F. 652; *Low* v. *Owen*, 12 C. P. 101. The words of Lord Campbell, C. J., may be aptly quoted here, who said, in delivering judgment in *Everard* v. *Watson*, 1 E. & B., at page 804, "Now, is not that a sufficient notice which conveys to any person of reasonable understanding the knowledge of the requisite facts?" see also *Paul* v. *Joel*, 4 H. & N. 355; *Bain* v. *Gregory*, 14 L. T. N. S. 601; *Aldridge* v. *Medwin*, L. R. 4 C. P. 464; *Allen* v. *Geddes*, L. R. 5 C. P. 291, to the same effect.

The following is a general form of such notice:

In the Division Court for the County of .

A. B., Plaintiff, v. C. D., Defendant.

You are hereby required to take notice that I dispute the jurisdiction of this Court to entertain and try this case.

Dated this day of A.D. 188 .

C. D., the Defendant.

To A. B., the plaintiff, and the Clerk of this Court.

The notice may be transmitted to the Clerk of the Court, together with his fees, by mail. It need not contain the grounds of dispute: *R.* v. *Westmoreland* (*Justices*), 10 B. & C. 226; *R.* v. *Derbyshire* (*Justices*), 9 Jur. 181.

(*e*) The Clerk is imperatively required to give notice of the jurisdiction being disputed "forthwith" to the plaintiff, primary creditor, or their Attorney or agents: see Sinclair's D. C. Act, 15 (*y*), and the notes to sections 8 and 21 of this Act, as to the meaning of this expression.

(*f*) As to the manner of giving this notice, see Rule 88, Sinclair's D. C. Act, 258. The letter containing this notice must now, under new Rule 180, be *registered*. Should the Clerk omit to give this notice, the defendant, primary debtor, or garnishee, could not be prejudiced by it. His rights would still remain. A party should not be prejudiced by the misprison of the Clerk: Arch. Pract., 12th Ed., 363, 1557. The notice could be left by the defendant with the Clerk on Good Friday or other holiday (*Clarke* v. *Fuller*, 2 U. C. R. 99), but not on a Sunday, though probably good for the following Monday: *R.* v. *Leominster*, 2 B. & S. 391. If the notice should be sent by mail it must reach the Clerk within the stipulated time (see *Robson* v. *Arbuthnot*, 3 P. R. p. 315), and would be at defendant's risk until received by the Clerk.

(*g*) From the language employed in this section, the jurisdiction here conferred, by not giving the plaintiff a notice disputing the same, is a most extensive one. Contrasting sections 10 and 11 with this, it will be seen how extensive the jurisdiction of the Division Courts is, where the defendant, or the primary

determined, and all proceedings may thereafter be taken as fully and effectually (*h*) as if the said suit or proceeding had been properly commenced, entered or taken in such Court.

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debtor, or the garnishee, does not choose to question it. The provisions of section 10 are confined to "any suit *within the jurisdiction* of the Division Court." The language of section 11 limits the application of its provisions to any suit "which might properly have been entered in some other Division Court of the same or any other county," but no restriction is seemingly placed on cases coming under this section. The clause does not declare that it shall apply to cases coming within the jurisdiction of *some* Division Court, so that it might perhaps apply to every case *sued* in a Division Court. It will be observed that the notice must be to contest the jurisdiction of any Division Court "to hear or determine *any* cause, matter or thing *in* such Court." To hold that these words do not mean "any cause *sued* in such Court would possibly be at variance with the language used. The section presupposes suits brought in these Courts beyond the jurisdiction of a Division Court; and the Legislature, no doubt, considering that the parties should be allowed to agree upon their own tribunal, have determined that in case a party does not question the jurisdiction he must be taken to have assented to it. The parties may be said to have tacitly agreed that, whether the matter is beyond the jurisdiction or not, they are willing, for reasons best known to themselves, to have it disposed of in the Division Court. The same principle was acted upon in the case of references to arbitration. The parties having chosen their own *forum* were held, in the absence of fraud or misconduct, bound by the decision. The principle of law acted upon in *Robin* v. *Hoby*, 2 Macqueen, 488, and *Dudgeon* v. *Thompson*, 1 Macqueen, 714, and followed in *McColl* v. *Waddell*, 19 C. P. 213, appears to the writer to favour this view. In the latter case, after the evidence had been taken in a cause in the County Court, a verdict was entered by consent for the plaintiff, subject to the opinion of the Court upon the whole case, with power to the Court to reduce the verdict, it was held that the parties had bound themselves by their conduct, so as to take the case out of the ordinary course, and thereby their right of appeal was gone. In delivering the judgment of the Court, Hagarty, C. J., says, at page 216, "It is sufficient to say that here the parties have bound themselves to abide by the decision of the Judge, not according to the ordinary course of the Court, but giving him a power he could not otherwise have exercised." As remarked by the Lord Chancellor, in the case in 1 Macqueen, the decision of the Judge is more in the character of an arbitrator than otherwise. On the other hand, it may very properly be contended that the jurisdiction of other Courts is not to be superseded by the conduct of the parties, and that what the parties cannot do directly under the tenth section they should not be allowed to do indirectly under this. The words of the section are very broad, and do not appear to be confined to any particular class of cases; and it may therefore well be argued that where an action is brought for an amount beyond the jurisdiction of any Division Court, say for $201, on a promissory note, that unless notice is given under this section, the right of the Court to hear and determine the case should "be considered as established and determined." These last words may be read as "concluded," or "not now open to question." A somewhat similar provision will be found in the 53rd section, subsection 7, of the Division Courts Act, in respect to actions against Justices of the Peace: Sinclair's D. C. Act, 53. The doubt just suggested must remain until decided by judicial decision.

(*h*) If the notice is not given as this section requires, the "subsequent proceedings" may be taken "as fully and effectually" as if the cause "had been.

Place of trial in suits against Clerk or Bailiff.

15. Notwithstanding anything in the Division Courts Act contained, any Clerk or Bailiff of a Division Court may be sued (*i*) in the Court of an adjoining County, the place of sitting (*j*) whereof is nearest (*k*) to the residence of the defendant without (*l*) the County in which he holds his office as such Clerk or Bailiff; and upon a transcript of any judgment which may be recovered against any Clerk or Bailiff in any such suit (*m*) being sent to and received by the Clerk of the Court of any division adjoining (*n*) the division for which the defendant was or is Clerk or Bailiff in the County in which the last named division is situate with a certificate of the amount due on such judgment as provided by the one hundred and sixty-first section (*o*) of the Division Courts Act, such proceedings for enforcing

Enforcing judgment.

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properly commenced, entered or taken in such Court." Parties who wish to raise the question of jurisdiction, will see the importance of giving this notice within the proper time, and the prepayment of the Clerk's fees in connection with it. It is to be hoped that the difficulty suggested in the next preceding note will be authoritatively settled ere long.

(*i*) As to actions by and against Clerks and Bailiffs, see Sinclair's D. C. Act, 89. This section gives a party, having a cause of action against a Clerk or Bailiff, the additional right to sue upon it in a Court of an "adjoining County," that is, a County of which some part *touches* the one to which the Clerk or Bailiff belongs.

(*j*) The place of sitting does not here refer to the Municipality but the building in which the Court is held: *Re Timson*, L. R. 5 Ex. 257; *Shaw* v. *Morley*, 2 L. R. 3 Ex. 137; *Bows* v. *Fenwick*, L. R. 9 C. P. 339; *Eastwood* v. *Miller*, L. R. 9 Q. B. 440; *Haigh* v. *Sheffield*, L. R. 10 Q. B. 102.

(*k*) As to how the distance is to be measured, see Sinclair's D. C. Act, 88 (*p*); *R.* v. *Saffron Walden*, 9 Q. B. 76; Maxwell on Statutes, 173.

(*l*) As to what is the residence of a party, see Sinclair's D. C. Act, 23 (*g*) 86 to 88; *Beal* v. *Lord*, 3 C. P. D. 73; *Taylor* v. *The Overseers of St. Mary, Abbott, Kensington*, L. R. 6 C. P. 309; *Bond* v. *Overseers of the Parish of St. George, Hanover Square*, L. R. 6 C. P. 312; *Durant* v. *Carter*, L. R. 9 C. P. 261; *Ford* v. *Pye*, L. R. 9 C. P. 269; *Ford* v. *Hart*, L. R. 9 C. P. 273; Maxwell on Statutes, 59, 60. As will be seen by reference to the above cases, and the notes to section 8, sub-section 5, "residence" must receive a meaning consistent with the object and scope of the Statute in which it is used. The words "without the County" refer to the place of sitting of the Court, not the residence of the Clerk or Bailiff. There appears to be no provision of the Division Courts Act which renders it necessary for a Clerk or Bailiff to reside *within* the County of which he is such officer (Sinclair's D. C. Act, 20, 21), but in practice it is seldom, if ever, otherwise.

(*m*) The transcript, before referred to, can only be issued from the Court in the adjoining County in which the suit is brought.

(*n*) See note (*i*) to this section. The object is to afford the plaintiff an additional independent remedy on his judgment.

(*o*) See Sinclair's D. C. Act, 180, 318, 320.

and collecting the judgment by way of execution (*p*) and otherwise, may be had and taken in the Division Court (*q*) to which such transcript has been so sent by the officers thereof as may be had or taken for the like purpose upon a judgment regularly recovered in any Division Court.

Costs.

16. Where in a contested (*r*) case for more than one hundred dollars, a counsel or an attorney or agent (*s*) has been employed by the successful party in the conduct of the cause or defence, (*t*) the Judge may, in his discre-

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(*p*) As to the law bearing on the issue of execution and the execution of the writ, see Sinclair's D. C. Act, 172 and following pages.

(*q*) This means the adjoining division in the same County in which the Clerk or Bailiff holds his office.

(*r*) It will be observed that the fee here provided for can, under any circumstances, only be allowed in cases for more than $100. Some difference of opinion may arise as to what meaning is to be attached to the words "contested case." It is submitted that the section only applies to cases *contested or disputed in Court* (see Worcester, 304), and, however much may be expended in the preparation of a cause for trial, nothing can be allowed to the successful party for it. When a fee is allowable the amount of care and time bestowed in the preparation for the trial can be considered in judging of its "difficulty and importance," but not otherwise. Should the case be settled before Court it would seem as if no fee could be allowed. The expression "such costs" in the 63rd section of this Act has, it is submitted, reference only to costs that are properly chargeable to a defendant in the ordinary course. There would, in the case contemplated by that section, be no fee allowable, because not "contested." The contest must be a *bona fide* one, "for more than one hundred dollars," and not merely a suit for such a sum without an actual dispute therefor: see note (*d*) to section 2 of this Act.

(*s*) The fee here given is not confined to a counsel or attorney only, but to an "agent" as well. In legal proceedings, generally, an agent is understood as an attorney who acts as a professional agent (see Rev. Stat. cap. 140, sec. 25; Arch. Prac., 12th Ed., title, "Agents to Attorneys;" Lush's Prac., 3rd Ed., 342), but can the same meaning be here given to that word? It is submitted that it cannot. "Any person" may, under the 84th section of the Division Courts Act, "appear at the trial or hearing of any cause, matter or proceeding *as agent* and advocate for any party to any such cause, matter or proceeding in the Division Courts." The section in question must be read in connection with the clause just quoted from. Under the general Act "*any person*" can be an "agent" in the advocacy of a cause in the Division Court (Sinclair's D. C. Act, 107); and, as a necessary consequence, *any person* can earn this fee to be allowed to his client. [Is not this the first time in our law that any person may not only appear as an advocate in the Division Court, but entitle his client to have taxed to him a fee for his services?] An attorney or agent in a Division Court case has not the same power and authority as an attorney in a cause in a Court of Record; *Lovegrove* v. *White*, L. R. 6 C. P. 440.

(*t*) The best evidence of the employment of the counsel, attorney or agent would be the fact of his attendance in Court. It is submitted that a fee could not be allowed, even if the person employed had advised on the proceedings, or prepared the case for trial, when he did not personally appear on the trial of

tion, (*u*) direct a fee of five dollars, to be increased, according to the difficulty and importance of the case, to a sum not exceeding ten dollars, to be taxed to the successful party, and the same, when so allowed, shall be taxed by the Clerk (*v*) and added to the other costs.

APPEALS (*w*) IN SUCH CASES.

Appeal.

17. In case any party to a cause, wherein the sum in dispute upon the appeal exceeds one hundred dollars exclusive of costs, is dissatisfied with the decision of the Judge,

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the cause: see *Fryer* v. *Sturt*, 16 C. B. 218. There is no authority for the allowance of a fee to any but the "successful party."

(*u*) The discretion here meant is to be exercised "according to the rules of reason and justice, not private opinion; according to law, not humour; it is to be not arbitrary, vague and fanciful, but legal and regular:" Maxwell on Statutes, 100. The Judge must first determine whether or not *any* fee should be allowed. If he thinks it a case in which he should direct a fee, then $5 is the least that could be allowed; to be increased, in the Judge's discretion, to a sum not exceeding $10, in cases of difficulty *and* importance." It will be observed that a case must be *both* difficult *and* important to justify an allowance of the *increased* fee, but not of the $5 fee. The order may be in this form, indorsed on the summons or other paper:

"I hereby direct a fee of $ to be taxed to the plaintiff (or defendant) for the attendance of A. B., as counsel [or attorney or agent], on the trial of this cause, on his behalf.

"Dated this day of A.D. 188 . Judge."

The most convenient course would be for the party seeking this allowance to apply for it immediately after the trial. The Judge, having the facts of the case fresh in his mind, could the better decide whether it was one of difficulty and importance, and the opposite party would have an opportunity of opposing the allowance, if so advised.

(*v*) The amount, when so fixed by the Judge, "*shall* be taxed by the Clerk." The Clerk has no discretion here as he has in respect to other items of the bill of costs. His duty is simply a ministerial one, which he is bound to execute; the responsibility of the order being improperly granted resting with the Judge: *Andrews* v. *Marris*, 1 Q. B. 3; *Graham* v. *Smart*, 18 U. C. R. 482; *Hill* v. *Managers of Met. Asylum District*, 4 Q. B. D., pages 440, 441.

(*w*) *General Principles of Appeal.*

An appeal does not lie in any case unless expressly given by statutory enactment: *R.* v. *Cashiobury* (Justices), 3 D. & R. 35; *R.* v. *Hanson*, 4 B. & Ald. 521; *R.* v. *Stock*, 8 A. & E. 405; *R.* v. *Recorder of Ipswich*, 8 Dowl. 103. Williams, J., at page 411 of 8 A. & E., says: "There are innumerable instances where an appeal is given in terms, but no case has been mentioned in which it has been given by implication." The creation of a new right of appeal requires legislative authority (*Atty.-Gen.* v. *Sillem*, 10 L. T. N. S. 434); and where that right is so conferred, it is, in the absence of any other statutory provision, the only one that can be taken: *Thomas* v. *Hilmer*, 4 U. C. R. at page 528, *per* Robinson, C. J.; *Pattypiece* v. *Mayville*, 21 C. P. 316; *In re Newton*, 8 Jur. N. S. 495; Paley on Convictions, 6th Ed. 358.

An appellate Court does not reverse the decision of a Court below it, simply because it might on the facts have come to a different conclusion. The appellate Court sees that the inferior Court is clearly wrong before reversing its decision. In *Keena* v. *O'Hara*, 16 C. P. at page 438, Richards, C. J., in delivering the judgment of the Court, says: "The general rule in matters of appeal is, that unless the appellate Court can say that the judgment of the Court appealed from is clearly wrong, then the judgment ought to stand. I cannot say this judgment is wrong." In the Judicial Committee of the Privy Council it has been decided that although it will not lay down any exclusive rule as to appeals from judgments of the Court below upon questions which are entirely of fact, yet they are most reluctant to come to a conclusion different from that of the Judge of the Court below merely on a balance of testimony—the Judge having had the opportunity of seeing and testing the conduct and demeanour of the witnesses: the "*Alice*," and the "*Princess Alice*," L. R. 2 P. C. 245. At page 252, Lord Justice Wood, in delivering the judgment of the Court, says: "But in the opinion of their Lordships, the principal point upon which we should rest our decision is this, that following the doctrine laid down in the case of *The Julia*, we should be most unwilling to come to a conclusion different from that of the Judge of the Court below merely upon a balance of testimony, and on its being affirmed by the appellant that the testimony ought not to have been credited by the Judge of the Court below. He had an opportunity of testing, in the most ample manner, the conduct and demeanour of the witnesses; and we should require evidence that would be overpowering in its effect on our judgment with reference to the incredibility of the statements made by any witness, and the general testimony to which credit has been so given, before we could venture to come to a conclusion, not only in favour of an appellant in a case of this kind, but, of course, a conclusion adverse to a respondent, thus inflicting on the respondent a loss occasioned by the Board coming to a conclusion different from that which was come to on evidence, as to the value of which we have not the same facilities and means of forming a judgment as were possessed by the learned Judge who decided in the first instance." In *Gray* v. *Turnbull*, L. R. 2 Scotch Appeals, at page 54, Lord Chelmsford says: "Upon a question of fact an appellate tribunal ought not to be called upon to decide which side preponderates on a mere balance of evidence. Different minds will, of course, draw different conclusions from the same facts; and there is no rule or standard which can be referred to by which the correctness of the decision either way can be tested. If we were upon the present occasion to come to the conclusion that the five Judges who have decided in favour of the respondent miscarried, we should be just as likely to be wrong in our conclusion from the facts as they were in deciding the other way; and, therefore, if there is to be an appeal on questions of fact (and I regret that there should be such), I think that this principle should be firmly adhered to, namely, that we must call upon the party appealing to shew us irresistibly that the opinion of the Judges on the question of fact was not only wrong, but entirely erroneous." In the report of the same case, Lord Westbury says, at page 55: "In the English tribunals, when a question of fact has once been decided by the verdict of a jury, it requires an overwhelming case of error by the jury, or the disregard of some cardinal rule of law, to induce the Court to grant a new trial." In *Penn* v. *Bibby*, L. R. 2 Chan. 127, it was held, on a motion for a new trial made before the Court of Appeal, that the Court would not consider whether the finding on the facts was proper, but merely whether there was sufficient evidence to warrant the verdict. In *Sanderson* v. *Burdett*, 18 Grant 417, before our own former Court of Appeal, Spragge, C., in delivering the judgment of the Court, says: "The appellant can scarcely expect this Court to review the finding of the Judge in the Court below, in whose presence the witness was examined, upon a mere question of credibility; for whilst there can be no doubt but that it is open to the appellate Court in Equity causes to review the

evidence, and to come to a different conclusion as to its weight and effect from that arrived at in the Court in the first instance; yet this right will not be so exercised as to reverse the finding of the Judge, who heard the cause, upon a mere question of the credibility of a witness, when the evidence, as recorded, does not appear to be either self-contradictory or improbable, although it may be controverted by that of other witnesses; and this is but giving the same effect to the decision of the Judge in Equity, upon questions as to the veracity of the witnesses, as is at law accorded to the finding of a jury." Commenting on this principle in the Halton Election case, 11 L. J. N. S., at page 274, Richards, C. J., says: "We do not think we can properly interfere with the decision of the learned Chief Justice as to the facts found by him, the general rule being, that, the finding of the Judge who hears the witnesses, when there is conflicting evidence, and the decision turns on the credibility of the witnesses, should prevail. He sees the witnesses, hears their testimony, observes the way in which they answer questions, and is in a much better position to decide on conflicting evidence than those who merely read the statements of the witnesses as they have been taken down. We are all of opinion that we ought not to interfere with the finding of the learned Chief Justice (Draper) as to the matters of fact." What was said by Sir John T. Coleridge in the case of *R.* v. *Bertrand*, L. R. 1 P. C., at page 535, has an equal application to a civil case. That learned Judge remarks: "Those of their Lordships who have been used, on motions for new trials, to hear the Judge's notes of the evidence read, probably know well by experience how difficult it is to sustain the attention, or collect the value of particular parts, when that evidence is long; and one cannot but feel how much more this difficulty must press upon twelve men of the ordinary rank, intelligence, and experience of common jurymen. But this is far from all. The most careful note must often fail to convey the evidence fully in some of its most important elements, those for which the open oral examination of the witness in presence of prisoner, Judge, and jury, is so justly prized. It cannot give the look or manner of the witness, his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration. It cannot give the manner of the prisoner when that has been important upon the statement of anything of particular moment. Nor could the Judge properly take on him to supply any of these defects, who, indeed, will not necessarily be the same on both trials. It is, in short, or it may be, the dead body of the evidence, without its spirit, which is supplied, when given openly and orally by the ear and eye of those who receive it." In *Chesney* v. *St. John*, 4 App. R., at page 153, Moss, C. J. A., says: "The jury found certain controverted points in favour of the plaintiff, upon which, supplemented by the undisputed facts, the verdict is founded. Upon this appeal we are not embarrassed with any enquiry whether the answers given by the jury are supported by the evidence. Our sole concern is to see whether in point of law the verdict can stand:" see also the remarks of Hagarty, C. J., in *McKinstry* v. *Furby*, 24 U. C. R. 176. But on the other hand, see *The Glannibanta*, 1 P. D. 287; *Bigsby* v. *Dickinson*, 4 Chan. D. 24. The provisions of the English Statutes, allowing appeals in County Court cases, are different from this one of our own now under consideration. By the English County Courts Act of 1850 (13 & 14 Vic. c. 61), s. 14, it was enacted that: "If either party in any cause of the amount to which jurisdiction is given to the County Courts by this Act, shall be dissatisfied with the determination or direction of the said Court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the Superior Courts of common law at Westminster." It was enacted by the English County Courts Act 1875 (38 & 39 Vic. c. 50), s. 6, that: "In any cause, suit, or proceeding, other than a proceeding in Bankruptcy, tried or heard in any County Court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction or decision of the Judge, at any time within

upon an application for a new trial, he may appeal (*x*) to

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eight days after the same shall have been made or given, to appeal against such ruling, order, direction or decision by motion to the Court to which such appeal lies, instead of by special case; such motion to be *ex parte* in the first instance, and to be granted on such terms as to costs, security, or stay of proceedings, as to the Court to which such motion shall be made shall seem fit. And if the Court to which such appeal lies be not then sitting, such motion may be made before any Judge of a Superior Court sitting in Chambers. And at the trial or hearing of any such cause, suit, or proceeding, the Judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause, suit or proceeding; and he shall, at the expense of any person or persons, being party or parties in any such cause, suit or proceeding, requiring the same for the purpose of appeal, furnish a copy of such note, or allow a copy to be taken of the same by or on behalf of such person or persons, and he shall sign such copy; and the copy so signed shall be used and received on such motion, and at the hearing of such appeal."

Now it will appear quite obvious that there is a very marked distinction between the provisions of this Act, in respect to appeals and the English Statutes on the same subject, from which the foregoing extracts are taken. Under the English Acts, an appeal cannot be taken except on questions of law, or the improper admission or rejection of evidence, and for that purpose the Act of 1875 superadds the requirement that the Judge shall at the hearing, if asked, take a note of the particular exception made to his decision, and of the facts in relation thereto, and the facts arising in any case cannot be questioned on appeal: *Cousins* v. *Lombard Bank*, 1 Ex. D. 404; *Sharrock* v. *L. & N. W. Ry. Co.*, 1 C. P. D. 70; *Rhodes* v. *Liverpool Com. Investment Co.*, 4 C. P. D. 425. The whole scope of our Statute is different, giving to the Judge of the Appellate Court the right not only to review the decision of the Judge who tried the cause in the Division Court on questions of law, but (*subject to the principles of law which obtain in all appellate tribunals, and to which we have already referred*) to review his decision on questions of fact as well.

(*x*) *Ontario Statutes relating to Appeals.*

The Act relating to appeals from our County Courts is made the basis of appeal under this Statute, so that a reference to it will be necessary for a proper understanding of the appeal clauses of this Act. By sections 67 and 68 of the Consolidated Statutes of Upper Canada, the different Acts then in force in reference to appeals from County Courts were consolidated. These in time were amended, first, by 27 Vic., cap. 14, which was passed to get over the difficulty experienced in the Court below in getting the appeal bond executed by the appellant *himself*, even though a nominal plaintiff, as was felt in *Dennison* v. *Knox*, 24 U. C. R. 119; next, by Statutes of 33 Vic., cap. 7, sec. 13, and 39 Vic., cap. 7, sec. 5. The law so remained until the several Acts were again consolidated in the Revised Statutes of Ontario, cap. 43, ss. 34 to 42 inclusive. The particular clauses of that Act to be considered in connection with this are the following. The 34th section is in these words: "The terms 'party to a cause,' and 'appellant,' hereinafter used, shall include persons suing or being sued in the name of others, though not mentioned in the record, and persons on whose behalf or for whose benefit any suit is prosecuted or defended, as well as parties named in the record." The following are sections 37, 38 and 39 of the same Act:

"**37.** The appellant shall give or cause to be given to the opposite party security either—

"1. By a bond executed by two persons, whether named as sureties or as parties interested or otherwise, in such sum as the Judge of the Court appealed

the Court of Appeal, (*y*) and, in such case, the proceedings, in and about the appeal, and the giving and perfecting of the security, shall be the same as on an appeal from the County Court, except where otherwise provided by this Act, and the terms "party to a cause" and "appellant" in this section and hereafter used, shall have the meaning attached thereto in and by section thirty-four of the County Courts Act.

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from may direct, conditioned that the appellant shall abide by the decision of the cause by the Court of Appeal, and pay all sums of money and costs, as well of the suit as of the appeal, awarded and taxed to the opposite party; or

"2. By paying into the Court appealed from, in the manner provided by law, within the time herein limited for the perfecting of an appeal bond, the sum of four hundred dollars, or such other sum as the Judge may direct.

"**38.** In case of security being given by bond, the parties executing the same shall justify to the amount of the penalty of the bond by affidavit annexed thereto, in like manner as bail are required to justify.

"**39.** Such bond and affidavit of justification, and an affidavit of the due execution of the bond, shall be produced to the Judge, to be approved of by him; and, upon being approved of, shall be filed in the office of the Court appealed from until the opinion of the Court of Appeal has been given, and shall then be delivered to the successful party."

By 41 Vic., cap. 8, sec. 2, any *three* Judges of the Court of Appeal may sit as a Court to hear appeals from the County Court. Here *one* Judge only sits in appeal. It will be observed that there is no substantial difference between the 68th section of the old Act in the Consolidated Statutes of Upper Canada and the amendments to it, and the three sections above quoted, so that the decisions under the County Court appeal clauses will, for the most part, be applicable to cases under this Act. Our Court of Appeal Act is very differently worded (Rev. Stat., cap. 38, ss. 18–20), and some of the cases under that Act would not apply to this: see *Trumpour* v. *Saylor*, 1 App. R. 100; *Le Banque Nationale* v. *Sparks*, 2 App. R. 112. It is submitted that the grounds of application for a new trial in County Court cases under the 292nd section of the Common Law Procedure Act (Rev. Stat., p. 672), are as extensive as are conferred under the 107th section of the Division Courts Act (Sinclair's D. C. Act, 138), and that the 35th section of the County Court Act, in reference to appeals from that Court, is as comprehensive in its terms in most respects as the 17th clauses of this Act, and that the cases decided on questions which arise in the County Court have therefore in a very great measure application here.

(*y*) *When an Appeal lies.*

As previously remarked, the Judge in Appeal has under this Statute a power of review, not only over the law, but the facts of any case brought before him; but it is presumed that he would be slow to interfere with the finding of the Judge in the Court below, or his decision afterwards, on application for new trial, on the facts of a case, and would only do so when the decision appeared to be clearly wrong: see note (*w*) to this section. There is no appeal direct from the Judge's decision on the trial of a cause, but only *after* he has decided "an application for a new trial." Parties applying for new trials in appealable cases must be careful to take all their grounds in the application for a new trial, for it is submitted that any other than those there appearing would not be enter-

tained on appeal. In *Manning* v. *Ashall*, 23 U. C. R. 302, the appeal was against the decision of a County Court, the Judge of that Court granting a new trial because he thought that "the verdict was against evidence, or at all events against the greater preponderance of evidence." Draper, C. J., in delivering the judgment of the Court, says: "The decision involved no point of law, strictly speaking, and certainly does not decide the questions which were argued before us. We think we should not give effect to an appeal from a decision of the Judge of a County Court on a point like this, which is so truly an exercise of discretion by one who, having presided at the trial, and seen and heard the witnesses, is in a much more favourable position to decide correctly than this Court can be." In *Harris* v. *Robinson*, 25 U. C. R. 247, where the Judge of the County Court granted a new trial, considering the verdict as against evidence, Hagarty, J., in delivering the judgment of the Court, says: "The learned Judge states that he exercises his discretion in setting aside the second verdict with hesitation, and expresses a hope that an appeal may be lodged to take the opinion of this Court on the propriety of his doing as he has done. We do not think that our appellate jurisdiction is properly claimable (except perhaps in an extreme case) to review the exercise of such a discretionary power as the granting of a new trial on a review of all the evidence. We do not dissent from the learned Judge's view of the law of the case, and see no ground for our interference on any alleged legal right of the defendants to hold their verdict on the evidence." The case of *Clark* v. *Hurlburt*, 6 C. P. 438, was to the same effect. The verdict was for the defendant, and the Judge of the County Court, in his discretion, refused to grant a new trial in the case on the ground that the verdict was against evidence. The plaintiff appealed, and Draper, C. J., in delivering the opinion of the Court, says: "Probably we should have taken a different view of the evidence had it been submitted to us instead of to the jury; and so probably would the judge below; but he has felt that in the exercise of his discretion, and the application was entirely in his discretion, that he ought not to interfere, and he had seen the witnesses, heard all the evidence given, and was therefore in a much more favourable position to determine on such an application than this Court can be; and, unless we clearly saw he was wrong, we ought not to interfere, or to encourage appeals on such a ground as an alleged error in the exercise of the discretion of the Judge of the Court below, on the finding of the Jury on conflicting evidence." On the same subject, see *Fowler* v. *McDonald*, 3 U. C. R. 385; *Bradley* v. *Crane*, 4 U. C. R. 122; *Cinqmars* v. *Moodie*, 15 U. C. R. 601-610, note; *Somers* v. *Livingston*, 24 U. C. R. 64; *R. Ex rel McKeon* v. *Hogg*, 15 U. C. R. 140; *R.* v. *McLean*, 22 U. C. R. 443; *Molloy* v. *Shaw*, 5 P. R. 250; *Swift* v. *Jones*, 6 U. C. L. J. 63; *Hall* v. *Hamilton*, 24 C. P. 302. The following cases shew the views of the Courts in application for new trial in criminal cases, on the ground of the verdict being against evidence, when the law allowed an application for new trial in such cases: *R.* v. *Chubbs*, 14 C. P. 32; *R.* v. *McIlroy*, 15 C. P. 116; *R.* v. *Fick*, 16 C. P. 379; *R.* v. *Hamilton*, 16 C. P. 340; *R.* v. *Seddons*, 16 C. P. 389; *R.* v. *Slavin*, 17 C. P. 205; and may be referred to with advantage on appeals on questions of fact under this Act.

As a general rule, an appeal will not be entertained on a question of costs (*Kerby* v. *Elliott*, 13 U. C. R. 367; *Taylor* v. *Dowlen*, L. R. 4 Chan. 697; *Witt* v. *Corcoran*, 2 Chan. D. 69; *In re Hoskin's Trusts*, 6 Chan. D. 281; *Harris* v. *Aaron*, 4 Chan. D. 749; *Graham* v. *Campbell*, 7 Chan. D. 490; *Attenborough* v. *Kemp*, 7 Jur. N. S. 665; *Richards* v. *Birley*, 2 Moore P. C. N. S. 96; *Home* v. *Pringle*, 8 C. & F. 264; *In re Chennell, Jones* v. *Chennell*, 8 Chan. D. 492; *Hope* v. *Carnegie*, L. R. 4 Chan. 264; *The Samuel Laing*, L. R. 3 A. & E. 284; *Bush* v. *Trowbridge W. Co.*, L. R. 10 Chan. 463, 14 L. J. N. S. (Ontario) 283), nor whether the plaintiff's or defendant's counsel had the right first to address the jury (*Hastings* v. *Earnest*, 7 U. C. R. 520), nor as to the right to begin (*Neville* v. *Fox*, 28 U. C. R. 231), unless substantial injustice has resulted from

it: *Brandford* v. *Freeman*, 5 Ex. 734. The order of a Judge, upon an application to amend, would not be the subject of appeal (*Branigan* v. *Stinson*, 10 U. C. R. 403) unless, perhaps, it should clearly appear that the opposite party was prejudiced by it: *Sainsbury* v. *Matthews*, 4 M. & W. 347, *per* Lord Abinger. In the County Court, an appeal lies on an interpleader issue (*Fechan* v. *Bank of Toronto*, 10 C. P. 32); but under this Statute it would not be so, because the right of appeal is confined to actions brought for a money demand exceeding $100 and not exceeding $200: see *Rackham* v. *Blowers*, 15 Jur. 758; 20 L. J. Q. B. 397; *Fraser* v. *Fothergill*, 14 C. B. 295; *Beswick* v. *Boffey*, 9 Ex. 315; *The Falcon*, 3 P. D. 100. In England, the right of appeal now exists in interpleader cases under 19 and 20 Vic. cap. 108, sec. 68: *Vallance* v. *Nash*, 2 H. & N. 712. Payment into Court, it is submitted, would not prevent an appeal: *Osborne* v. *Homburg*, 1 Ex. D. 48; *Foster* v. *Usherwood*, 3 Ex. D. 1. No appeal would lie during the pendency of an application for a new trial: *Robinson* v. *Richardson*, 32 U. C. R. 344. In order to have an appeal, the motion for new trial and other proceedings must be taken in the manner pointed out by the Statutes and practice of the Court, and the consent of the parties to a different practice would frustrate an appeal: *McColl* v. *Waddell*, 19 C. P. 213. The appeal given by this Act would not apply to orders for committal under the 182nd section of the Division Courts Act: *Rackham* v. *Blowers*, 15 Jur. 758, 20 L. J. Q. B. 397. The "sum in dispute" means *reasonably in dispute*, and where a plaintiff sued for a sum sufficient to entitle him to an appeal, but the evidence shewed that he was not, under any circumstances, entitled to recover such sum, it was held, under the English Statute, that the right of appeal did not exist: *Mayer* v. *Burgess*, 4 E. & B. 655. In delivering the judgment of the Court, Lord Campbell, C. J., says, at page 659: "We must look at the real nature of the cause, not at the amount claimed." But should the claim sued for in amount be sufficient to give an appeal, the fact of a recovery for less would not of itself prevent the appeal: *Dreesman* v. *Harris*, 9 Ex. 485. The Court remarked in that case that it "was an appealable cause when it was brought in the County Court, and nothing has occurred to take away that right. The improper decision of the Judge upon some point of law, as, for instance, by the exclusion of evidence which ought to have been admitted, may have been the cause of the judgment being under £20." To hold otherwise would in effect be saying that a Judge could prevent an appeal by his wrong decision. It is submitted that no appeal lies in a case beyond the jurisdiction of the Division Court where the parties have consented, under section 10 of this Act, to try in that Court: *Groves* v. *Janssens*, 9 Ex. 481. At page 485, Parke, B., says: "There is no reason why, if the parties agree themselves to leave it to the decision of the County Court Judge, they should not be bound by his decision, just as much as they would be bound if they had left the case to an arbitrator. We are of opinion, therefore, that, comparing these sections together, the appeal does not lie in any case in which the parties have given, by voluntary agreement, jurisdiction to the County Court Judge:" see also *Harding* v. *Knowlson*, 17 U. C. R. 564. Probably the same would be the result in a case beyond the jurisdiction and tried under the 14th section of this Act. It was held that no appeal lay from a decision in an interlocutory matter, such as taxation of costs, on the ground that the Court had no jurisdiction to decide such a point, but entertained the appeal so as to dismiss it with costs: *Carr* v. *Stringer*, E. B. & E. 123; *Re Freeman et al.* 2 Error and App. R. 109; see also *Anglin* v. *Municipality of Kingston*, 16 U. C. R. 121. The plaintiff having closed his case, it was submitted for the defendant that there was no evidence for the jury. The Judge deciding that there was, evidence was offered on the part of the defendant, and a verdict was ultimately found for the plaintiff, it was held that the defendant did not by calling witnesses preclude himself from appealing on the ground that the Judge had ruled erroneously: *G. N. Ry Co.* v. *Rimell*, 18 C. B. 575. "Either party" has a right to appeal (in any case

the subject of appeal) against any decision of a Judge, on an application for a new trial: see section 19; *Foster* v. *Green*, 6 H. & N. 793. In England, a case has to be stated, settled and signed, separating the law and facts (*Cawley* v. *Furnell*, 12 C. B. 291), but our Statute does not require anything of that kind. Possibly, however, the Court of Appeal may lay down certain rules on the subject of Division Court Appeals. Probably only such objections can be raised on appeal as were taken at the trial (*Hillia.* ' v. *Eiffe*, L. R. 7 H. L. 39; *Watson* v. *Ambergate Ry. Co.*, 15 Jur. 448; *Parr*, 17 C. P. 621; *Williams* v. *Evans*, L. R. 19 Eq. 547, and note (*w*) to this section), or perhaps as are patent on the face of the proceedings: *Devine* v. *Holloway*, 14 Moore, P. C., 290. A purely technical objection to a party's right of action, which had not been made in the Court below, would not, it is submitted, be entertained in appeal: *Bank of Bengal* v. *Fagan*, 7 Moore, P. C., 61; *Kay* v. *Marshall*, 8 C. & F. 245. This rule prevails even in criminal cases: *R.* v. *Clark*, L. R. 1 C. C. 54. In the case of *The Midland Banking Co.* v. *Chambers*, L. R. 4 Chan., Sir C. J. Selwyn, L. J., says, at page 400: "It is not desirable that we should decide a case which was not argued in the Court below. As no objection to the jurisdiction was taken before the Vice-Chancellor, we shall hear the case on the merits." A *new argument*, in support and illustration of the objection originally made, is altogether a different thing: *per* Bramwell, B., in *Bayley* v. *Fitzmaurice*, 8 E. & B. 680. Where the evidence shews a total absence of foundation for the conclusion at which the Judge has arrived, his decision will be reversed on appeal: *British Industry L. Ass. Co.* v. *Ward*, 17 C. B. 644. An order need not be formally drawn up on the application for new trial before appealing: *In re Jones*, 4 P. R. 317. Should the appellant die during the pendency of his appeal, and *before* argument, it is questionable if the appeal would not drop (*Lawrie* v. *McMahon*, 6 P. R. 9), but probably judgment would be delivered if the case had been argued: *Braybrook* (*Lord*) v. *Attorney-General*, 7 Jur. N. S. 741; see also *LaCloche* v. *LaCloche*, L. R. 3 P. C. 325; *Chadwick* v. *Chadwick*, L. R. 8 Chan. 926. Under the 18th section, the time for appealing begins to run "from the day of giving judgment," and not from the time of the Judge's signing and delivering out or transmitting the order: *Heslop, Ex parte*, 1 DeG. Mac. & G. 477; *Dudley and West Bromwich Banking Company, Ex parte*, 9 Jur. N. S. 702. An appeal would not, it is submitted, be entertained, not on the ground of the merits of the party's case, but of a mere formal defect in procedure on the part of the opposite party: *Kennington, Ex parte*, 8 Jur. N. S. 1111. A question of practice would not be appealable: *R.* v. *Stubbs*, 1 Jur. N. S. 1115. Should a Judge be ready to deliver judgment, but formally delay it until a certain day in order to facilitate an appeal, judgment delivered on the day to which postponement made would be the formal delivering of it: *Rathbone* v. *Munn*, 18 L. T. N. S. 856; *In re Burrowes*, 18 C. P. 493; *Re Smart and O'Reilly*, 7 P. R. 364. Should the claim, as shewn by the particulars, exceed $100, the plaintiff could not, by abandonment of a portion of it at the trial, and the amendment of the particulars, accordingly, by the Judge, so as to reduce the claim under $100, deprive the defendant of his right of appeal: *North* v. *Holroyd*, L. R. 3 Ex. 69. In *Gage* v. *Collins*, L. R. 2 C. P. 381, it was held on that the reversal of the judgment of a County Court Judge, and granting a new trial, the Court had power to reverse the judgment as to the costs of the first trial below: see also section 21 of this Act. Parties will be bound by the case made by the papers, certified by the Clerk, and will not be allowed to travel out of it: *Watson* v. *Ambergate, &c., Ry. Co.*, 15 Jur. 448; *Williams* v. *Evans*, L. R. 19 Eq. 547; *Rhodes* v. *Liverpool Com. Invest. Co.*, 4 C. P. D. page 427, *per* Coleridge, C. J. The respondent will equally be bound by what appears in the certified proceedings, even though not correct; but probably the Judge in appeal would, if any inaccuracy were shewn to him, either refuse to hear the appeal (*Yorke* v. *Smith*, 21 L. J. Q. B. 53), or send it

back for correction, as was done in *Thornwell* v *Wigner*, L. R. 6 Ex. 87, where "the result of the evidence" only was returned to the Court of Appeal. In that case, Kelly, C. B., says: "The learned Judge has only set out the "result" of the evidence and such as he deems material, but we have to consider whether his judgment was correct, and we cannot determine this without knowing not only what, on his construction of the evidence, he deemed material, but the *whole evidence* on which he formed his opinion." The death of a respondent would not deprive the appellant of his right of appeal (*Hemming* v. *Williams*, L. R. 6 C. P. 480), but possibly the suit might have to be revived: see Sinclair's D, C. Act, 275. If a case is referred to arbitration there would be no appeal (*Mayer* v. *Farmer*, 3 Ex. D. 235), nor would the consent of the parties make any difference: *McColl* v. *Waddell*, 19 C. P. 213. Where a judgment is obtained by fraud, appeal is not the remedy: *Flower* v. *Lloyd*, 6 Chan. D. 297. Should the parties agree that the Judge might determine their rights in a summary manner, there would be no appeal: *In re Durham County P. B. B. Society, Ex parte Wilson*, L. R. 7 Chan. 45. There would be no appeal from a garnishee order: *Mason* v. *Wirral Highway Board*, 4 Q. B. D. 459. Where there has been a mistake upon some matter of law that governs or affects the costs of a suit, the party prejudiced was held, in one case, to have the right to have the benefit of its correction by appeal: *Yeo* v. *Tatem*, "*The Orient*," L. R. 3 P. C. 696. It would be too late for the respondent, at the hearing, to take an objection to the competency of the appeal, on the ground that the subject matter of the suit did not involve the prescribed appealable amount, such objection not having been taken before the Judge below. The proper course would be to move in the first instance to dismiss the appeal, on that ground, with costs: *Aldridge* v. *Cato*, L. R. 4 P. C. 313, and at page 319, *per* James, L. J. Should the amount not justify an appeal, possibly the Judge of appeal might, of his own mere motion, refuse to entertain it: but *Query?* The cases of *Murphy* v. *The Northern Ry Co.*, 13 C. P. 32; *Duffil* v. *Dickenson*, 14 C. P. 142; *Wood* v. *G. T. Ry. Co.*, 16 C. P. 275, and *Brown* v. *Cline*, 27 U. C. R. 87, which decide that in County Court cases a judgment, entered and standing in the Court below, is, until reversed, a bar to an appeal, cannot, it is submitted, apply to an appeal under this Statute. In the County Court the appeal is *before* judgment, but in the Division Court, from the nature of the procedure, it must necessarily be *after* judgment. It is submitted, however, that, if there is no order staying proceedings, and an execution is issued and the money made, there could not then be an appeal: see *In re Denton* v. *Marshall*, 1 H. & C. 654. At one time the practice in County Court cases was to go behind the certificate of the Judge and, on a special application for that purpose, to enquire whether or not the conditions, on which the appeal had been given, had been duly observed (*Pentland* v. *Heath*, 24 U. C. R. 464; *Darling* v. *Sherwood*, 2 L. J. N. S. 130; *Wood* v. *G. T. Ry Co.*, 16 C. P. 275); but that practice was reversed, and the rule laid down was, that the Court would not go behind the certificate of the County Judge to enquire into the regularity of the prior proceedings, but would assume that everything had been rightly done in the Court below, including the giving of a proper bond (*McLellan* v. *McClellan*, 2 L. J. N. S. 297); unless such objections should appear on the proceedings certified: *Penton* v. *G. T. R. Co.*, 28 U. C. R. 367. The writer humbly expresses his belief in the correctness of the former practice. An appeal is given *on condition* of a bond being given, with certain formalities, and, if it is brought to the notice of the Appellate Court that such have not been complied with, cannot that Court entertain the question on a substantive application?: *Aldridge* v. *Cato*, L. R. 4 P. C. 313; *Re Parr*, 17 C. P. 621; *Meyers and Wannacott, In re*, 23 U. C. R. 611; *R.* v. *Oxfordshire* (*Justices*), 1 M. & S. 446; *R* v. *Carnarron* (*Justices*), 4 B. & A. 86; *R.* v. *Bond*, 6 A. & E. 905; *R.* v. *Lancashire* (*Justices*), 8 E. & B. 563; *Morgan* v. *Edwards*, 5 H. & N. 415; *Woodhouse* v. *Wood*, 1 L. T. N. S. 59; *Ex parte Lowe*, 3 D. & L. 737; *Gossage* v. *Can. L. & Em. Co.*,

18. Any Judge of the County Court of the county in which the cause was tried, on the application of the person proposing to appeal, his Counsel, Attorney or agent, shall stay (*z*) the proceedings in the cause, for a time not exceed- Stay of proceedings.

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24 U. C. R. 452, and cases cited in the notes to section 51. At page 334 of Maxwell on Statutes it is thus laid down: "So if the liberty of appealing from a decision is given, subject to the fulfilment of certain conditions, such as giving notice of appeal and entering into recognizances, or transmitting documents within a certain time, a strict compliance with these provisions would be imperative, and non-compliance fatal to the right of appeal." The Court of Appeal could not impose an additional condition of appeal, not imposed by the Statute: *R.* v. *Pawlett*, L. R. 8 Q. B. 491.

(*z*) *Application and Order for Stay of Proceedings.*

The application for stay of proceedings should be made by or on behalf "of the person proposing to appeal:" section 18. If not made in person, it can be done by "his Counsel, Attorney, or agent." The proceedings in and about the appeal, and the giving and perfecting security, shall be the same as on appeal from the County Court, except where otherwise provided by this Act: see Rev. Stat. cap. 43, sections 34 to 42. The stay of proceedings may be by order of the Judge, to be served upon the opposite party. It may be in these words:

In the Division Court for the County of .

A. B., Plaintiff, v. C. D., Defendant.

Upon the application of the plaintiff (or defendant), I hereby order that proceedings herein be stayed for ten days from the day of A.D. 188 , in order to afford the plaintiff (or defendant) time to give the security required in this cause to enable him to appeal; which security I hereby direct to be by a bond in the sum of $ or the sum of $ paid into Court.

Dated this day of A.D. 188 . Judge.

The order would be *ex parte*: *Ex parte Kempson, re Barker*, 12 L. T. N. S. 43. The Judge would not fix a day on which the security is to be given: *Polini* v. *Gray*, 11 Chan. D. 471. The Judge cannot extend the time for appealing: *Brown* v. *Shaw*, 1 Ex. D. 425; *Tennant* v. *Rawlings*, 4 C. P. D. 133; *Whistler* v. *Hancock*, 3 Q. B. D. 83. The Judge could not extend the time by allowing his judgment to be post-dated: *Wilberforce* v. *Sowton*, 39 L. T. N. S. 474. Should execution be placed in the Bailiff's hands, and acted upon before the stay of proceedings was obtained, it is very questionable if there would be a stay of execution: *Gilmour* v. *Hall*, 10 U. C. R. 508; see also *Scott* v. *Carveth*, 20 U. C. R. 435; *Ex parte Willmott*, 1 B. & S. 27. In *Robinson* v. *Gordon*, 24 U. C. R. 285, the perfecting of the appeal-bond was held a supersedeas of execution; but that was under the particular words of the 35th section of chapter 13 of the Consolidated Statutes of Upper Canada. A difficulty may arise where a judge reserves judgment, and delivers it on some day after the sittings of the Court, under section 106 of the Division Courts Act. It must then be delivered at the Clerk's office. A considerable time might elapse before the necessary stay of proceedings could be got; but the party proposing to appeal could not be prejudiced by that: see *Francis* v. *Dowdeswell*, L. R. 9 C. P. 432, *per* Brett, J. The stay is for ten days "from the day of giving judgment," and not from the day the formal order may be signed, if signed at a subsequent time: see *Re Owens*, 12 Grant, 446; *Foster* v. *Green*, 6 H. & N. 793; *Ex parte Johnson*, 3 B. & S. 947. The day on which judgment may be given is of course excluded: *Young* v. *Higgon*, 6 M. & W. 49; *McCrea* v. *Waterloo M. F. Ins. Co.*, 26 C. P. 437; s. c. 1 App. R. 218. For instance, if judgment

ing ten days from the day of giving judgment on the application for a new trial, in order to afford the party time (*a*)

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were given on the *first* of the month, proceedings could only be stayed until the last moment of the *eleventh* day of the same month. If the last day should happen to fall on a Sunday, it would be computed as one of the ten days: *Rowberry* v. *Morgan*, 9 Ex. 730; *Wynne* v. *Ronaldson*, 12 L. T. N. S. 711; *R.* v. *Peacock*, 4 C. B. N. S. 264; *Ex parte Viney, In re Gilbert*, 4 Chan. D. 794; *Ex parte Suffery, In re Lambert*, 5 Chan. D. 365; *Ex parte Simpkin*, 2 E. & E. 392; *R.* v. *Middlesex (Justices)*, 2 Dowl. N. S. 719; *Ex parte Ferrige, In re Ferrige*, L. R. 20 Eq. 289. In the case of *Hood* v. *Dodds*, 19 Grant, at page 643, the Vice-Chancellor appeared to have a somewhat different impression of it; but there *juridical* days were meant, and the authorities upon the point were not fully brought to his notice. The distinction appears to be this: if the act is to be done by the Court, and the last day happens to be a Sunday, it is not reckoned; but if by the party it is: *Hughes* v. *Griffiths*, 13 C. B. N. S. 324; see also note (*u*) to section 8 of this Act. The authorities there referred to and the remarks made have an equal application here.

Agent for Service of Papers.

By the 19th section provision is made for the appointment by each party "of some person resident within the county town of the county or united counties in which the cause was tried, upon whom all papers may be served in appealable cases. It is important for parties to observe this requirement of the Act. If disregarded, papers may be left with the Clerk of the Court, and they might not reach the party or his Attorney in time to be of service to him. All papers received by the Clerk under this section must be *forthwith* mailed by him "to the person entitled to the same" by registered letter.

(*a*) *Security, when given.*

There is a difference between the language used in the English Act (13 & 14 Vic. cap. 61, sec. 14) and in this Statute, in regard to putting in the security necessary to an appeal. The words of that section, in regard to the question to be considered, are, "provided that such party shall, within ten days after such determination or direction, give notice of such appeal to the other party, or his attorney, *and* also give security, to be approved by the Clerk of the Court, for the costs of the appeal." As the 17th section of this Act adopts the practice of appealing in the County Courts, we must look to the cases decided in regard to that practice, so far as applicable, for our guidance here. It will be observed that our Statute makes no provision as to the time when security must be perfected. Under the English Act, as remarked by Lord Coleridge, C. J., in *Francis* v. *Dowdeswell*, L. R. 9 C. P., at page 427, in speaking of the appeal clauses, "Now it is admitted that they do not make the giving of a notice *within the ten days* strictly a condition precedent; but they peremptorily enact what shall be done to entitle a party to appeal, and provide that, if certain requirements are not complied with, the appeal cannot be allowed." The case of *Haworth* v. *Fletcher*, in our own Court of Queen's Bench, (20 U. C. R. 278), is instructive on this point. In an appeal from the County Court it appeared that the bond was not given within the then necessary four days after the delivery of judgment, and objection was made to the appeal being heard for that reason. At page 280, Robinson, C. J., in delivering the judgment of the Court, says: "If the party now appealing did not furnish a *proper* bond, in time, he ran the risk of having judgment entered against him in the County Court, from which he probably would not have been relieved." The Court heard and decided the appeal on the merits: see also *Murphy* v. *N. Ry Co.*, 13 C. P. 32; *Duffil* v. *Dickenson*, 14 C. P. 142; *Wood* v. *G. T. Ry Co.*, 16 C. P.

to give the security (*b*) required to enable him to appeal. (*c*)

275; *Hacking* v. *Lee*, 2 E. & E. 906; *Shaw* v. *Crawford*, 4 App. R. 371. As to the English Act, on the subject of appeal generally, see *Waterton* v. *Baker*, L. R. 3 Q. B. 173; *Park Gate Iron Co.* v. *Coates*, L. R. 5 C. P. 634; *Walters* v. *Coghlan*, L. R. 8 Q. B. 61; *Francis* v. *Dowdeswell*, L. R. 9 C. P. 423. As our Statute makes no provision for the security being perfected within any particular time, it is submitted that, *if execution did not intervene*, the Judge would probably not only be justified, but compelled, to approve of the bond after the expiration of the ten days' stay, and, if the appellant did all that he could reasonably do, to perfect the security within the time, and failed through the act of the Judge or the officers of the Court, he would not, on that account, be deprived of his right of appeal: *Francis* v. *Dowdeswell*, L. R. 9 C. P., page 432, *per* Brett, J.; *R.* v. *Allan*, 4 B. &. S. 915, and the cases cited in note (*u*), section 8. Parties may waive the giving security within any particular time, or probably may dispense with the giving of it altogether: *In re Sharpe*, 20 C. P. 82; *Park Gate Iron Co.* v. *Coates*, L. R. 5 C. P. 634; *Ward* v. *Raw*, L. R. 15 Eq. 83. The appellant could, within the ten days' stay of proceedings, if he found his first bond defective, withdraw or abandon it and put in another: *Daniels* v. *Charsley*, 11 C. B. 739; *Norton* v. *L. & N. W. Ry Co.*, 11 Chan. D. 118; see also *Blenkairne* v. *Statter*, 31 L. T. N. S. 413. It is submitted that the security should be approved of before the time for giving notice of appeal has arrived.

(*b*) *Security, how given.*

As the County Court procedure has been adopted under this Act, the sections of the County Courts Act on the subject of appeal must be referred to as to the manner of perfecting the required security: see Revised Statutes, chapter 43, sections 34 to 42, inclusive.

Not only must the security be by a "bond" (*Phosphate Sewage Co.* v. *Hartmont*, 2 Chan. D. 811), but such security must be "perfected," as will be seen by the 17th section, in the same way "as on an appeal from the County Court;" or money must be paid into Court as security, under section 37 of the County Courts Act. Care should be taken in putting in the security strictly in accordance with the Statute, for if the party, in whose favour judgment has been given, does not obtain his Statutory security, he would have the right to oppose the approval of the bond on that account, and if successful, to proceed by execution on his judgment.

The following are given as forms of bonds, affidavits of justification and execution thereof:

Bond where the Plaintiff is Appellant.

Know all men by these presents, that we, A. B., of, &c., and E. F., of, &c., and G. H., of, &c., are jointly and severally held and firmly bound to C. D., of, &c., in the penal sum of dollars of lawful money of Canada (*usually double the probable amount of defendant's costs in the Court below and in appeal, and where the defendant has a judgment in his favour on plea of set-off, of such sum too*), to be paid to C. D., or his certain Attorney, executors, administrators or assigns. For which payment, well and faithfully to be made, we bind ourselves, and each and every of us in the whole, our and each and every of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of , in the year of our Lord one thousand eight hundred and eighty .

Whereas a certain action is now depending in the Division Court for the County of , wherein the above-bounden A. B. is plaintiff, and the above-named C. D. is defendant; and whereas the said action came on to be

tried in the said Court on the day of last past, when a judgment was given for the said C. D. [If judgment postponed under section 106, it can be stated thus: "When judgment was postponed until the day of last past, at of the clock in the noon, at the office of the Clerk of the said Court, at which time and place judgment was given by the Judge of the said Court in writing for the said C. D."]

And whereas the said A. B., being dissatisfied with such judgment, duly applied for a new trial in the said cause, according to the Statutes and Rules of Court in that behalf, which application the said Judge in due course refused.

And whereas the said A. B., being dissatisfied with the decision of the said Judge on such application for a new trial, is desirous of appealing to the Court of Appeal for the Province of Ontario, against such decision; and in pursuance of the Statutes in that behalf, this bond is given as security to enable the said A. B. so to appeal; and whereas the above-bounden E. F. and G. H., at the request of the said A. B., have agreed to enter into the above written obligation for the purposes aforesaid.

Now, therefore, the condition of this obligation is such, that if the above-bounden A. B. shall abide by the decision of the said cause by the said Court of Appeal, and pay all sums of money and costs, as well of the said suit as of the said appeal, awarded and taxed to the said C. D., then this obligation shall be void, otherwise the same shall remain in full force and effect.

Signed, sealed and delivered by the above-bounden A. B., E. F. and G. H., in the presence of J. K.

A. B. [Seal.]
E. F. [Seal.]
G. H. [Seal.]

Bond where the Defendant is Appellant.

Know all men by these presents, that we, C. D., of, &c., and E. F., of, &c., and G. H., of, &c., are jointly and severally held, and firmly bound to A. B., of, &c., in the penal sum of dollars of lawful money of Canada (*usually double the amount of debt and costs in the Court below and the costs in appeal, or such lesser sum as the Judge directs*), to be paid to the said A. B., or his certain Attorney, executors, administrators or assigns. For which payment, well and faithfully to be made, we bind ourselves, and each and every of us in the whole, our and each and every of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of , in the year of our Lord one thousand eight hundred and eighty .

Whereas a certain action is now depending in the Division Court for the County of , wherein the above-named A. B. is plaintiff, and the above bounden C. D. is defendant; and whereas the said action came on to be tried in the said Court on the day of last past, when a judgment was given for the said A. B. for the sum of dollars debt, together with costs of suit [or as the case may be]. [If judgment postponed, under section 106, it can be stated thus: "When judgment was postponed until the day of last past, at of the clock in the noon, at the office of the Clerk of the said Court, at which time and place judgment was given by the Judge of the said Court, in writing, for the said A. B., for the sum of dollars, together with costs of suit"].

And whereas the said C. D., being dissatisfied with such judgment, duly applied for a new trial in the said cause, according to the Statutes and Rules of Court in that behalf, which application the said Judge in due course refused.

And whereas the said C. D., being dissatisfied with the decision of the said Judge on such application for a new trial, is desirous of appealing to the Court of Appeal for the Province of Ontario against such decision; and, in pursuance

of the Statutes in that behalf, this bond is given as security to enable the said C. D. so to appeal; and whereas the above bounden E. F. and G. H., at the request of the said C. D., have agreed to enter into the above written obligation for the purposes aforesaid.

Now, therefore, the condition of this obligation is such, that if the above-bounden C. D. shall abide by the decision of the said cause by the said Court of Appeal, and pay all sums of money and costs, as well of the said suit as of the said appeal, awarded and taxed to the said A. B., then this obligation shall be void, otherwise the same shall remain in full force and effect.

Signed, sealed and delivered by the above-bounden C. D., E. F., and G. H., in the presence of J. K.

C. D. [Seal.]
E. F. [Seal.]
G. H. [Seal.]

The above forms will probably have to be changed in the recitals to meet the facts in many cases. They can also be easily adapted to County Court Appeals. Sometimes, in the latter cases, the form of appeal-bond, on appeal from a Superior Court to the Court of Appeal, is erroneously used. The Judge directs the sum for which the bond must be entered into. If a party chooses to pay money into Court instead of giving a bond, his right of appeal is complete on paying in $400, "or such other sum as the Judge may direct." See section 37 of the County Courts Act.

The affidavit of justification may be in this form:

In the Division Court for the County of .

Between A. B., Plaintiff, and C. D., Defendant.

I, E. F., of, &c., one of the sureties for the above-named plaintiff (or defendant) in this cause, in the annexed appeal-bond, make oath and say: That I am a householder (or freeholder, *as the case may be*), residing at (*give particular description of the place of residence*); that I am worth property to the amount of dollars ("*the amount of the penalty of the bond*," Rev. Stat. cap. 43, s. 38), over and above what will pay all my just debts (*if bail or security in any other action add*, "and every other sum for which I am now bail or security"); that I am not bail or security for any plaintiff or defendant except in this action (*or, if bail or security in any other action or actions, add*), except for C. D., at the suit of E. F., in the Court of in the sum of $; for G. H., at the suit of J. K., in the Court of in the sum of $ (*specifying the several actions, with the Courts in which they are brought, and the sums in which the deponent is bail or security*). Sworn, &c.

[See County Court Rule 84, and the form of affidavit of justification of bail there given. The affidavit of the other surety will be the same, excepting name, &c., as the above.)

The following is a form of affidavit of execution of appeal-bond:

In the Division Court for the County of .

Between A. B., Plaintiff, and C. D., Defendant.

I, J. K., of, &c., make oath and say:

1. That I was personally present, and did see the annexed appeal-bond duly signed, sealed and executed by A. B. (or C. D.), E. F. and G. H., the obligors therein mentioned.

2. That I am personally acquainted with the said parties.

3. That I am a subscribing witness to the execution of the said appeal-bond by all of the said parties; and the signature "J. K." affixed thereto in attestation of such execution is in my own proper handwriting; and that such bond was so executed at, &c. Sworn, &c.

The appellant should give notice to the opposite party of his intention to apply to the Judge for his approval of the bond. It is submitted that there

need not be two days notice of justification, as is required by the 85th Superior Court and the 88th County Court Rules of Practice. The bond should not be approved of without the opposite party having an opportunity of objecting to it. See Maxwell on Statutes, 325, and cases cited at pages 31 and 127 of Sinclair's D. C. Act, and the notes to section 8 of this Act. The notice may be in this form :

In the Division Court for the County of .

A. B., Plaintiff, *v.* C. D., Defendant.

Take notice that I will, on the day of instant, at o'clock in the forenoon (*or as the case may be*), apply to the Judge of this Court, at his chambers in , for the approval of the appeal-bond herein, in pursuance of the Statute in that behalf, and that the names, residences, and additions of the sureties in the said bond are (*here state the same particularly, so that the respondent may find them out*).

Dated this day of A. D., 188 .

L. M.,

To N. O., Plaintiff's (or Defendant's) Attorney or Agent.

Defendant (or Plaintiff's) Attorney or Agent.

At the appointed time, the Judge should hear what objections, if any, are made to the bond, and approve of it or not, as advised. If execution should not intervene after the stay of proceedings had expired, and the Judge refused to approve of the bond, it is submitted that the appellant could put in a fresh bond : *Daniels* v. *Charsley*, 11 C. B. 739. No particular length of notice would be necessary—only reasonable notice. The better opinion would seem to be that the "two persons" mentioned in the 37th section, sub section 1, of the County Courts Act, must be two persons *other* than the plaintiff or defendant. Anyway it is *safer* to have it so. The forms of bond above given make the appellant a party, but it does not seem absolutely necessary that he should be so ; but if convenient to get his execution of the bond, perhaps it is better to save all questions. The present section, it will be observed, is very different in this respect from the 68th section of the 15th chapter of the Consolidated Statutes of Upper Canada. There the bond was required to be "executed by *himself* (the appellant), and two sureties in such sum," &c. The present section referring to the bond does not contain the words "by himself." The authorities are conflicting as to whether the appellant's attorney can execute the bond as one of the sureties or not. From the case of *Myers* v. *Hutchinson*, 2 P. R. 380, and the authorities there referred to, and *Re Owens*, 12 Grant, 564, it would seem as if such a thing was contrary to the spirit of the law ; but, on the other hand, *Carr* v. *Stringer*, 4 Jur. N. S. 439 (*n*) ; *Johnson* v. *Emerson*, L. R. 6 Ex. 329, and especially at pages 336 and 337, appear to sustain the opinion that an appellant's attorney can be one of the "two persons" who become the sureties. Until the point is settled by judicial decision, it will be safer for the appellant, and in much better taste in the attorney, not to be a party to the bond. The condition of the bond should strictly comply with the requirements of the Statute : *Norris* v. *Carrington*, 16 C. B. N. S. 10. Where money is paid into Court instead of giving a bond, a written memorandum, setting forth the conditions on which the money is deposited, is unnecessary : *Griffin* v. *Coleman*, 4 H. & N. 265 ; *Walters* v. *Coghlan*, L. R. 8 Q. B. 61. Unless the Judge orders the sum to be reduced, a party paying into Court would have to deposit the full $400. The order should be for payment into Court of such sum as would probably be sufficient to meet the amount of the debt and costs, and of the costs of the appeal. The money should be paid in within the ten days, otherwise the opposite party could proceed as in the case of an omission to put in the appeal-bond. When the terms of the Judge's order as to payment into Court are complied with, it then becomes the duty of the

Clerk to certify the proceedings. The Attorney-General suing would not be required to give security on appeal: *Attorney-General (I. M.)* v. *Cowley*, 12 Moore, P. C., 27; *In re Attorney-General of Victoria*, L. R. 1 P. C. 147. The bond would be good without any recitals: *R.* v. *Wells*, 17 U. C. R. 550, *per* McLean, J. If a Judge should improperly refuse to approve of a bond, or a Clerk to certify the proceedings, mandamus would lie against each of them (*R.* v. *Wells*, *supra*; *In re Keenahan and Preston*, 21 U. C. R. 461; *R.* v. *Fletcher*, 2 E. & B. 279; *In re Linden, et ux.* v. *Buchanan*, 29 U. C. R. 1), and if the refusal was grossly wrong, costs would probably be imposed: Rev. Stat. 730; *R.* v. *Langridge*, 24 L. J. Q. B. 73. When a Judge refuses a new trial or approves of the appeal-bond, his authority is at an end. He cannot reconsider the matter in either case, and make a fresh decision: *G. N. Ry Co.* v. *Mossop*, 17 C. B. 130; *Irving* v. *Askew*, L. R. 5 Q. B. 208. If no stay of proceedings be granted with a view of appeal, it is submitted that the Clerk would, within a reasonable time after the decision on the application for the new trial, if execution was due, be bound to issue execution: *Wood* v. *G. T. Ry Co.*, 16 C. P. 275. What would be a reasonable time must depend on the circumstances of each particular case. The bond shall be in such sum as the Judge "may direct." It would be improper to approve of a bond with a penalty less than the amount of the judgment for the plaintiff: *McLellan* v. *McClellan*, 2 L. J. N. S. 297. A bond conditioned to pay "all such sums of money and costs, as well of the said suit as of the said appeal, as should be awarded and taxed," would cover the costs of defence as well as of appeal: *Waddell* v. *Robertson*, 26 U. C. R. 376. The bond, if in accordance with the Statute, is a security for any debt awarded to be paid, and the costs of suit and of appeal: *Ib.* On declaring on an appeal-bond, the determination of the suit in the Court of Appeal in favour of the obligee must be distinctly alleged: *Waddell* v. *McColl*, 30 U. C. R. 260.

(c) *Affidavit of justification and opposing approval of bond.*

On this subject, see County Court Rule 84 and the form there given; Har. C. L. P. Act, 664, *et seq.*, and the previous note to this, where a form of affidavit is given. A proper affidavit of justification is as necessary a part of the security as any other: see *Robson* v. *Waddell*, 24 U. C. R. 574. The affidavit should be entitled in the Division Court and the cause, and otherwise be according to Rule 133 (Sinclair's D. C. Act, 269, and note (*x*) to section 8 of this Act). There is this difference to be observed between an affidavit of justification of bail and this affidavit, that in the former case the bail must justify to "double the amount sworn to," here the Statute requires the sureties to justify "to the amount of the penalty of the bond." The reason probably is, that an appeal bond is usually made for double the amount for which it stands as security. The Act says the parties executing the bond must justify by affidavit "annexed thereto." If indorsed on the bond, no doubt it would be a substantial compliance with the Statute.

Should the respondent have any grounds for opposing the approval of the bond, notwithstanding the affidavit of justification, such as the insufficiency of the security, or otherwise, he could do so before the Judge on an affidavit of the facts: see Arch. Prac., 12th Ed., 849, *et seq.* The affidavit must set forth the particular objections, intended to be relied on, against it; merely stating matters of report and general opinion will not suffice: *Sanderson's Bail*, 1 Chitty, 676. The appellant need not himself justify. The following objections are open to the respondent: That the sureties are neither "householders" nor "freeholders." In England, and in the Superior Courts in this Province, the words of justification are, "housekeeper" and "freeholder" (Har. C. L. P. Act, 664: Arch. Prac. 12th Ed.); but our County Court Rule No. 84 has, instead of the former word, adopted the word "*house*holder," so that, if the affidavit does not use that term when necessary, it would be objectionable. To be a "house-

holder," it is submitted that he should live in this Province: *Hughes* v. *Stirling*, 11 Price, 158. A person in lodgings, in England, having a house in Scotland, was held inadmissable as bail: *Anon.*, 1 Dowl. 61. He must be the *bona fide* tenant of the house in his own right, enjoying its benefits and bearing its burdens: Lush's Prac., 3rd Ed., 716. Where the house was taken in the name of one, because the landlord would not trust the other, the bail of the latter was rejected: *Anon.*, 1 Chitty, 316. So also was the tenant of a tap belonging to an hotel, the lease being taken out by the hotel-keeper: *Walker's Bail*, 1 Chitty, 316. So a party who occupied every room but one, which was reserved for the landlord, who paid all taxes: *Slade's Bail*, 1 Chitty, 502. Where a person hired a house, but was prevented from entering through illness in the family of a former tenant, he was held inadmissable: *Bold's Bail*, 1 Chitty, 288. On the other hand, a person who had taken a house, occupied by lodgers, and received rent from one of them, was deemed a "housekeeper," though he had never occupied it himself: *Coehn* v. *Waterhouse*, 8 Moore, 365. A person who lived in lodgings, but paid his proportion of the rent and taxes of a house occupied by his partner, where the business was carried on, was held admissable: *Savage* v. *Hall*, 1 Bing. 430. It is no objection that the house is kept as a gambling-house: *Anon.* 1 Dowl. 160. If the party giving security is to have a commission for doing so, he should be rejected: *Foxall's Bail*. 7 D. & R. 783. It is no objection to the security that the party appealing agreed to indemnify the sureties, for that is the legal position of the parties anyway: *Vestris's Bail*, 4 Scott, 395. It is no objection that the sureties do not know the appellant (*Jameson's Bail*, 2 Chitty, 97), or that they became security at the request of the appellant's attorney: *Hunt* v. *Blaquiere*, 4 Bing. 588. The property should be situated in the Province: *Levy's Bail*, 1 Chitty, 285; see also *Swinborne* v. *Carter*, 23 L. J. Q. B. 16. With the opposite party's consent, persons who are not householders may justify (*Saggers* v. *Gordon*, 5 Taunt. 174); or the justification may be waived altogether: *Park Gate Iron Co.* v. *Coates*, L. R. 5 C. P. 634. The property need not be seizable on which the surety justifies, but may consist of book debts, money out on mortgage, bills of exchange, shares, &c., as well as stock-in-trade and household furniture: *Pierpoint* v. *Brewer*, 15 M. & W. 201. The fact that the surety has property to the amount required is not enough; he must have it over and above what will discharge all his legal liabilities, and the discovery of circumstances, which raise a reasonable suspicion of his solvency, will, if unexplained, render him inadmissable: Lush's Prac. 3rd Ed. 717. The acceptor of a bill of exchange cannot go security for the drawer, because, being himself primarily liable, his default shews him not to be a responsible party (*Anon.* 1 Dowl. 183); but a drawer or indorser may be security for the acceptor: *Prine* v. *Beesly*, 5 Dowl. 477. If it appears that the person is in arrears for his rates or taxes (*Lewis* v. *Thompson*, 1 Chitty, 309), or a dishonoured bill outstanding (*Barnesdall* v. *Stretton*, 2 Chitty, 79; *Cross* v. *Williams*, 1 Tyr. 531), that he has been arrested several times (*Rawlins' Bail*, 1 Chitty, 3), or the like, and the matter be not satisfactorily explained, the security should be rejected. An undischarged insolvent cannot be security, because his property continues liable for his former debts: *Anon.* 2 Chitty. 77; *Holm* v. *Booth*, 2 Chitty, 78; Insolvent Act, 1875, section 16. Where the qualifying property consists of money deposited in the hands of the surety, to indemnify him, it would be insufficient: *Nicholl's Bail*, 1 Hodges, 77. Bail was rejected where the person did not know whether he had been arrested or not for two years: *Newman's Bail*, 2 Chitty, 95. So a foreigner, having no property in the Province (*Boddy* v. *Leyland*, 4 Burr, 2526; *Levy's Bail*, 1 Chitty, 285), should be rejected. A person would be rejected who had gone other security, and his property not enough for both: *Varden* v. *Wilson*, 1 Chitty, 287. The fact that the surety kept a gaming-house (*Anon.* 1 Dowl. 160) or a brothel (*Gouge's Bail*, 3 Dowl. 320), or that he has suffered the penalty of crime (*Hatfield's Bail*, 2 Chitty, 98), would be no objection. The inquiry will not be as to the character

Agent for service.

19. Upon any application for a new trial in any cause wherein either party may appeal, each party to the suit shall leave with the Judge by whom the application is heard, a memorandum in writing of the name of some person, resident within the county town of the county or united counties in which the cause was tried, with his place of abode, upon whom the notice of appeal, and all other papers thereafter requiring service, may be served for him, and service upon such person, or, in his absence, at his place of abode, shall be sufficient service thereof; and. in the event of failure to leave such memorandum by either party, all papers requiring service upon him may be served upon the Clerk of the Division Court where the suit was tried, or left at his office, for the person so failing to leave such memorandum, and such service shall be good service. The Clerk shall, in such case, forthwith mail, by registered letter, all such papers so served upon him to the person entitled to the same.

Evidence, &c., to be certified.

20. Upon the bond being approved by the Judge, or the deposit being paid into Court, the Clerk of the Court in which the suit is pending, shall, at the request of the

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of the bondsmen, but as to the property on which they justify. In an anonymous case (1 Dowl. 127), Littlehales, J., held that an affidavit of sufficiency, stating that the bail were "householders" instead of "housekeepers," was insufficient, but allowed it to be amended: see also *Gablentz's Bail*, 1 H. & W. 111. The description of "housekeeper" would, it is submitted, be the correct practice under this Act. The property on which a surety qualifies need not, as bail in England, be described in the affidavit. Neither, in regard to bail under our law or security under this Statute, would such be necessary. It was held not a sufficient ground to reject one of two bail, that *one* of his creditors agreed to compound for his debt for two shillings in the pound: *Daniell* v. *James*, 2 P. R. 195. After hearing all objections to the approval of the bond the Judge will, if he determines to approve of it, indorse some such words as these upon it: "Approved of by me this day of 188 ," and affix his signature to it. After the bond is approved of it must be filed with the Clerk of the Division Court, to remain with him until after the decision of the case in the Court of Appeal, when the Judge will order it to be delivered up to the successful party: Rev. Stat. cap. 43, s. 39. Where money is paid into Court, instead of the security being by bond, it remains in Court, under the 40th section, as a security to the opposite party. If the appellant should be successful he could, after the taxation of his costs, &c, apply to the Judge by summons for an order on the Clerk to pay him sufficient to satisfy his established claim against the opposite party, and costs. A successful appellant could elect to proceed on the security or in the suit, and probably on both. Such a bond, no matter to what amount the penalty might be, would be suable in the Division Court: Sinclair's D. C. Act, 213, and section 68 of this Act.

appellant, his counsel, Attorney, or agent, furnish a duly certified copy (*d*) of the summons with all notices endorsed thereon, the claim, and any notice or notices of defence, and of the evidence and all objections and exceptions thereto, and of all motions or orders made, granted, or refused therein, together with such notes of the Judge's charge as have been made, the judgment or decision when in writing, or the notes thereof, and all affidavits filed or used in the cause, together with all other papers filed in the cause affecting the questions raised by the appeal. The Clerk shall also furnish to the respondent, when required so to do, a duplicate copy of the proceedings so furnished to the appellant, or such portion thereof as may be required by him, and for every copy he shall be entitled to receive the sum of five cents per folio of one hundred words.

(*d*) *Clerk to Certify Proceedings.*

The Clerk *shall* furnish a duly certified copy of the proceedings. It is imperative on him to do so after the conditions of appeal have been duly complied with: see notes under title, "Security, how given." The "request" to the Clerk is not required to be in writing, but it had better be so, in order to prevent any mistake. The Clerk's certificate may be in this form:

In the Division Court for the County of .

A. B., Plaintiff, *v.* C. D., Defendant.

I, , Clerk of the said Court, do hereby certify to the Court of Appeal for the Province of Ontario, that the annexed papers contain true and examined copies of the summons in this cause, with all notices endorsed thereon, the claim, and any notice or notices of defence, and of the evidence and all objections and exceptions thereto, and of all motions or orders made, granted or refused herein ["together with such notes of the Judge's charge as have been made," if the cause tried by a jury], the judgment or decision in writing [or the notes thereof], and all affidavits filed or used in the cause, together with all other papers filed in the cause affecting the questions raised by the appeal.

Given under my hand and the seal of the said Court this day of , A.D. 188 .

[Seal of Court.] Clerk.

The Clerk shall also, when required so to do, furnish to the respondent a duplicate copy of the proceedings furnished to the appellant, or such portion of it as he may require, at the rate of five cents per folio. As will be seen from the notes on these appeal clauses, the only matters which could be argued on appeal would be what the certified copy of the papers disclosed (*Bank U. C.* v. *Tarrant*, 19 U. C. R. 423; *Stanford* v. *Brunette*, 14 Moore P. C. 60, sec. 17 (*y*)), subject to be sent back for correction if wrong, or in a confused state: *L. & N. W. Ry. Co.* v. *Grace*, 2 C. B. N. S. 555. It is suggested that it would be well for the Clerk to let the Judge examine the copy which he proposes to certify before it is done. The Judge should see that his notes of the trial, decision, &c., are correctly set out, and for that purpose the Clerk had better observe the suggestion just made. After the Clerk has certified the copy of proceedings,

21. The appellant shall within two weeks after the approval of the security or deposit being paid into Court, or at such other time as the Judge of the said County Court may by order in that behalf provide, file (*e*) the said certified copy with the registrar of the Court of Appeal, and shall thereupon forthwith set down the cause for argument before a Judge of the said Court of Appeal, and shall forthwith give notice (*f*) thereof, and of the appeal, and of the

Setting down appeals.

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he could not alter or add to the same (*Warner* v. *Riddiford*, 4 C. B. N. S. 180), unless sent back to him for the purpose: see cases *supra*. The Judge's decision should be stated publicly, and the reasons for it, before the certification of the papers, and not sent afterwards to the Court of Appeal: *Brown* v. *Gugy*, 2 Moore P. C. N. S. 341.

(*e*) *Filing Copy of Proceedings and setting down Cause.*

The appellant has two weeks *after* the approval of the security or deposit being paid into Court, or such other time as the Judge of the County Court may order, to file the certified copy of the proceedings with the Registrar of the Court of Appeal. The two weeks are to be reckoned *exclusive* of the day on which the security is approved of, or the deposit paid into Court. Whether the Court of Appeal would consent to hear the case if such was not done, would be a matter for them to consider. No paper books are here required as in England: see *Tattersall* v. *Fearnley*, 17 C. B. 368. It is submitted that the Court of Appeal would not (if it could) allow the appeal to be set down or argued after the time prescribed by the Statute, unless the parties had acted as if the appeal was entered: *Figg* v. *Wilkinson*, 9 Ex. 475. The appeal must be entered before the day mentioned in the notice for hearing it: *Donovan* v. *Brown*, 4 Ex. D. 148. If any mistake should be made in copying the proceedings, or in setting down the appeal, there would appear to be no objection to an abandonment of these proceedings and taking them afresh, provided such could be done *within the prescribed time*: *R.* v. *W. R. Yorkshire (Justices)*, 3 T. R. 778; *Norton* v. *L. & N. W. Ry. Co.*, 11 Chan. D. 118. As to appeal being dismissed with costs when improperly set down, see *In re National Funds Ass. Co.*, 4 Chan. D. 305; *In re Mansel, Rhodes* v. *Jenkins*, 7 Chan. D. 711; *Machu* v. *O'Connor*, W. N. 1878, 144; see *post* "Costs of Appeal."

As to the old practice of setting down County Court Appeals, see *Ruttan* v. *Vandusen*, 10 U. C. R. 620; *Simpson* v. *G. W. R. Co.*, 17 U. C. R. 57; *Smith* v. *Foster*, 11 C. P. 161. As to the present practice, see 22 U. C. R. 166, and the Rules of the Court of Appeal.

(*f*) *Notice of Appeal.*

This is to be given *forthwith* after the appeal is set down. It must be served on the respondent, his counsel, attorney or agent, "at least seven days before the day for which the same is set down for hearing." The notice must therefore be given seven *clear* days (both the day of giving the notice and the day set for argument being excluded: *R.* v. *Aberdare Canal Co.*, 14 Q. B. 854, and cases there cited; Maxwell on Statutes, 310; *Fox* v. *Wallis*, 2 C. P. D. 45; *Runtz* v. *Sheffield*, 4 Ex. D. 150: *Ex parte Viney, In re Gilbert*, 4 Chan. D. 794; *Ex parte Saffery, In re Lambert*, 5 Ch. D. 365.) The meaning of the notice is that the appeal shall not be heard until the seven days have elapsed: *In re Wood*, L. R. 7 Chan. 302. In England, the notice of appeal has been held to be

grounds thereof, to the respondent, his counsel, attorney or agent, at least seven days before the day for which the same

Hearing. is set down for hearing, and the said appeal may be heard

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simply "a requirement for the information of the Court below: *per* Erle, J., in *Evans* v. *Matthews*, 26 L. J. Q. B. 166; see also *Cannon* v. *Johnson*, 21 L. J. Q. B. 164. The provisions of our Statute may be different. These cases also decide that the giving of a notice of appeal is not a condition precedent to the appeal being heard. Reasonable certainty only would be required in the notice, and it should not be criticized too closely or construed too strictly: *R.* v. *West Houghton*, 5 Q. B. 300, *per* Denman, C. J., at page 302; *In re West Jewell Tin Mining Co., Little's Case*, 8 Chan. D. 806; see also notes to section 51 of this Act. The notice may be signed by the appellant's attorney (*R.* v. *Middlesex (Justices)*, 1 L. M. & P. 621), or in the appellant's name, by the clerk to his attorney, with the appellant's authority: *R.* v. *Kent (Justices)*, L. R. 8 Q. B. 305. In strictness, perhaps, it need not be signed at all: *R.* v. *Nichol*, 40 U. C. R. 76. The Statute requires "the ground" of appeal to be stated in the notice. A general statement that the judgment was erroneously made would be insufficient: *Torrance* v. *McPherson*, 11 U. C. R. 200. For the authorities bearing on the question of "grounds of appeal" in the notice, see the notes to sec. 51, and *Severn* v. *Street Ry Co.*, 23 U. C. R. 254; *Corbett* v. *Taylor*, 23 U. C. R. 254; *Eddy* v. *Ottawa City P. Ry Co.*, 31 U. C. R. 569. It is submitted that the omission of the grounds of appeal should not prevent its being heard, such being for the information of the Court of Appeal, and not a condition precedent to hearing the case: *Evans* v. *Matthews*, 26 L. J. Q. B. 166; *Grant* v. *G. W. Ry Co.*, 8 C. P. 348; *Smith* v. *Muirhead*, 13 U. C. R. 9; *Ex parte Bromley, re Redfearn*, 12 L. T. N. S. 783; *Richardson* v. *Silvester*, 29 L. T. N. S. 395. The case of *R.* v. *Boultbee*, 4 A. & E. 498, and that class of cases, are quite distinguishable. There the statement of grounds of appeal is a necessary part of the notice, which is a condition precedent to an appeal against a Magistrate's conviction, as will be seen from a discussion of that question, and others arising under this clause, in the notes to section 51 of this Act. Until the Court of Appeal prescribes a form of notice of appeal, the following, or something to the like effect, might be used:

In the Court of Appeal.

In a cause in Appeal from the Division Court for the County of in which A. B. is plaintiff and C. D. defendant.

Take notice, that this cause has this day been set down for argument in appeal before a Judge of this Court, for the day of A.D. 188 , and that such cause, having been appealed, will then be heard, and the grounds of such appeal are as follows:

1. [*Here in separate paragraphs set out clearly and concisely the grounds of appeal relied on.*]

Dated this day of A.D. 188 .

A. B., Appellant,
(or Attorney for Appellant).

To C. D., the Respondent (or to the "Counsel, Attorney, or agent," of the Respondent, *as the case may be, naming him*).

It is difficult to comply strictly with the ambiguous words "shall forthwith give notice thereof and of the appeal." It has, however, been attempted in the above form. The notice must be served according to section 19. During the intervening seven days, the parties can, if not already done, instruct their Counsel for the argument of the case, and otherwise prepare for the hearing of the appeal.

and disposed of (*g*) by a single Judge of the Court of Appeal, and he shall have power to dismiss the appeal or give any judgment (*h*) and make any order which ought to have been made, and he shall give such order or direction to the court below touching the decision or judgment to be given in the

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(*g*) *The Argument.*

On the argument generally the appellant begins: *Gee* v. *L. & Y. Ry. Co.*, 30 L. J. Ex. 11. Where a comparison of handwriting was made in the Court below, the appellate Court ordered the former Court to transmit the originals for the purpose of inspection and comparison at the hearing of the appeal: *McCarthy* v. *Judah*, 12 Moore P. C. 47. When objection is made to the regularity of an appeal, on that question the party objecting should have the right to begin: *Geils* v. *Geils*, 1 Macq. H. L. 36. An appeal should not be allowed to stand over indefinitely, even pending a compromise: *London* (*Mayor*) v. *Combe*, 4 H. L. Cas. 1089. The rule in the House of Lords is that a Counsel cannot in his own case argue it with another Counsel; he must either appear in person or by Counsel: *N. B. and Can. Ry. Land, &c., Co.* v. *Conybeare*, 31 L. J. Chan. 297. The appellate Court may make its own rules as to the argument of an appeal. It is submitted that only such objections can be raised in appeal as were taken and argued in the Court below: *Watson* v. *Ambergate Ry. Co.*, 15 Jur. 448; *Kay* v. *Marshall*, 8 C. & F. 245, and cases cited in the notes to s. 17. Where there is a fatal objection to the right of appeal, should not the respondent apply to quash the appeal, and not wait until the hearing to urge such objections to its competency? *Tronson* v. *Dent*, 8 Moore P. C. 420, and notes to section 17.

(*h*) *Judgment in Appeal.*

The Judge who hears the appeal has power to "dismiss the appeal, or give any judgment and make any order which ought to have been made; and he shall give such order or direction to the Court below touching the decision or judgment to be given in the matter as the law directs." On the same point, under the English Acts, see *Fuller* v. *Cleveley*, 17 Jur. 736; *Clarke* v. *Stancliffe*, 7 Ex. 439; *Whiteman* v. *Hawkins*, 4 C. P. D. 13. When the question is one of fact only, and has been tried by a Jury, an appellate Court will not reverse a judgment on such finding, unless satisfied that the judgment is clearly wrong: *Moore* v. *Clucas*, 7 Moore P. C. 352; *Keena* v. *O'Hara*, 16 C. P. 435; *Cowin* v. *Moore*, 14 Moore P. C. 354; *North German Lloyd S. S. Co.* v. *Elder*, 14 Moore P. C. 241; *Scott* v. *Paquet*, 4 Moore P. C. N. S. 505; *Ghoolam Moortoozah Khan Bahadoor, In re*, 9 Moore India Appeals, 456, and the cases cited under section 17, and the other appeal clauses under the heads, "General Principles of Appeal" and "When an Appeal Lies;" but see *Bigsby* v. *Dickinson*, 4 Chan. D. 24. As to the principles which govern an appellate Court in granting a new trial when the verdict of the Jury is against the opinion of the Judge explained, see *Humphrey* v. *Howland*, 15 Moore P. C. 343. Where a case has been tried by a Jury, and the appeal is on the ground of misdirection or the improper admission of evidence, the Judge in Appeal, if his opinion is in favour of the appellant, cannot, it is submitted, do anything but grant a new trial, and cannot give a final judgment for the appellant: *Jonas* v. *Adams*, 20 L. J. Q. B. 397. It is submitted that the Judge in Appeal could not adjourn the case to the sitting of the full Court, but must himself hear and determine it: *Button* v. *Woolwich Building Society*, 5 Q. B. D. 88. It was held, in the case of *The East Anglian Rys. Co.* v. *Lythgoe*, 10 C. B. 726, that the observations made by the Judge in delivering judgment did not legitimately form part of the case on appeal, and could not be referred to, either as finding a fact or as giving a reason

Costs.

matter as the law requires, and shall also award costs (*i*) to the party in his discretion, which costs shall be certified to and form part of the judgment of the court below, and upon receipt of such order, direction and certificate, the court below shall proceed in accordance therewith.

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for the judgment. The parties are bound by the case as it appears on the certified proceedings: *Watson* v. *Ambergate Ry. Co.*, 15 Jur. 448, sec. 20 (*d*). Where the evidence shews a total absence of foundation for the conclusion at which the Judge has arrived, the Court will reverse his decision: *British Industry L. Ass. Co.* v. *Ward*, 17 C. B. 644. Where judgment has been given for the plaintiff, the Court has, it is submitted, power to order a nonsuit: see sec. 21; *Fuller* v. *Cleveley*, 17 Jur. 736; Sinclair's D. C. Act, 103, 265. If the respondent appears and the appellant does not, the appeal will probably be dismissed with costs (*Sherburne* v. *Middleton*, 9 C. & F. 72; *Scanlan* v. *Usher*, 8 C. & F. 561; *Smith* v. *Durant*, 9 H. L. Cas. 192; 31 L. J. Chan. 383; *Berry* v. *The Exchange Trading Co.*, 1 Q. B. D. 77); and it is submitted that in the absence of the appellant's Counsel, the Counsel for the respondent would not be called upon to sustain the judgment of the Court below: *Gardiner* v. *Simmons*, 1 C. & F. 35; see also the next note. Should the appellant die during the consideration of his case, it is submitted that, nevertheless, judgment could be given: *Braybrook* (*Lord*) v. *Attorney-General*, 7 Jur. N. S. 741. The appeal is to the Court of Appeal, although one Judge *may* hear it. It is submitted, therefore, that his decision is the same as if that of the Court, and as binding upon the Court as a decision by the full Bench: see *Attorney-General* v. *Windsor* (*Dean and Canons*), 30 L. J. Chan. 529. A case once decided on appeal would not, it is submitted, be reconsidered: *Thellusson* v. *Rendlesham*, 7 H. L. Cas. 429. For a fuller reference to the cases under this head, the reader is referred to the first three notes under these appeal clauses, commencing at section 17. On the case coming back to the Division Court, it is submitted that an order of the County Judge should be obtained in the terms of the judgment of the Judge in Appeal, upon which the officers of the Court should act. It will be observed that "an order or direction" is to be given to the Court below, which Court "*shall* proceed in accordance therewith" The words of the 44th section of the Court of Appeal Act, upon which *McArthur* v. *Southwold*, 8 P. R. 27, was decided, are quite different from the language here used; see also s. 42 of the County Courts Act.

(*i*) *Costs in appeal.*

In County Court appeals in England, costs are generally awarded to the successful party unless there is something very exceptional in the circumstances: *Outhwaite* v. *Hudson*, 7 Ex. 380; *Cannon* v. *Johnson*, 21 L. J. Q. B. 164; *Daniels* v. *Charsley*, 11 C. B. 739; *Schultz* v. *Leidemann*, 14 C. B. 38; *Robinson* v. *Lawrence*, 7 Ex. 123, and *Hunt* v. *Wray*, in a note to the last case; *Foster* v. *Smith*, 18 C. B. 161; *Schroder* v. *Ward*, 13 C. B. N. S. 410; *Conybeare* v. *Farries*, L. R. 5 Ex. 16; *Richardson* v. *N. E. Ry. Co.*, L. R. 7 C. P. 83; *Ashby* v. *Sedgwick*, L. R. 15 Eq. 245; *Leach* v. *S. E. Ry. Co.*, 34 L. T. N. S. 134; *Ex parte Masters, In re Winson*, 1 Chan. D. 113.

The case of *Gee* v. *L. & Y. Ry. Co.*, 6 H. & N. 211, which decided that where a new trial is granted on the ground of misdirection, costs would not be allowed, has not been generally followed: see *Conybeare* v. *Farries*, L. R. 5 Ex. 16; on the other hand, see the concluding part of the judgment of Willes, J., in *Richardson* v. *N. E. Ry. Co.*, L. R. 7 C. P. at page 83.

In our own Courts, the same general rule as to allowing costs to the successful party on appeals from the County Court, has been followed of late years (*Eddy*

22. The costs taxable, as between party and party, upon or connected with any appeal shall be the actual disbursements, and no greater amount over and above actual disbursements than fifteen dollars, inclusive of counsel fee. The costs of such appeal, as between Attorney and client, (*j*) Taxable costs.

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v. *Ottawa City P. Ry. Co.*, 31 U. C. R. 569, 576; *In re Shaver and Hart*, 31 U. C. R. 609, note (*a*); *Herbert* v. *Park* 25 C. P. 57; *Wambold* v. *Foote*, 2 App. R. 579; *Winger* v. *Sibbald*, 2 App. R. 611), and very many other cases that could be cited; but in *Kelly* v. *Ottawa Street Ry. Co.*, 3 App. R. 616, 627, a new rule, but a most reasonable and salutary one, was adopted, namely, that where a case is decided in the Court of Appeal upon considerations which did not appear to have been distinctly brought before the notice of the Court below, there should be no costs of appeal to the successful party. The costs should be applied for when the case is disposed of, and it is very questionable if an application could be successfully made afterwards for them: *Caswell* v. *Cook*, 12 C. B. N. S. 242; *Taylor* v. *G. N. Ry. Co.*, L. R. 1 C. P. 430; *Lindo* v. *Barrett*, 9 Moore, P. C. 456; *Ashworth* v. *Outram* 9 Ch. D. 483. It is submitted that if the appellant appears, and the respondent does not, the appellant should get his costs on dismissal of appeal (*Sherburne* v. *Middleton*, 9 C. & F. 72; *Scanlan* v. *Usher*, 8 C. & F. 561; *Smith* v. *Durant*, 9 H. L. Cas. 192; 31 L J. Chan. 383; *Berry* v. *The Exchange Trading Co.*, 1 Q. B. D. 77), unless indeed the appeal was clearly bad, when the party would not be bound to appear and he did, he might not get his costs (*Daubney* v. *Shuttleworth*, 1 Ex. D. 53; *Brown* v. *Shaw*, 1 Ex. D. 425); but on the other hand, see *G. N. Committee*, v. *Inett*, 2 Q. B. D. 284; *In re Haycock's Policy*, 1 Chan. D. 611; *In re Sutton's Trusts*, 12 Chan. D. 175; Sinclair's D. C. Act, 179 (*q*). If a party should make default on the day appointed for the hearing of his cause, he would probably have to pay the opposite party not in default, the costs of the day; or, if it appeared that he had not instructed counsel for that day (not intending to appear in person), his cause might be struck out: *Flight* v. *Thomas*, 8 C. & F. 231. It is submitted that if the appellant's Counsel does not appear to support the appeal, that the respondent's Counsel would not be compelled to go on, but that the appeal might be dismissed with costs: *Gardiner* v. *Simmons*. 1 C. & F. 35; *Sherburne* v. *Middleton*, 9 C. & F. 72; *In re Oakwell Collieries*, 7 Chan. D. 706; *R. C. Bank* v. *Stevenson*, 22 C. P. 562; *Webb* v. *Mansell*, 2 Q. B. D. 117. The Judge in appeal has power under the wide power given by the Statute, to allow a successful appellant the costs of the appeal as well as the costs in the Court below, and in England it is generally done: *Ashby* v. *Sedgwick*, L. R. 15 Eq. 245. *Quære?*—Could the expenses of a short-hand writer's notes of the trial of a cause be allowed as part of the costs?: see *Ex parte Sawyer*, 1 Chan. D. 698; *In re Albezette*, 8 Chan. D. 599; *Ashworth* v. *Outram*, 9 Chan. D. 483; *In re Duchess of Westminster Silver Lead Ore Co.*, 10 Chan. D. 307 & 312. The costs are "to be certified to, and form part of the judgment of the Court below." On the order of the Judge in appeal, and the allocatur of the taxing officer of the Court of Appeal being produced, the County Judge would then embody them in his order, which would be entered by the Clerk as the judgment of the Court. It is submitted that, from the language of these clauses in regard to the manner of obtaining the costs of appeal, such costs could not be made directly on the order of the Court of Appeal: see *Philipps* v. *Philipps*, 5 Q. B. D. 60; *McArthur* v. *Southwold*, 8 P. R. 27.

(*j*) As to the costs between Attorney and client, see Arch. Pract., 12th Ed., 74 to 80, 130 to 142; Lush's Pract., 3rd Ed., 243 to 341; Gray on Costs, 181 and 525; Fisher's Digest, 478 to 517, 2094, 9186, 9608, 9678; 6 P. R. 299, 313, 354; R. & J's. Digest, 322, 338. As between the parties to the suit only $15

shall be taxable on the County Court scale. Section fifty-five of the Court of Appeals Act (*k*) shall not apply to appeals made under this Act.

INSPECTOR OF DIVISION COURTS AND HIS DUTIES.

Appointment of Inspector.

23. The Lieutenant-Governor may, from time to time, appoint an Inspector of Division Courts, who shall hold office during pleasure, and whose duty shall be:

Inspection of offices.

(1) To make a personal inspection of each Division Court and of the books and Court papers belonging thereto;

Books, etc.

(2) To see that the proper books (*l*) are provided, that they are in good order and condition, that the proper entries and records are made therein in a proper manner, at proper times, and in a proper form and order, and that the Court papers and documents are properly classified and preserved;

Officers' duties.

(3) To ascertain that the duties of the officers of the Division Courts are duly and efficiently performed, and that the office is at all times (*m*) duly attended to by the Clerk;

Lawful fees.

(4) To see that lawful fees (*n*) only are taxed or allowed as costs;

Security by Clerks and Bailiffs.

(5) When directed so to do by the Lieutenant-Governor, to ascertain that proper security (*o*) has been given by any Clerk or Bailiff, and that the sureties continue sufficient;

Reporting to the Lieutenant-Governor.

(6) To report upon all such matters as expeditiously as may be to the Lieutenant-Governor for his information and decision.

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and "actual disbursements" are taxable to the successful party, yet as between Attorney and client the County Court tariff is adopted.

(*k*) This is the section of the Court of Appeal Act which prescribes what fees are payable to the Crown in stamps on proceedings in that Court. Stamp fees are not payable on any proceedings under this Act.

(*l*) These books consist of the procedure book, cash book, debt attachment book (Rule 77), and the book of fees, charges and emoluments, under section 31 of this Act.

(*m*) This means at all *reasonable* hours. It is suggested that Registrars' hours, from ten o'clock in the forenoon until four o'clock in the afternoon, would be reasonable. Properly the office should be open every day, except Sundays and legal holidays, for the transaction of business.

(*n*) The tariff and this Statute prescribe *all* "lawful fees:" see new tariff herewith and Sinclair's D. C. Act, 338 to 345.

(*o*) As to what is proper security, see Sinclair's D. C. Act, 22 to 29, and section 7 of this Act.

Power of Inspector in making inquiry into conduct of officers.

24. When the said Inspector considers it expedient (*p*) to institute an inquiry into the conduct of any Division Court Clerk or Bailiff in relation to his or their official duties or acts, (*q*) it shall be lawful for the said Inspector to require such Clerk or Bailiff, or other person or persons, to give evidence on oath, and for this purpose the said Inspector shall have the same power, (*r*) to summon such officers to attend as witnesses, to enforce their attendance and to compel them to produce books and documents, and to give evidence, as any Court has in civil cases.

Inspector's salary.

25. A salary, not exceeding fourteen hundred dollars per annum, shall be paid to the Inspector, and such actual and necessary travelling and other expenses as shall be from time to time voted by the Legislature, and shall be payable out of the Consolidated Revenue Fund for the Province of Ontario.

Books, etc., to be produced for inspection.

26. The Division Court Clerks and Bailiffs shall, as often as required (*s*) by the said Inspector, produce all books and documents required to be kept by them, or that

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(*p*) A very wide discretion is here given to the Inspector. It should be carefully exercised, and only after he is satisfied that in the public interests an investigation is necessary. Any "inquiry" must necessarily be after the officer has at least some general knowledge of what he is charged with having done or omitted to do, and he should have a fair opportunity of explaining his conduct, or answering the charges by his own evidence or otherwise. The inquiry should not, it is submitted, be made *ex parte:* Sinclair's D. C. Act 225. (*i*)

(*q*) The "inquiry" could only extend to the officer's "official duties or acts," and not to his private conduct, except in so far as the same might injuriously affect his official position.

(*r*) As to summoning persons to give evidence and the consequences of disobeying a subpœna, the reader is referred to Arch. Pract., 12th Ed., 349, 358; Lush's Pract., 3rd Ed., 524, *et seq.* Power is not only given to the Inspector to summon the Clerk or Bailiff, but "any other person or persons." Should the officer desire any person summoned in his interests, it should be done, for the inquiry should be full and complete on both sides. The Inspector would have to draw up and serve a summons, answering the place of a subpœna in ordinary cases, and have the same served on the parties, whose evidence might be required, before they would be compelled to attend. If "books and documents" were required to be produced, a *duces* clause would have to be inserted. In short, pretty much the same course would have to be adopted as in the case of an ordinary witness, as to which see Sinclair's D. C. Act, 123 to 128. It is here suggested that the Inspector should take proper notes of the evidence taken by him to be reported to Government.

(*s*) The object of compelling the officers to produce their books, &c., to the Inspector, is an obvious one. The Inspector is now entitled to see such as a

may hereafter be required to be kept by them, at the Clerk's office, for examination and inspection. Any Clerk or Bailiff shall report to the Inspector all such matters relating to any cause or proceeding as the Inspector shall require (*t*).

Officers to inform Inspector of their appointment, etc.

27. It shall be the duty of every Division Court Clerk or Bailiff, within five days after his appointment to office (*u*), to inform the Inspector of his appointment, his full name (*v*) and post office address, the names of his sureties (*w*), their respective callings or professions, places of residence, (*x*) and post-office address.

Inspector to be informed of new sureties.

28. When any Clerk or Bailiff has given new sureties, (*y*) as required by the Division Courts Act, he shall immediately (*z*) inform the said Inspector of such change, giving

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right, which he did not before possess. As the writer reads this section, production should only be made "at the Clerk's office." A verbal request would be sufficient.

(*t*) As complaints will frequently be made to the Inspector against Clerks and Bailiffs, for the due understanding and investigation of the matters to which such complaints refer, the Clerks and Bailiffs are compelled to make a report to the Inspector of such matters relating to any cause or proceeding as he shall require. This provision will be found a very useful and necessary one.

(*u*) The time would commence to run from the day that the officer was officially notified of his appointment, either by receipt of his commission or by seeing it in the *Ontario Gazette*, or so advised by the Provincial Secretary. The day on which he became aware of his appointment would not be reckoned as one of the "five days." Although the Clerk or Bailiff had his commission, yet he could not perform any official act until he had put in his security. Sinclair's D. C. Act, 24.

(*v*) The full name of the Clerk or Bailiff must be given. For instance, "C. A. Smith" would not be a compliance with the Act if the name were "Charles Alexander Smith."

(*w*) The names of the sureties had better be given in full too, if possible, although the section does not expressly require it. The respective callings or professions, places of residence and post-office address, must also be given. As to what is a man's residence, see Sinclair's D. C. Act, 23, 87, and notes to section 8, sub-section 5, of this Act.

(*x*) The calling or profession should be given according to the fact, in the same way as in an affidavit. The "post-office address" means that P. O. at which the surety *usually* gets his letters and papers. Such address should be given of each surety.

(*y*) As to giving new sureties, see Sinclair's D. C. Act, 27.

(*z*) In the case of *R.* v. *Berkshire* (*Justices*), 4 Q. B. D. at page 471, Cockburn, C. J. says "It is impossible to lay down any hard and fast rule, as to what is the meaning of the word 'immediately' in all cases. The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression 'within a reasonable time,' and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of

the names of the sureties, (*a*) their respective callings or professions, places of residence, and post office address. (*b*)

Officers to produce certificate of filing covenant, etc.

29. Every (*c*) Division Court Clerk and Bailiff shall have and keep (*d*) in his possession or custody the certificate of the Clerk of the peace named in the twenty-eighth section (*e*) of the Division Courts Act, and shall produce the same for the information of the Inspector when required so to do. (*f*)

Returns.

30. Every Clerk shall, on or before the fifteenth day of January in each year, make a return (*g*) of the business of his office for the year ending the thirty-first day of December preceding, in such form and manner as the Lieutenant-Governor shall direct.

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fact, having regard to the circumstances of the particular case:" see Sinclair's D. C. Act, 15, 34, 103.

(*a*) As to the names of the sureties, see note (*w*) to next preceding section.

(*b*) As to the places of residence, and post office address, see Sinclair's D. C. Act, 23, 87, and notes to sections 8 and 27 of this Act.

(*c*) It will be observed that "every" Division Court Clerk and Bailiff shall *have* and *keep* this certificate in his possession or custody. Each had better keep his own.

(*d*) The officer should keep it safely, and in such a place that he might readily be able to produce it to the Inspector whenever required. This requirement is imperative.

(*e*) It is the duty of the Clerk of the Peace to give this certificate in all cases: Sinclair's D. C. Act, 25. One fee only is allowed to him for filing the covenant *and* granting the certificate of such filing. The certificate may be in this form:

I hereby certify that the covenant of A. B., as Clerk (or Bailiff) of the Division Court for the County of , with C. D. of, &c. (addition), and E. F. of, &c. (addition), as his sureties therein; approved and declared sufficient under the hand of the Judge of the said County, has this day been duly filed in the office of the Clerk of the Peace in and for the County of .

Dated this day of A.D. 188 .

Clerk of the Peace for the County of .

In cases where Clerks and Bailiffs have not this certificate in their possession or custody, they had better obtain it at once. The Clerk of the Peace (if the same person as filed the covenant), would be obliged to give this certificate yet, without further fee. Instead of stating that it has "this day been duly filed," it would, in that case, have to be altered so as to read "was on the day of A.D. 18 , duly filed, &c. By new rule 173, it is made the duty of the Clerk to report to the Judge in writing, "at every sitting" of the Court any change in the suretyship of the Clerk or Bailiff.

(*f*) The Clerk or Bailiff need not be "required" in writing. A verbal request would be sufficient.

(*g*) The duty here imposed on "*every* Clerk" is an imperative one. The return should be mailed to the Provincial Secretary, at Toronto, not later than the 15th of January in each year. The mailing of it, postage prepaid, would

Clerks to make returns to Inspector.

31. Every Clerk and Bailiff shall keep (*h*) a separate book, in which he shall enter from day to day all fees, charges and emoluments received (*i*) by him by virtue of his office, and shall, on the fifteenth day of January, in each year, make up to and including the thirty-first day of December, of the previous year, a return to the Inspector (*j*), under oath, shewing the aggregate amount of fees, charges and emoluments so received by him and which he has become entitled to receive, and has not received, (*k*) during the year.

CLERKS AND BAILIFFS.

Dismissal of Clerks and Bailiffs.

32. The Lieutenant-Governor may, upon the report of the Inspector or of the County Court Judge, dismiss (*l*) from office for misconduct or incompetency, any Clerk or Bailiff heretofore appointed (*m*).

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be *making* a return within the meaning of this section: see *Marshall* v. *Jamieson*, 42 U. C. R., at page 120.

(*h*) The keeping of this book and the entering of the fees in it is also imperative on the officers. It will be observed that this section does not apply to the Clerk alone, but to the Bailiff as well. The Government may direct in what particular form this book may be; but, in the absence of such direction, the writer can only say that he does not think *each* item of costs in a suit need be entered, but only the total amount in each suit, specifying the name of the cause, when received, &c.

(*i*) The entries are to be made from day to day, just as the fees, charges and emoluments are "*received*" by the officer. The fees *not* received need not be entered in this book; but an account will in some way have to be kept of them for the purposes of the return mentioned in the latter part of this section.

(*j*) This return, it will be observed, has to be made "to the Inspector." Under the 30th section, the return there required to be made by the Clerk is to be made to the Lieutenant-Governor.

(*k*) This part of the clause must not be overlooked. Not only must the return comprise the moneys received, but those which the officer became "*entitled to receive*," and which he did not receive. The "*oath*" may be taken by any of the persons mentioned in the 105th section of the Division Courts Act, and in section 138 of chapter 62 of the Revised Statutes.

(*l*) This power of dismissal is to be exercised on the report of the Inspector or of the Judge. The "misconduct or incompetency" charged should be made known to the Clerk or Bailiff, so that he might answer or explain the same if so advised, unless, perhaps, where there was an inquiry under section 24 of this Act. Such, the writer understands, is the usual practice in the Government of Ontario in cases of complaint against public officers. What amounts to "misconduct or incompetency," must be determined with reference to the circumstances of each particular case. What might properly be considered incompetency of a Clerk in a city office, where a large amount of business is done, might not be so in a country office, where the suits are few.

(*m*) This section only applies to the dismissal of a Clerk or Bailiff "heretofore appointed" by the Judge. No express provision is required for the dismissal

The Lieutenant-Governor may appoint Clerks and Bailiffs.

33. The Lieutenant-Governor may appoint, during pleasure (*o*), the Clerk and Bailiff or Bailiffs of any Division Court.

Duty of County Court Judges not affected.

34. Nothing in this Act contained shall relieve the County Judge from the responsibility of seeing that the officers of his Court perform their duties, or from examining into complaints (*p*) which may be made against them, or from the duties imposed upon him by the said Act in reference to the security (*q*) to be given by Clerks and Bailiffs, and such last mentioned duties are declared and shall be held to be of a judicial (*r*) and not of an administrative character. The Judge may for cause (*s*) suspend any Clerk or Bailiff appointed by the Lieutenant-Governor, and in case of such suspension by him, he shall forthwith (*t*) report the

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of officers appointed by Government. The power of appointment impliedly carries with it, in the absence of language to the contrary, the power of removal: Interpretation Act, section 8, subsections 25 and 27 (Rev. Stat., p. 6).

(*o*) Every Clerk or Bailiff appointed under this Act, holds his office during the pleasure of the Government. In fact, in view of the 32nd section, it may be said that all Clerks and Bailiffs, no matter when appointed, are in the same position. As to the appointment and removal of such officers, see Sinclair's D. C. Act, 22, and the cases cited at page 701 of L. R. 1 C. P.

(*p*) As to what cases are the subject of examination by the Judge, and how it should be conducted, see Sinclair's D. C. Act, 224, 226, 260; *Nerlich* v. *Malloy*, 4 App. R. 430.

(*q*) As to the responsibility which formerly attached to a Judge, in connection with the security of the officers, see Sinclair's D. C. Act, 16, 23, 25; *Parks* v. *Davis*, 10 C. P. 229.

(*r*) Formerly the responsibility which the law attached to the Judge, in connection with Clerks' and Bailiffs' securities, was of an administrative character, as will be seen from the report of the case last cited. Now the duty is a "judicial" one, very different in its nature and pecuniary responsibility from the other. Sinclair's D. C. Act, pages 16 and 17, and cases there cited.

(*s*) This suspension cannot be made, except for "cause," which presupposes every reasonable opportunity being given the Clerk or Bailiff of answering any complaint made against him, and on which the Judge might propose to suspend him, unless, perhaps, where the "cause" is, in some other legal proceeding, established to the satisfaction of the Judge: see Sinclair's D. C. Act, 127, 155, 223; *Willis* v. *Gipps*, 5 Moore, P. C. 379; *R.* v. *Cheshire Lines Committee*, L. R. 8 Q. B. 344; *Fisher* v. *Keane*, 11 Chan. D. 353; *Ex parte Tucker, In re Tucker*, 12 Chan. D. 308; *Labouchere* v. *Wharncliffe (Earl)*, W. N. 1879, 196. This section only allows the Judge to suspend Clerks or Bailiffs "appointed by the Lieutenant-Governor." His power over the others is conferred by section 36.

(*t*) The Judge is "forthwith" to report the suspension, and the cause of it to the Provincial Secretary. As to the meaning of this expression, see note (*z*) to section 28 of this Act.

same and the cause thereof to the Provincial Secretary; and in case a vacancy shall occur in the office of Clerk or Bailiff within his county, the Judge shall forthwith notify (*u*) the Provincial Secretary thereof.

R. S. O., c. 47, s. 25, amended.

35. The twenty-fifth section (*v*) of the Division Courts Act is amended by striking out the words "County Court Clerk or" in the first line thereof.

S. 26 repealed.

36. The twenty-sixth section (*w*) of the Division Courts Act is hereby repealed, but, nevertheless, the Judge of the County Court may at pleasure suspend or remove any Clerk or Bailiff within his own county heretofore appointed by a Judge.

Clerk or Bailiff not to collect on commission.

37. No Clerk or Bailiff shall directly or indirectly (*x*) take or receive any commission, charge, expenses, fee, or reward for or in connection with the collection of any debt or claim which has been or may or can be sued (*y*) in the Court for which he is so Clerk or Bailiff, except such fees

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(*u*) The Judge is also "*forthwith*" to notify the Provincial Secretary in the case of a vacancy in the office of Clerk or Bailiff. For all practical purposes we daresay this will be unnecessary. The Provincial Secretary will *probably* hear of the vacancy before the Judge does, nevertheless the official notification here mentioned should be given.

(*v*) This section will now read: "No practising Barrister or Solicitor shall be appointed Clerk of a Division Court:" Sinclair's D. C. Act, 21.

(*w*) This was the section which empowered the Judge to appoint and remove Clerks and Bailiffs at his pleasure. Now he may suspend or remove any such officer appointed by a Judge, but he cannot remove any appointed by the Lieutenant-Governor, although he can "*for cause*" *suspend* any Clerk or Bailiff so appointed, under section 34.

(*x*) The language of this section is quite strict, and should be carefully observed. Certain things are prohibited, whether done by the Clerk or Bailiff "directly," which means personally by himself or by another in his name or for him, openly, or "indirectly," which means secretly for himself, although ostensibly by, through, or in the name of another person. It would have been supposed that for a Clerk or Bailiff to receive a commission on moneys in a suit in Court would never have been thought of. The execution of a landlord's warrant, or of a power of sale in a chattel mortgage, would not, it is submitted, be a contravention of this section: Maxwell on Statutes, 166; Sinclair's D. C. Act, 21.

(*y*) Any debt or claim which "has been or may, or can be sued" in the Clerk's or Bailiff's Court is within this section. It is submitted that these words "debt or claim," include any claim for debt or unliquidated damages suable in a Division Court. It may be stated generally that where any claim has been or can, under the Division Courts Act or this Act, be sued in any particular Court, then the officers of that Court are within these provisions.

as are provided by any tariff of fees (*z*) under the Division Courts Act or this Act.

Certain Clerks not disqualified.

38. Nothing in this Act or any other Act contained shall render ineligible or disqualify (*a*) to sit or vote as a member of the Legislative Assembly any person who at present holds the office of Division Court Clerk under the nomination or appointment of any Judge of any County Court.

Fees to be retained by Clerks for their own use.

39. Each Division Court Clerk shall be entitled to retain to his own use in each year all the fees and emoluments earned (*b*) by him in that year up to one thousand dollars;

(1) Of the further fees and emoluments earned by each Division Court Clerk in each year in excess of one thousand dollars, and not exceeding fifteen hundred dollars, he shall be entitled to retain to his own use ninety per cent., and no more;

(2) Of the further fees and emoluments earned by each Division Court Clerk in each year in excess of fifteen hundred dollars, and not exceeding two thousand dollars, he shall be entitled to retain to his own use eighty per cent., and no more;

(*z*) See the table of fees herewith.

(*a*) Without some such provision as this it is probable that Division Court Clerks, heretofore appointed, would be ineligible to be elected, and disqualified to sit or vote in the Assembly. Any Clerk, appointed under this Act, will be ineligible: Rev. Stat., cap. 12, s. 7 (*b*).

(*b*) Some doubt will arise as to the proper meaning to be given to the word "earned," as used in this section. Does it mean exclusive of such necessary disbursements as rent, fuel, stationery, &c.? This is trying to assimilate the regulations here made as to Clerk's fees with the provision of the Registry law in respect to fees, but forgetting that rent, fuel, books, &c., are furnished to a Registrar free. It is a great hardship that Clerks should be obliged to provide books at their own expense, which, as soon as an entry is made in them, become the property of the public, though the officer may be removed next day. The writer hopes that in the next amendment to the Division Courts Act this will be remedied; and that the municipalities in which Courts are held shall be compelled to provide the necessary books for Division Court officers, with as much propriety as they are now compelled to provide accommodation for holding the Courts. The present system is a very unjust one, and a change in that respect would only be a simple act of justice. It is an anomaly under our system of government that public officers should be compelled to pay for the public books they officially keep. In other branches of service, under both the General and Provincial Governments, it is otherwise; and we see no reason why it should be continued in the Division Court service.

(3) Of the further fees and emoluments earned by each Division Court Clerk in each year in excess of two thousand dollars, and not exceeding twenty-five hundred dollars, he shall be entitled to retain to his own use seventy per cent., and no more;

(4) Of the further fees and emoluments earned by each Division Court Clerk in each year in excess of twenty-five hundred dollars, and not exceeding three thousand dollars, he shall be entitled to retain for his own use sixty per cent., and no more;

(5) Of the further fees and emoluments earned by each Division Court Clerk in each year in excess of three thousand dollars he shall be entitled to retain for his own use fifty per cent., and no more.

Clerk to pay excess to Treasurer of Province.

40. On the fifteenth day of January (*c*) in each year each Division Court Clerk shall transmit to the Treasurer of the Province a duplicate of the return (*d*) required by this Act, and shall also pay (*e*) to such Treasurer for the use of the Province such proportion of the fees and emoluments earned by him during the preceding year, as under this Act he is not entitled to retain to his own use.

HOLDINGS OF COURTS.

Holding Courts in Cities.

41. For and notwithstanding anything contained in chapter forty-seven of the Revised Statutes of Ontario, or any amendment thereof, or any of the general rules in force in the Division Courts of this Province, in any city in which two Division Courts are established or held (*f*), all

(*c*) The language of this section is very strict, and would seem to require that the return must be made *on* the fifteenth day of January in each year (see *Beaty* v. *Fowler*, 10 U. C. R. 382), and neither before nor after that day. A literal compliance with the Act would seem to require mailing on the day mentioned.

(*d*) There are other returns required by this Act, but the "return" here spoken of, evidently refers to that mentioned in the next preceding section.

(*e*) The omission or refusal to pay this money would be a serious matter for the Clerk.

(*f*) Under the Division Courts Act the sittings of Division Courts (except under certain exceptional circumstances) must be he held within the division for which the Court is held: Sinclair's D. C. Act, 6. In cities, where two Courts were established, this was found a public inconvenience, as the Court

or any of the sittings of both of such Courts may be appointed and held in any of such Divisions (*g*), and both Clerks of such Courts may, with the approval of the Lieutenant-Governor in Council, have and keep their offices in the same Division in such city.

Use of Court house.

42. The sittings of the Division Court in any county town may (*h*) be held in the County Court house, and, in the cases of cities and towns separated from the county, the use of the Court house for such purpose may be taken into account in settling the proportion of the charges to be paid by the city or town for the maintenance of the Court House (*i*).

JURIES.

R. S. O. c. 47, s. 109 repealed.

43. Section one hundred and nine (*j*) of the Division Courts Act is hereby repealed, and the following section is substituted therefor:

When a jury may be required.

109. Either party may require a jury in actions of tort or replevin where the sum or the value of the goods sought to be recovered exceeds twenty dollars, and in all other actions where the amount sought to be recovered exceeds thirty dollars.

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house was found to be the proper and most convenient place in which to hold the Division as well as other Courts. This clause, therefore, allows both Courts to be held in the one place, but not necessarily so. The Clerks may also, with the approval of the Lieutenant-Governor in Council, have both of their offices in the same division, and not, as the law was, each one in his own division: Rule 76. A concentration of public offices is generally the most convenient. Except in cities, where there are two Courts, the place of sitting is unchanged.

(*g*) The Judge may hold the sittings of one or both of such Courts in either division. Should the sittings of any other Court at the Court-house interfere with the holding of the Division Court there, it could be held either in that division or the other, as, in the opinion of the Judge, might be most convenient.

(*h*) This section gives the *right* to the Judge to hold the sittings of any Division Court in the county town at the County Court-house: Maxwell on Statutes, 219; *R.* v. *Oxford* (*Bishop*), 4 Q. B. D., at p. 553. It will, therefore, be the duty of the municipal county officers to make due and proper provision for the holding of such Courts there. This provision is very much in the public interests.

(*i*) As to the manner of settling such differences in the event of disagreement, see Har. Mun. Manual, page 24, and following pages.

(*j*) As to the right to have a Jury summoned, see Sinclair's D. C. Act, 141, and cases cited. The only difference between this clause and section 109 of the General Act, which is here repealed, is, that now the right to a Jury is extended to actions of replevin, and in other cases, except under the extended

S. 112 amended.

44. The one hundred and twelfth section (*k*) of the Division Courts Act is hereby amended by inserting after the word "beginning," in the fourth line thereof, the words "at the first selection after this Act comes into force," and by adding to said section the following:

"In case it shall not be necessary to summon all the persons on the roll or rolls entitled to be summoned in any one year, the Clerk shall, at the end of each year, so certify on the roll, and shall state in such certificate the number of persons summoned during the year, and at what number on the roll he left off; and, in summoning persons for the next year, he shall begin with the next number on the roll as nearly as he conveniently can; and so on from year to year until all the rolls have been gone through."

Fees for jury fund.

45. There shall be paid to the Clerk of the Division Court, in addition to all costs or jury fees now by law payable, (*l*) on every suit entered where the claim exceeds twenty

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jurisdiction, that right is curtailed. A Jury can only be demanded now in an action of tort where the sum sought to be recovered is $20, instead of $10, as formerly; and in all other actions where the sum is $30, instead of $20, as before. The right to have a Jury cannot be taken away: see *R.* v. *Harwood*, 22 L. J. Q. B. 127; *Ford* v. *Taylor*, 3 C. P. D. 21; *Bordier* v. *Burrell*, 5 Chan. D. 512; *Wood and Ivery (Limited)* v. *Hamblet*, 6 Chan. D. 113; *Powell* v. *Williams*, 12 Chan. D. 234.

(*k*) The 112th section of the Division Courts Act will now read thus:

"112. The jurors to be summoned to serve at any Division Court shall be taken from the Collector's rolls of the preceding year, for the townships and places wholly or partly within the division, and shall be summoned in rotation, beginning, at the first selection after this Act comes into force, with the first of such persons on such roll; and, if there be more than one such township or place within the division, beginning with the roll for that within which the Court is held, and then proceeding to that one of the other rolls which contains the greatest number of such persons' names, and so on, until all the rolls have been gone through; after which, if necessary, they may be again gone through, wholly or partly, in the same order, and so on, *toties quoties*. In case it shall not be necessary to summon all the persons on the roll or rolls, entitled to be summoned in any one year, the Clerk shall, at the end of each year, so certify on the roll, and shall state in such certificate the number of persons summoned during the year, and at what number on the roll he left off; and, in summoning persons for the next year, he shall begin with the next number on the roll as nearly as he conveniently can; and so on from year to year until all the rolls have been gone through." This obviates the difficulty suggested at page 142 (*h*) of Sinclair's D. C. Act.

(*l*) The expense of summoning jurors is still payable by the party who requires a jury to be summoned, but the fee of three, six or twenty-five cents, as the case may be, payable under this section, must be charged "on *every* suit entered," in addition to all other fees payable. [Does this not appear very much like a tax on the many for the benefit of the few?]

dollars but does not exceed sixty dollars, three cents; where the claim exceeds sixty dollars, but does not exceed one hundred dollars, six cents; and where the claim exceeds one hundred dollars, twenty-five cents; and the same shall be taxed and allowed as costs in the cause; and, on or before the fifteenth day of January in each year, every Clerk shall return to the Treasurer of the County a statement, under oath, shewing the number of suits originally entered in his Court during the year previous, in which the claim exceeded twenty dollars but did not exceed sixty dollars; the number in which the claim exceeded sixty dollars, but did not exceed one hundred dollars, and the number in which the claim exceeded one hundred dollars; and he shall, with such statement, pay over to such Treasurer the sum of three cents on each suit so entered where the claim exceeded twenty dollars but did not exceed sixty dollars; the sum of six cents on each suit where the claim exceeded sixty dollars, but did not exceed one hundred dollars; and the sum of twenty-five cents on each suit where the claim exceeded one hundred dollars, together with all other moneys received by him for jurors' fees during the year; and such Treasurer shall keep an account of all such moneys so received by him under the head of "Division Court Jury Fund." Return to Treasurer.

46. In cities which include one or more entire divisions and no other fraction of a division the Clerk shall make the return and payment, provided for by the next preceding section, to the Treasurer of such City who shall keep an account of such moneys in the same way as is provided in the case of County Treasurers, and shall, on the presentation of the certificate of the Judge, forthwith repay to the Clerk of the Court the jurors' fees paid by him in the same manner as is hereafter provided in the case of County Treasurers. Return in cities forming separate divisions.

47. The Clerk of every Division Court shall pay to each person who has been summoned as a juror, and who attends during the sittings of the Court for which he has been summoned, and who does not attend as a witness in any cause, Fees of jurors.

or as a litigant in his own behalf, the sum of one dollar; (*m*) and having so paid the same, except in the cases in the next preceding section provided for, the presiding Judge shall so certify to the Treasurer of the County, and shall deliver such certificate to the Clerk, and the Treasurer of the County shall, upon the presentation of such certificate to him, forthwith pay to the Clerk, or his order, the amount which the Clerk appears, by such certificate, to have paid the jurors as aforesaid. In the case of Cities, other than those provided for by the next preceding section, and Towns separated from the County, the amounts paid in by the Clerks of the Courts in such Cities and Towns, and the amounts paid by the County Treasurer to the Clerks of such Courts for Jury fees, shall be taken into account in settling the proportion of the charges to be paid by the City or Town towards the costs of administration of justice.

Sec. 114 amended.

48. The word "fifteen" (*n*) in the second line of the one hundred and fourteenth section of the Division Courts Act is repealed, and the word "twelve" is substituted therefor.

(*m*) A juror *who has been summoned* is entitled to this fee of $1, but not one called by the Judge. The latter is still only entitled to the small fee hitherto payable: Sinclair's D. C. Act, 279. He must not attend as a witness in any cause, to be entitled to this fee, nor as a litigant. Whether paid or not as a witness would make no difference. If, without being subpœnaed, a juror should attend as a witness, he would also be disentitled to the fee. As a litigant is now entitled under certain circumstances to his fees as a witness if successful in a case (Sinclair's D. C. Act, 327 (*a*), and cases there cited, and *Fox* v. *T. & N. Ry. Co.*, 7 P. R. 157), it would be unjust that he should be paid double fees. No mention is made of mileage, so that none would be allowable. The small fee formerly payable to jurors shall not in addition to this be payable now. The fee here mentioned is substituted for the other. "If an Act says that a juror shall have twenty pounds a year, and a new Statute enacts that he shall have twenty marks, the latter necessarily implies that the qualification required by the former Act shall not be necessary, and repeals that Act:" Maxwell on Statutes, 143. The same principle would apply here. It does not matter whether the juror is sworn in the case or challenged, or the case is settled or the like; he would in any of these cases be entitled to his fee. Care must be taken by the Clerk where a case is settled after a Jury is summoned. He should, if possible, countermand the Jury summonses, so as to save the Jury fees. A person summoned and sworn under the 49th section of this Act as a *tales*, would, it is submitted, be entitled to this fee. This section, it will be observed, does not say *how or when* a juror is to be summoned in order to entitle him to the fee, so that in the latter case the juror would be equally entitled to it.

(*n*) Formerly fifteen persons had to be summoned as jurors, now twelve only are necessary. It is only those who attend, however, that are entitled to the fee for attendance.

Sec. 121 amended.

Judge may call *tales*.

49. There shall be added to the one hundred and twenty-first section (*o*) of the said Division Courts Act the following words:—"In the event of the panel being exhausted before a jury shall be obtained, the Judge may direct the Clerk to summon from the body of the Court a sufficient number of disinterested persons to make up a full jury, and any person so summoned may, saving all lawful exceptions and rights of challenge (*p*), sit and act as a juror as fully as though he had been regularly summoned."

APPEALS UNDER MASTERS' AND SERVANTS' ACT. (*q*)

Mode of appeal under R. S. O. c. 133.

50. All appeals hereafter to be made from or against any

(*o*) The 121st section will now read thus:

"121. Five jurors shall be empanelled and sworn to do justice between the parties whose cause they are required to try, according to the best of their skill and ability, and to give a true verdict according to the evidence, and the verdict of every jury shall be unanimous. In the event of the panel being exhausted before a jury shall be obtained, the Judge may direct the Clerk to summon from the body of the Court a sufficient number of disinterested persons to make up a full jury, and any person so summoned may, saving all lawful exceptions and rights of challenge, sit and act as a juror as fully as though he had been regularly summoned."

(*p*) As to the right of challenge, see Sinclair's D. C. Act, 144.

(*q*) This is a new jurisdiction conferred on Division Courts which formerly belonged to the General Sessions of the Peace (Rev. Stat., 856, 1191). It must be exercised in accordance with the terms and conditions which the legislature has thought proper to impose. The law bearing on the relations of Master and Servant is far too wide a field even to enter upon in a discussion of the questions which this section presents. A short reference to some authorities of practical service on that subject will be found, however, at page 76, and the two following pages of Sinclair's D. C. Act. The sections of chapter 133 of the Revised Statutes to which this Act applies are the following:

"2. No voluntary contract of service or indentures entered into by any parties shall be binding on them, or either of them, for a longer time than a term of nine years from the day of the date of such contract. C. S. U. C. c. 75, s. 2.

"3. It shall be lawful in any trade, calling, business, or employment, for an agreement to be entered into between the workman, servant, or other person employed, and the master or employer, by which agreement a defined share in the annual or other net profits or proceeds of the trade or business carried on by such master or employer, may be allotted and paid to such workman, servant, or person employed, in lieu of or in addition to his salary, wages, or other remuneration; and such agreement shall not create any relation in the nature of partnership, or any rights or liabilities of co-partners, any rule of law to the contrary notwithstanding: and any person in whose favour such agreement is made, shall have no right to examine into the accounts, or interfere in any way in the management or concerns of the trade, calling, or business in which he is employed under the said agreement or otherwise; and any periodical or other statement or return by the employer, of the net profits or proceeds of the said trade, calling, business, or employment, on which he declares and

appropriates the share of profits payable under the said agreement, shall be final and conclusive between the parties thereto and all persons claiming under them respectively, and shall not be impeachable upon any ground whatever. 36 V. c. 25, s. 1.

"4. Every agreement of the nature mentioned in the last preceding section shall be deemed to be within the provisions of this Act, unless it purports to be excepted therefrom, or this may otherwise be inferred. 36 V. c. 25, s. 2.

"5. All agreements or bargains, verbal or written, between masters and journeymen, or skilled labourers, in any trade, calling or craft, or between masters and servants or labourers, for the performance of any duties or service of whatsoever nature, shall, whether the performance has been entered upon or not, be binding on each party for the due fulfilment thereof; but a verbal agreement shall not exceed the term of one year. C. S. U. C. c. 75, s. 3.

"6. No tavern-keeper or boarding-house keeper shall keep the wearing apparel of any servant or labourer in pledge for any expenses incurred to a greater amount than six dollars, and on payment or tender of such sum, or of any less sum due, such wearing apparel shall be immediately given up, whatever be the amount due by such servant or labourer; but this is not to apply to other property of the servant or labourer. C. S. U. C. c. 75, s. 6.

"7. If after the termination of an engagement between master and servant, any dispute arises between them in respect of the term of such engagement or of any matter appertaining to it, the Justice or Justices of the Peace who receive the complaint shall be bound to decide the matter, in accordance with the provisions of this Act, and as though the engagement between the parties still subsisted: but proceedings must be taken within one month after the engagement has ceased. 29 V. c. 33, s. 1.

"8. In case any written agreement or bargain is made out of Ontario for the performance of any duties or service within Ontario, which agreement or bargain, if it had been made within Ontario, could have been enforced therein under the provisions of this Act, or in respect of which agreement or bargain any proceedings might in such case have been had or taken under this Act, then such written agreement or bargain made as aforesaid without Ontario may be enforced in like manner, and the like proceedings may be had in respect thereof, upon the parties thereto being or coming within this Province as if such agreement had been made within Ontario. 36 V. c. 24, s. 1.

Summary Proceedings before Justices.

"9. Any one or more of Her Majesty's Justices of the Peace may receive the complaints upon oath of parties complaining of any contravention of the preceding provisions of this Act, and may cause all parties concerned to appear before him or them, and shall hear and determine the complaint in a summary and expeditious manner. C. S. U. C. c. 75, s. 7.

"10. Wherever the Justice takes the evidence of the complainant in support of his or her claim, the said Justice shall be bound to take the evidence of the defendant also, if tendered. 29 V. c. 33, s. 2.

"11. Complaints against any person under this Act may be prosecuted and determined in any county in which the person complained against is found. C. S. U. C. c. 75, s. 11.

"12. Any one or more of such Justices, upon oath of any such servant or labourer against his master or employer concerning any non-payment of wages, may summon such master or employer to appear before him or them at a reasonable time to be stated in the summons, and he or they or some other Justice or Justices shall, upon proof on oath of the personal service of such summons, examine into the matter of the complaint, whether the master or employer

conviction or order (*r*) for the payment of wages, or any order of dismissal from service or employment or against any decision (*s*) of any Justice or Justices under the one hundred and thirty-third chapter of the Revised Statutes of

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appears or not, and upon due proof of the cause of complaint, the Justice or Justices may discharge such servant or labourer from the service or employment of such master, and may direct the payment to him of any wages found to be due, not exceeding the sum of forty dollars, and the said Justice or Justices shall make such order for payment of the said wages as to him or them seems just and reasonable, with costs, and in case of non-payment of the same, together with the costs, for the space of twenty-one days after such order has been made, such Justice or Justices shall issue his or their warrant of distress for the levying of such wages, together with the costs of conviction and of the distress. C. S. U. C. c. 75, s. 12.

"13. Any person who thinks himself aggrieved by any such conviction or order for the payment of wages, or by any order of dismissal from service or employment, or any order or decision of any Justice or Justices under this Act, may appeal [in the same manner as is provided in *The Act respecting Summary Convictions before Justices of the Peace;* and in case of dismissal of the appeal or affirmance of the conviction, order or decision, the Court appealed to shall order and adjudge the offender to be punished according to the conviction; or shall enforce the order for payment of wages or of dismissal, as the case may be, and for the payment of the costs awarded, and shall, if necessary, issue process for carrying such judgment into effect. C. S. U. C. c. 75, s. 13."]

(*r*) *The Conviction or Order.*

A proper discussion of this subject would take more space than is consistent with the object that the writer has in view in this annotation and be outside of the purpose of a work of this nature. A general reference to the works on this branch of the law is all that can properly be made. The reader is referred to Paley on Convictions, 6th Ed.: Dickinson's Guide to the Q. S.; Fisher's Digest, 5102 to 5148, 5768 to 5781, 9615; R. & F.'s Digest, 3482 to 3489; L. R. Digest, 1568; L. R. Digest, 1876-8, 386.

No power is given to the Judge on appeal to amend the conviction or order, so it would seem that it must stand or fall as returned by the Magistrate: see *R.* v. *Lawrence*, 43 U. C. R. 164; *R.* v. *Black*, 43 U. C. R. 180; *R.* v. *Cuthbert*, 45 U. C. R. 19; *R.* v. *Lennon*, 44 U. C. R. 456; Rev. Stat., cap. 181, s. 77, and cap. 75, ss. 13 to 16; sec. 53 (*i*).

(*s*) *General Principles of Appeal.*

Many of the remarks made under this head, under section 17 and the five following sections, and especially with reference to the foundation of appeals generally, have reference to this appeal also. The general rule always has been in cases of appeal against the convictions and orders of Justices of the Peace, that the conditions of the Statute under which the appeal is given must be strictly complied with. In cases under these sections in regard to appeals from convictions or orders of Justices of the Peace, under the Master and Servants Act, as in other appeals from Magistrates decisions; the giving of a proper notice of appeal is a necessary condition of the appeal being heard; so also is the giving to the opposite party of a proper appeal bond within the four days: *Stone* v. *Dean*, E. B. & E. 504; and compare the Act under which *Stanhope* v. *Thorsby* L. R. 1 C. P. 423, was decided with this; Dickinson's Guide to Q. S., 6th Ed., 639; *Kent* v. *Olds*, 7 U. C. L. J. 21. They are *conditions precedent*

Ontario, intituled "An Act respecting Master and Servant," (*t*) shall, notwithstanding anything contained in the thirteenth section of the said Act, be made to the Division Court, holden in the division in which the cause of action arose, or in which the party complained against, or one of them, resided at the time of the making of the complaint.

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to the right of appeal (*Ex parte Simpkin* 2 E. & E. 392; *Meyers and Wannacott, In re*, 23 U. C. R. 611; Maxwell on Statutes, 334; *Morgan* v. *Edwards*, 5 H. & N. 415; *Woodhouse* v. *Wood*, 29 L. J. M. C. 149; 6 Jur. N. S. 421; *R.* v. *Hatch*, 15 C. P. 461; *R.* v. *Boultbee*, 4 A. & E. 498; *R.* v. *Lancashire* (*Justices*), 8 E. & B. 563; *Kent* v. *Olds*, 7 U. C. L. J. 21; *R.* v. *G. W. Ry. Co.*, L. R. 4 Q. B. 323; *Liverpool Gas Co.* v. *Everton*, L. R. 6 C. P. 414; *R.* v. *Wiltshire* (*Justices*), 4 Q. B. D. 326), unless waived (*Park Gate Iron Co.* v. *Coates*, L. R. 5 C. P. 634; *Ward* v. *Raw*, L. R. 15 Eq. 83; *R.* v. *Crouch*, 35 U. C. R. 433; *R.* v. *W. R. Yorkshire* (*Justices*), 3 M. & S. 493), or prevented by the act of God, as by the death of the person to whom the notice was to be given, in which case service of the notice of appeal would be dispensed with: *R.* v. *Leicestershire* (*Justices*), 15 Q. B. 88. If the Judge should improperly refuse to hear an appeal, *mandamus* would lie against him, but the writ would have to be moved for, not later than the term next after the hearing of the appeal had been refused: *R.* v. *Recorder of Richmond*, E. B. & E. 253. An appeal against a conviction or order made by a Justice of the Peace is very different in regard to procedure from an appeal under the 17th section of this Act. It is in the nature of a fresh trial of the case: *R.* v. *Commissioners of Appeal*, 3 M. & S. 133; *R.* v. *Hall*, L. R. 1 Q. B. 632. As remarked by Blackburn, J., in the last case at page 637: "There can be no doubt that the appeal from Justices to Quarter Sessions is in the nature of a new trial, and fresh evidence is admissable on the hearing of the appeal:" see also *R.* v. *Bathurst* (*Justices*), 5 O. S. 74; and *R.* v. *Pilgrim*, L. R. 6 Q. B. 89. All the evidence will have to be gone over again, unless the parties consent to use the depositions. See also notes to section 17 on the general question.

(*t*) *In what Cases an Appeal lies, when and by whom.*

Although the Statute does not in express words declare, yet its obvious meaning is, that a right of appeal is here conferred on *any* person who may consider himself aggrieved by *any* conviction or order under the Master and Servants' Act. The appellant must, of course, be one who is directly affected by the decision. No provision is here made for the "conviction or order" being sent by the Justice to any particular officer. It is suggested that after the appeal is duly lodged with the Clerk of the Division Court, notice should be given to the Justice of that fact, with a request for him to transmit the conviction or order to such Clerk, to remain with him until the trial of the appeal: see *R.* v. *Slaven*, 38 U. C. R. 557. The Justice need not make any return of an order for the payment of money under this Act, to the Clerk of the Peace (*Ranney qui tam* v. *Jones*, 21 U. C. R. 370), as is required in the case of convictions: *Corsant qui tam* v. *Taylor*, 23 C. P. 607. Should the Justice refuse or omit to send the conviction or order to the Clerk, the proper course would appear to be for the appellant to summon him by a subpœna, *duces tecum*, calling on him to bring with him and produce the conviction or order, and all depositions and other papers (*Barker* v *Davis*, 34 L. J. M. C. 140), in the case: see Paley on Convictions, 6th Ed. 388. But should the Justice of the Peace not attend under subpœna, or attend and refuse to produce the document, not on the ground of privilege, secondary evidence could not be given of its contents, the only remedy being to punish the witness for a contempt: *R.* v. *Llanfaethly*,

2 E. & B. 940, and especially *per* Erle, J., at page 945; *Phelps* v. *Prew*, 3 E. & B. 430. If the Justice had no jurisdiction, yet an appeal would lie: *R.* v. *Taylor*, 8 U. C. R. 257; *Graham* v. *McArthur*, 25 U. C. R. 478. It will be observed that a complaint may be made before a Justice of the Peace by a "servant or labourer, against his master or employer concerning any non-payment of wages." In this Province, until the passing of 29 Vic., cap. 33, the law was, and in England is so still, that the relation of master and servant must exist *at the time* of laying the complaint against the master for non-payment of wages, in order to give the Justice of the Peace jurisdiction in the case. It is laid down in Smith's Master and Servant, that "In order to give a Magistrate jurisdiction, there must either be an actual service, or a contract of service:" see page 301, note (*f*); *Hardy* v. *Ryle*, 9 B. &. C. 603; *Lancaster* v. *Greaves*, 9 B. & C. 628. In the latter case the contract was to build a wall for a certain price within a certain time, and having performed part of the work, the workman refused to complete it; it was held not a contract of service so as to give a Magistrate summary jurisdiction. This was followed in many other cases, such as *Willett* v. *Boole*, 6 H. & N. 26; *Wiles* v. *Cooper*, 3 A. & E. 524; *Ex parte Johnson*, 7 Dowl. 702; *Davies* v. *Berwick*, 3 E. & B. 549; *Ex parte Hughes*, 23 L. J. M. C. 138; *Lawrence* v. *Todd*, 14 C. B. N. S. 554; *Helps* v. *Eno*, 9 U. C. L. J. 302, but the contract of service need not be for any specific time: *Taylor* v. *Carr*, 2 B. & S. 335. In the last case, Wightman, J., says "A person contracting to do certain work is not a servant, whereas a labourer employed to work in a mill is." The case of *Lowther* v. *Radnor*, 8 East, 113, is explained by Parke, B., in *Riley* v. *Warden*, 2 Ex. at page 69. A master summoned for non-payment of wages would, it is submitted, be entitled upon satisfactory evidence, to a deduction for bad workmanship: *Sharp* v. *Hainsworth*, 3 B. &. S. 139. On the general question of who is a "servant" or "labourer" within the meaning of the 12th section of the Master and Servants' Act, the reader is referred generally to *Riley* v. *Warden*, 2 Ex. 59; *Chawner* v. *Cummings*, 8 Q. B. 311; *Sharman* v. *Sanders*, 13 C. B. 166; *Floyd* v. *Weaver*, 21 L. J. Q. B. 151; *Olding* v. *Smith*, 16 Jur. 497; *Fisher* v. *Jones*, 32 L. J. M. C. 177; *Sleeman* v. *Barrett*, 2 H. & C. 934; *Smith* v. *Walton*, 3 C. P. D. 109; *Pillar* v. *Llynvi Coal Co.*, L. R. 4 C. P. 752; *Cutts* v. *Ward*, L. R. 2 Q. B. 357; *Bowers* v. *Lovekin*, 6 E. & B. 584; *Ingram* v. *Barnes*, 7 E. & B. 115, 132; *Moorehouse* v. *Lee*, 4 F. & F. 355; *In re Doyle*, 4 P. R. 32; *McDonald* v. *Stuckey*, 31 U. C. R. 577. It seems somewhat questionable whether or not, from the peculiar language of 29 Vic., cap. 33, section 1, now the 7th section of the Revised Act, the law has been materially altered on the question of the servant or labourer not necessarily being in the employment of the master at the time of laying the complaint. The words "pertaining to *it*" have a doubtful meaning, it being somewhat difficult to say what the last word refers to. A party should not be deprived of his right of appeal on any doubtful ground, and where a party paid the amount with costs expressing his intention of appealing, it was held that his right of appeal remained: *Justices of York and Peel* v. *Mason*, 13 C. P. 159; see also *Myers and Wannacott, In re*, 23 U. C. R. 611. A verbal agreement for service extending beyond a year, would not establish the relationship of master and servant under section 5 of our Act: *Banks* v. *Crossland*, L. R. 10 Q. B. 97. Should a master be ordered to pay wages which have been forfeited by the misconduct of the servant (*Bray* v. *Chandler*, 18 C. B. 718; *Huttman* v. *Boulnois*, 2 C. & P. 510; *Lilley* v. *Elwin*, 11 Q. B. 742; *Blake* v. *Shaw*, 10 U. C. R. 180), he would have a right to a correction of the decision on appeal. The Master and Servants' Act does not apply to the case of school trustees and teachers: *In re Joice*, 19 U. C. R. 197. If a party expressly or impliedly consents to an order being made, he cannot properly appeal against it: *Harrup* v. *Bayley*, 6 E. & B. 218; *R.* v. *Salop* (*Justices*), 2 E. & E. 386. The appeal must be made to the Court "holden in the Division in which the cause of action arose, or in which the party com-

Notice of appeal.

51. The person proposing to appeal shall give to the opposite party a notice in writing (*u*) of his appeal, and of

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plained against, or one of them resided at the time of the making of the complaint." As to where the cause arose, or defendant resides, see Sinclair's D. C. Act, 85 *et seq.* and notes to section 8 of this Act. It is submitted that it is not necessary to the validity of an order for payment of wages that it should *also* discharge the servant or labourer from the employment of the master. The words used are permissive: see *Cutler* v. *Turner*, L. R. 9 Q. B. 302; *Hindley* v. *Haslam*, 3 Q. B. D. 481; *Unwin* v. *Clarke*, L. R. 1 Q. B. 417, *In re Baker*, 2 H. & N. 219; *R.* v. *Youle*, 6 H. & N. 753; *Crane* v. *Powell*, L. R. 4 C. P. 123; Maxwell on Statutes, 216; Potter's Dwarris on Statutes, 285; *R.* v. *Oxford* (*Bishop*), 4 Q. B. D. 522, and at page 553; Interpretation Act, sec. 8, subsection 2. Should the respondent be dead, the appeal nevertheless, should be heard (*R* v. *Leicestershire* (*Justices*, 15 Q. B. 88); and if the death of the respondent took place before the giving of the notice of appeal, it would be dispensed with: *ib.* The Court "should rather lean to the hearing of appeals than to dismissing them on technical grounds:" *per* Lord Denman in *R.* v. *Norfolk* (*Justices*), 5 B. & Ad. 992. If the Judge should erroneously decline to hear the appeal through supposed defective notice, or otherwise, he could be compelled by *mandamus* to do so: *R.* v. *Mayor of Monmouth*, L. R. 5 Q. B. 251; Sinclair's D. C. Act, 48. The *right* of appeal conferred by the 13th section of the 133rd chapter of the Revised Statutes is, to "any person who thinks himself aggrieved by any such conviction or order for the payment of wages," &c., but the *forum* in which the appeal is to be tried, is changed by this section from the General Sessions to the Division Court. Either master, servant or employer, would have the right to appeal.

(*u*) *The Notice of Appeal.*

The Statute does not prescribe any form of notice of appeal, so that it must, on common law grounds, contain all the statutory requirements. The notice must be "*in writing*," and given "to the opposite party." It is not necessary, under the language here used, to give notice to the Justice or Justices of the Peace (as it is in many cases in England: *Ex parte Blues*, 5 E. & B. 291) who made the order: see *Justices of York and Peel, Ex parte Mason*, 13 C. P., at page 162, *per* Draper, C, J.; *Ex parte Curtis*, 3 Q. B. D. 13. In strictness the notice need not be signed, as the Statute does not require it: *R.* v. *Surrey* (*Justices*), 5 B. & Ald. 539; *R.* v. *Nichol*, 40 U. C. R. 76; see also *R.* v. *Kent* (*Justices*), L. R. 8 Q. B. 305. If there is a joint grievance to several, they may all join in their notice of appeal: *R.* v. *Oxfordshire* (*Justices*), 4 Q. B. 177; *R.* v. *Recorder of Liverpool*, 31 L. J. M. C. 127. The notice may here (in the absence of words requiring it to be given personally) be given by attorney: *R.* v. *Middlesex* (*Justices*), 1 L. M. &. P. 621; section 21, note (*f*). Where notice of appeal has to be given to a collective body of persons, service on one is sufficient: *R.* v. *Warwickshire* (*Justices*), 6 A. & E. 873. As to the form of notice, in the absence of any statutory form, the following remarks will be found serviceable: "As the object of a notice is to inform the respondents that some particular conviction [or order] is to be appealed against, care should be taken that they cannot be misled on this subject; and therefore the names of the appellants, the intention to appeal, the Sessions to which the appeal is to be made, * * * * the Justices before whom the conviction took place, as well as the nature of the conviction itself, should be contained in the notice; and it would also be advisable to direct it to the proposed respondents. Notices, however, will not be critically construed, and, if they substantially give the respondents the requisite information, they will (apart from statutory provision) be held sufficient:" Paley on Convictions, 6th Ed., 369; *R.* v. *Denbighshire*

the cause or matter thereof, (*v*) within four days (*w*) after such conviction, order, decision or judgment, and eight days,

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(Justices), 9 Dowl. 509; *R.* v. *Oxfordshire (Justices)*, 4 Q. B. 177; *R.* v. *W. Houghton*, 5 Q. B. 300. Words in a notice may be rejected as surplusage if they do not mislead: *R.* v. *Recorder of Liverpool*, 15 Q. B. 1070; *R.* v. *Buckinghamshire (Justices)*, 4 E. & B. 259. A fraction of a day would not be considered to render a notice good: *R.* v. *Middlesex (Justices)*, 3 D. & L. 109; *Converse* v. *Michie*, 16 C. P. 167. It sometimes becomes necessary to consider the fraction of a day: *Campbell* v. *Strangeways*, 3 C. P. D. 105; *Evans* v. *Jones*, 3 H. & C. 423; *Whyte* v. *Treadwell*, 17 C. P. 488; *Boyer's Estate*, 2 U. C. L. J. N. S. 275. Service on the Magistrate or his Attorney would not be sufficient: *R.* v. *Kimbolton (Justices)*, 6 A. & E. 603. The notice could of course be given by an Attorney: see section 21, and notes thereto. The opposite party could, by his words or conduct, waive the giving of a notice of appeal: *Park Gate Iron Co.* v. *Coates*, L. R. 5 C. P. 634; *Ward* v. *Raw*, L. R. 15 Eq. 83; *R.* v. *Crouch*, 35 U. C. R. 433; *R.* v. *W. R. Yorkshire (Justices)*, 3 M. & S. 493.

(v) Grounds of Appeal.

"The cause or matter" of the appeal simply means, it is submitted, setting out the grounds of appeal in the notice. In the case of *R.* v. *Newcastle-upon-Tyne (Justices)*, 1 B. & Ad. 933, under a Statute that allowed an appeal, on notice shewing the grounds thereof, it was held that where the notice stated that the appellant was not guilty of the offence it was a sufficient compliance with the Act, as it meant that all the ingredients of the offence were disputed. No provision is here made for amending the notice of appeal by setting out fresh grounds, as is allowed under several of the English Statutes (Paley on Convictions, 6th Ed., 391), nor for amending the order, as can be done with convictions under some of our Statutes: see note (*r*) to section 50, and note (*i*) to section 53. It is submitted that in an appeal against an order for the non-payment of wages, a "cause or matter" of the appeal would be sufficiently set forth in ordinary cases by such words as these: "that I never was indebted to the said A. B. for the said amount of wages so ordered to be paid by me," or, "that before the proceedings were taken, on which the said order was made, I paid the said A. B. the wages in said order mentioned:" see *Mortlock* v. *Farrer*, 5 C. P. D. 73. Any other grounds of appeal could be set out in the notice in ordinary and concise language, and the appeal should be heard if it substantially informed the opposite party of the grounds intended to be relied on. (See note (*d*) to section 14.) In *Helps* v. *Eno*, 9 U. C. L. J. 302, it was held that a notice of appeal against an order for the non-payment of wages under the Master and Servants' Act, sufficiently stated the grounds of appeal in alleging "that the formal conviction drawn up and returned to the sessions is not sufficient to support the conviction," &c., to allow all objections to be raised which were apparent on the face of the conviction or order. It would, under the language of these sections, and of section 13 of the Master and Servants' Act, perhaps be safer to state in the notice that the appellant is a party aggrieved: See Paley on Convictions, 6th Ed. 370. It is submitted that a notice of appeal which merely stated that the appellant was ordered to pay a certain sum for wages, and of his intention to appeal against such order, would be insufficient: *R.* v. *Oxfordshire (Justices)*, 1 B. & C. 279. The Court could not entertain any other grounds of appeal than those stated in the notice: *R.* v. *Boultbee*, 4 A. & E. 498; *R.* v. *Stafford*, 10 A. & E. 417. Although the general law and practice of the Division Court is, by the 68th section, made applicable to this Act, yet it is submitted that the right of amendment of this purely statutory proceeding would not exist. The omission of the "*cause or matter*" of appeal in the notice would be a defect of jurisdiction, which would be fatal to the appeal: *R.* v.

at least, (*x*) before the holding of the Court (*y*) at which the appeal is to be heard, and shall also, within the four

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Oxfordshire (*Justices*), 1 B. & C. 279; *R.* v. *Sheard*, 2 B. & C. 856; *R.* v. *Blackawton*, 10 B. & C. 792; Dickinson's Guide to Q. S., 6th Ed. 639; *Mayor of London* v. *Cox*, L. R. 2 H. L. 239; *Serjeant* v. *Dale*, 2 Q. B. D. at page 566. If the notice of appeal, or the service of it, is insufficient the appeal would be refused: *Ex parte Curtis*, 3 Q. B. D. 13; see note (*s*) to section 50.

(*w*) *When Notice of Appeal must be given.*

The time for appealing would commence to run from the day the decision was given, and not from the day the formal order was drawn up: *Ex parte Johnson*, 3 B. & S. 947; *R.* v. *Barnet Sanitary Authority*, 1 Q. B. D. 558; *R.* v. *St. Albans Sanitary Authority*, 35 L. T. N. S. 362; *Re Owens*, 12 Grant, 446. The day upon which the decision was made would be excluded. For instance, if made on the first of May, the appellant could not properly give his notice of appeal later than the fifth day of the same month: *Weeks* v. *Wray*, L. R. 3 Q. B 212; Sinclair's D. C. Act, 28 (*b*); see also *Lawford* v. *Davies*, 4 P. D. 61. If the last day happens to fall on a Sunday, the notice on the following Monday would be too late; *R.* v. *Middlesex* (*Justices*), 2 Dowl. N. S. 719; *Peacock* v. *The Queen*, 4 C. B. N. S. 264; *Wynne* v. *Ronaldson*, 12 L. T. N. S. 711; *Rowberry* v. *Morgan*, 9 Ex. 730; *Ex parte Ferrige, In re Ferrige*, L. R. 20 Eq. 289; *Ex parte Viney, In re Gilbert*, 4 Chan. D. 794; *Ex parte Saffery, In re Lambert*, 5 Chan. D. 355. The notice could be given on Good Friday or other holiday (*Clarke* v. *Fuller*, 2 U. C. R. 99) but not on a Sunday (*R.* v. *Leominster*, 2 B. & S. 391) if the last day.

(*x*) *Notice must be given eight days before Sittings of Division Court, and how Served.*

The day of giving the notice and the Court day are *both* excluded. The expression here used denotes eight *clear days* (*R.* v. *Shropshire* (*Justices*), 8 A. & E. 173; *Mitchell* v. *Foster*, 12 A. & E. 472; *R.* v. *Aberdare Canal Co.*, 14 Q. B. 854; *Chambers* v. *Smith*, 12 M. & W. 2; *Zouch* v. *Empsey*, 4 B. & Ald. 522), nor could the fraction of a day be considered: *R.* v. *Middlesex* (*Justices*), 3 D. & L. 109; see also note (*u*) to this section. Should the last of the eight days fall on a Sunday, it, too, would be included as one of them. (See next preceding note.) Should there be less than eight days between the day of giving the decision and the then next sittings of the Division Court, the appeal should be to the second sittings thereafter: *R.* v. *Caswell*, 33 U. C. R. 303. The Statute does not expressly say that the appeal is to be heard at the sittings of the Division Court to be held *next after* the expiration of the eight days, the meaning of it being that the appeal shall be to the next *practicable* sittings at which it can properly be tried: *Liverpool Gas Co.* v. *Everton*, L. R. 6 C. P. 414. It will become a question whether or not an appeal can be adjourned until a subsequent sittings. It is submitted that under the general powers of the Court (incorporated in this Act by the 68th section hereof), and the fact that the Statute does not declare that the trial shall take place at any particular sittings, that the Judge would have power to adjourn the trial: *Bowman* v. *Blyth*, 7 E. & B. 47; *R.* v. *Westmoreland* (*Justices*), L. R. 3 Q. B. 457. The cases of *R.* v. *Murray*, 27 U. C. R. 134, and *R.* v. *G. W. Ry Co.*, 32 U. C. R. 506, were decided on the peculiar language of our Appeal Act since amended. There must of course be an appeal duly entered before there can be an adjournment: Paley on Con., 6th Ed., 382 and cases cited. The Statute requires the notice to be given by "the person proposing to appeal." It may be served by any literate person on his behalf: *Cuming* v. *Toms*, 7 M. & G. 29, 88; *R.* v. *Kent* (*Justices*), L. R. 8 Q. B. 305, and note (*f*) to section 21 *et seq.*; *R.* v.

days, enter into a bond (*a*) to the opposite party with two sufficient sureties—to be approved of by the Clerk of the

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Middlesex (*Justices*), 1 L. M. & P. 621. "Service of notice of appeal against a conviction under the Highway Act (5 & 6 Will. IV., c. 50), by leaving it at the dwelling-house of the respondent, was held to be sufficient, *and it seems it would be so in all cases where the Statute under which it was given does not expressly require a different service*:" Paley on Convictions, 6th Ed. 371; *R.* v. *N. R. of Yorkshire* (*Justices*), 7 Q. B. 154; *R.* v. *Cheshire* (*Justices*), 11 A. & E. 139; *R.* v. *Pocock*, 15 L. J. M. C. 132. A notice of appeal cannot be served under this Statute on a Sunday if the last day: *R.* v. *Leominster*, 2 B. & S. 391. Should a notice of appeal be given, or bond put in, and either found incorrect, the appeal could be taken afresh, provided it was within the proper time prescribed by this Act: *R.* v. *W. R. Yorkshire* (*Justices*), 3 T. R. 778; *R.* v. *Macclesfield* (*Justices*), 13 Q. B. 881. See particularly the notes to sections 17 to 22 of this Act, as to the service of notice of appeal.

(*y*) *Form of Notice of Appeal.*

As has been previously remarked in note (*u*) to this section, there is no form of notice here prescribed. It may be in this form on an appeal against an order made for the payment of wages found to be due to "a servant or labourer."

To A. B., of, &c. (*the name and addition of the party to whom the notice of appeal is required to be given*).

Take notice, that I, the undersigned, C. D., of, &c., being the person aggrieved by the order hereinafter mentioned, do intend to enter and prosecute an appeal at the (next) sittings of the Division Court for the County of to be holden at on the day of next (or instant), against a certain order made by L. M, Esquire, one of Her Majesty's Justices of the Peace in and for the (said) County of [or Police Magistrate in and for the city (or town) of], whereby I, the said A. B., was ordered to pay (*here state the terms of the order made as fully and correctly as possible*).

And further take notice, that the cause and matter of my appeal are, first, that [I never was indebted to the said A. B. for the said amount of wages so ordered to be paid by me; secondly, that before the proceedings were taken on which the said order was made I paid the said A. B. the wages in said order mentioned], [*together with any other cause or matter of appeal, care being taken that all grounds of appeal relied on are stated, as the appellant will be precluded from going into any other than those stated*].

Dated this day of A.D. 188 . A. B.

If this notice is given by or to several appellants or respondents respectively, or by an Attorney, it can easily be adapted to such cases. The addition of the appellant or respondent is not made necessary by the Statute, but it had better be given as matter of description; nor need it be signed by the appellant or his Attorney (*R.* v. *Nichol*, 40 U. C. R. 76; *R.* v. *Kent* (*Justices*), L. R. 8 Q. B. 305), but it had better be so. Care must be taken to make the appeal to the proper Court and sittings thereof, for, should a mistake be made in either respect, it would probably prove fatal to the appeal. The notice of appeal and the bond must be consistent in these as well as in other respects.

(*a*) *The Appeal-bond.*

The giving of this bond *within four days* after the "conviction, order, decision or judgment" is made a condition precedent to the appeal being heard, and any omission of the necessary requirements of the Act in respect to it

Court—in the penal sum of one hundred dollars, conditioned, personally to appear at the said Court and try such appeal, and to abide the judgment of the Court thereon, and to pay such costs as shall be by the Court awarded, and upon such notice being served and bond executed and filed with the Clerk, all proceedings on the order, conviction

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would be fatal to the appeal: see the previous notes to section 50 and this section. But any clerical mistake would not invalidate it: *R.* v. *Essery*, 7 P. R. 290. Any such defect might be waived: *Ib.*; *R.* v. *Crouch*, 35 U. C. R. 433; *Park Gate Iron Co.* v. *Coates*, L. R. 5 C. P. 634; *Ward* v. *Raw*, L. R. 15 Eq. 83. An infant could not be a party to the bond (*Fisher* v. *Mowbray*, 8 East. 330; *Baylis* v. *Dineley*, 3 M. & S. 477; *Stikeman* v. *Dawson*, 16 L. J. Ch. 205), nor would he be bound even if he had fraudulently represented himself to be twenty-one years of age: *Bartlett* v. *Wells*, 1 B. & S. 836. The writer sees no reason why a married woman could not legally be one of the sureties in the bond, provided she entered into the contract in such a manner as to render her liable (*Lawson* v. *Laidlaw*, 3 App. R. 77 and 92, and cases there cited; *Collett* v. *Dickenson*, 11 Ch. D. 687; *Dillon* v. *Cunningham*, L. R. 8 Ex. 23); but in the present state of our law on this subject it would be inadvisable to approve of such a bond. There must be "*two sufficient* sureties" to the bond. The appellant must be a party to the bond himself, for the section says that he shall "enter into a bond . . *with* two sufficient sureties." The opposite party should, if possible, have an opportunity of objecting to the sufficiency of the sureties before the Clerk of the Court. The bond must be for the appellant "*personally*" to appear. It is difficult to say what the effect of the appellant's non-appearance personally would be, on the right of the Court to hear the appeal. In Paley on Con., 6th Ed., 387, note (*q*), it is said that "On the hearing of appeals at sessions it sometimes becomes a question whether the Court can proceed unless the appellant is personally present. There seems to be no general rule upon this subject, the question depending in a great measure upon the practice of each Sessions respectively. In the case of an appeal against a conviction on the Stage Coach Act, 50 Geo. III. c. 48, it was resolved, after argument, by the Quarter Sessions for the County of Essex that the appellant must be present at the hearing of his appeal: *R.* v. *Cracklin*, Mic. 1822 Ed. The like practice seems to prevail at the Middlesex Sessions, and the same reason which requires that the appellant should be present applies equally to the informer. If the appellant does not appear according to his notice and recognizance, the Court cannot hear the case." For this proposition of law the cases of *R.* v. *Stoke Bliss*, 6 Q. B. 158, and *R.* v. *W. R. Yorkshire* (*Justices*), 5 Q. B. 1, are cited; but on a reference to the reports of these cases, it will be seen that they do not actually touch the point. One can scarcely see the necessity for an appellant's personal appearance in a case of this kind; and where a number of partners in a concern are appellants, it might almost be impossible for them *all* personally to attend Court, yet a strict construction of the condition of this bond would require it. If the appellant did not appear to sustain his appeal it could be dismissed with costs: see notes to sections 17-22, and especially "Judgment in appeal," on this point. It would be the duty of the Clerk of the Division Court to see that the sureties in the bond are sufficient. No affidavits of justification are rendered necessary, as is the case on an appeal under section 17; nor is there any provision for the appellant's paying money into Court instead of giving the bond. Such a provision would be very convenient in many cases: see the English Acts of 24 & 25 Vic. c. 96, s. 110, and 24 & 25 Vic. c. 97, s. 68, where such a provision was enacted.

The bond may be as follows, or to the like effect:

Form of Appeal Bond against an Order for Payment of Wages.

Know all men by these presents, that we, C. D., of, &c., and E. F., of, &c., and G. H., of, &c., are jointly and severally held and firmly bound to A. B., of, &c., in the penal sum of one hundred dollars of lawful money of Canada, to be paid to the said A. B., or his certain attorney, executors, administrators or assigns. For which payment, well and faithfully to be made, we bind ourselves, and each and every of us in the whole, our and each and every of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of , in the year of our Lord one thousand eight hundred and eighty-

Whereas the said A. B., on the day of instant (or last past), made complaint against the said C. D., before L. M., one of Her Majesty's Justices of the Peace in and for the County of [or the Police Magistrate in and for the City (or Town) of] for the alleged non-payment of wages by the said C. D. to the said A. B.

And whereas the said C. D. was, on the day of instant (or last past), by the said L. M., as such Justice as aforesaid [or as such Police Magistrate], ordered to pay to the said A. B. the sum of (*here fully and particularly state the substance of the order*).

And whereas the said C. D., being dissatisfied with the decision of said complaint, and with the said order made thereon, is desirous of appealing against the same to the Division Court for the (said) County of , at its (next) sittings, to be held on the day of next (or instant), and, in pursuance of the Statute in that behalf, this bond is given as security for such appeal.

And whereas the above-bounden E. F. and G. H., at the request of the said C. D., have agreed to enter into the above-written obligation, for the purposes aforesaid.

Now, therefore, the condition of this obligation is such, that if the above-bounden C. D. shall personally appear at the said Court and try such appeal, and abide the judgment of the Court thereon, and pay such costs as shall be by the said Court awarded, then this obligation shall be void, otherwise the same shall remain in full force and effect.

Signed, sealed and delivered by the above-bounden C. D., E. F. and G. H., in the presence of J. K.	C. D.	[Seal.]
	E. F.	[Seal.]
	G. H.	[Seal.]

[The above form can be altered to suit the circumstances of any particular case.]

Should the appeal be heard, the bond could, though not in accordance with the Statute, be enforceable as a voluntary bond: *Stansfeld* v. *Hellawell*, 7 Ex. 373. The Statute does not require the execution of this bond to be proved by affidavit, so that none can be made. The Clerk of the Court must satisfy himself as best he may of the genuineness of the bond and the sufficiency of the sureties. On the bond being left with the Clerk, he should file it as of the day he receives it. The Statute does not say exactly *when* the bond is to be filed, but in order to save questions, all had better be done within the four days if possible. In a great measure, what has been said in the notes to section 17 to 22, in regard to the perfecting of the security there required, can with equal propriety be applied here, and without further remark, the reader is referred thereto.

or decision appealed against shall be stayed (*b*) until the determination of the appeal (*c*).

Case to be entered by Clerk.

52. The Clerk shall, on the bond and notice of appeal with an affidavit of service (*d*) thereof being filed in his

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(*b*) *Stay of Proceedings.*

It follows, of course, from what has been said, that, if the *conditions* of appeal have not been complied with, there could be no stay of proceedings, and the Magistrate's order could be enforced: see *Haworth* v. *Fletcher*, 20 U. C. R., at page 280, and the other cases cited in note (*z*) to section 18 of this Act. There is no stay of proceedings *until* the bond is filed with the Clerk. If a *proper* bond is not given, the Justice of the Peace could go on and enforce the order for payment; but of course he would, in that case, run a considerable risk: *Kendall* v. *Wilkinson*, 4 E. & B. 680; *R.* v. *Willmott*, 1 B. & S. 27, and *Re* ..es, 5 E. & B. 291. In the above case of *Kendall* v. *Wilkinson*, Lord Campbell, ..J., said, "There is no universal juridical maxim or rule that an appeal or ..t of error is a stay of execution pending the appeal or writ of error:" see also *R.* v. *Brooke*, 2 T. R. 196.

(*c*) *When Appeal Determined.*

The appeal would be "determined," within the meaning of this section, when the Judge had, after hearing the case, given his decision upon it as in ordinary cases: Sinclair's D. C. Act, 134. The appellant would be obliged to submit to the decision as in ordinary cases. There could be no further appeal or proceeding of any kind, even though the decision was erroneous (*R.* v. *Hartington, Middle Quarter*, 4 E. & B. 780, sec. 51 (*j*)), nor in any way could there be a new trial (*R.* v. *Doty*, 13 U. C. R. 398; *Keane* v. *Stedman*, 10 C. P. 435); and, if the appeal should be dismissed for want of compliance with some of the prescribed forms, or for other informality, the appellant's right would be gone, and he would be concluded by it just as much as if there was a decision on the merits: Paley on Convictions, 6th Ed., 379. In virtue of the 68th section of this Act it is submitted that, on the appeal being properly entered, it could be adjourned: see note (*w*) to section 50, and cases there cited, and *R.* v. *Mainwaring*, E. B. & E. 474; *R.* v. *Kendal*, I E. & E. 492; *R.* v. *Cambridge Union*, 1 E. B. & S. 61; *Keen* v. *The Queen*, 10 Q. B. 928; *R.* v. *Lancashire* (*Justices*), 8 E. & B. 563. Should the original order not be forthcoming, an adjournment would be necessary and proper in the interests of justice (*R.* v. *Skircoat*, 2 E. & E. 185), and it may be made after the hearing of the appeal has been partly proceeded with (*R.* v. *Cambridge Union*, 1 E. B. & S. 61), if the Judge thinks it proper to be made. An adjournment would only be granted where the Court could properly hear the appeal after it had been duly entered: see *R.* v. *Oxfordshire* (*Justices*), 1 M. & S. 448; *R.* v. *Westmoreland* (*Justices*), L. R. 3 Q. B. 457.

(*d*) *Service of Notice of Appeal.*

The notice may be served by any literate person on the respondent himself, or even left at his dwelling-house. See note (*w*) to section 51 on this point: Paley on Convictions, 6th Ed., 371. Service of the notice on Sunday would not be a good service if the last day: *Re The Inhabitants of Asprell* v. *Lancashire* (*Justices*), 16 Jur. 1067 (note); *R.* v. *Middlesex* (*Justices*), 11 Jur. 434; *R.* v. *Leominster*, 2 B. & S. 391. Should the giving of notice be prevented by the act of God, as by the death of the person to whom it was to be given, notice would be dispensed with: *R.* v. *Leicestershire* (*Justices*), 15 Q. B. 88. "If the respondent

office, enter the cause in his procedure-book (*e*), and the appeal may be tried with a jury if the appellant file with the Clerk at the time of filing the bond a notice requiring a jury (*f*), or if the respondent, within four days after (*g*) the service of the notice of appeal upon him, file a notice with the Clerk, requiring a jury, and if the proper fees are, in either case, deposited with the Clerk; otherwise the Judge may try the appeal without a jury or may summon (*h*) a jury from the body of the Court as to him seems meet.

Proceedings in case of appeal dismissed or affirmed.

53. In case of the dismissal of the appeal or affirmance of the conviction, order or decision, (*i*) the Judge may order and adjudge the offender to be punished according to the

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in an appeal kept out of the way to avoid service of the notice of appeal, or at all events could not be found after due diligence in sending for him, the service required by the Statute would probably be dispensed with:" Maxwell on Statutes, 347. The affidavit of service of notice of appeal filed with the Clerk, would, it has been said, be proof at the trial of such service. See 7 U. C. L. J. 5. Such proof is part of the trial: *R.* v. *Middlesex* (*Justices*), 5 D. & L. 580.

(*e*) As to the entry by the Clerk of proceedings in his procedure-book, see Sinclair's D. C. Act, 31.

(*f*) If the appellant does not file the notice for jury with the Clerk when filing the bond, he would not be entitled to have a jury summoned. The Clerk in that case should not do so: see Sinclair's D. C. Act, 141 (*c*); *In re Brown and Wallace*, 6 P. R. 1; *R.* v. *Bradshaw*, 38 U. C. R. 564.

(*g*) The respondent, if he wishes a jury, must file his notice therefor "within four days *after* the service of the notice of appeal." This *excludes* the day of service. See note (*w*) to section 51. The notice may be in this form:

In the Division Court for the County of .

A. B., Appellant, v. C. D., Respondent.

Take notice that I hereby require a jury to be summoned in this cause.

Dated this day of A. D. 188 .

A. B., Appellant, or C. D., Respondent.

To the Clerk of this Court.

(*h*) Power is here given to the Judge to summon a jury from the body of the Court to try the appeal if to him that course "seems meet." See Sinclair's D. C. Act, 146. As the General Rules and Forms of the Division Court are by the 68th section of this Act made applicable to all proceedings under this Statute, the forms of oath (110) (*g* and *h*) would seem to be the proper ones to administer to jurors on trying this kind of appeal.

(*i*) *Hearing the Appeal.*

Both parties may appear by Advocate or agent under section 84 of the Division Courts Act, in all suits, matters or proceedings under that Act or this: see section 68 of this Act. The parties themselves may be examined as witnesses on the trial of an appeal: Rev. Stat. cap. 62, section 9. The conviction or order which the Justice of the Peace returns is the only one that can be

conviction or order, or he may direct (*j*) the enforcement of the order for payment of wages or of dismissal, as the case may be, with the payment of the costs awarded, and any order or orders made by him in the premises shall be enforced and carried into execution by the officers of the Court. The Judge may direct execution to issue for the

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questioned on appeal: *R.* v. *Allen*, 15 East. 333, 346; Paley on Convictions, 6th Ed. 384. It is doubtful if the conviction or order is amendable at all, the sections of other Statutes empowering such to be done on appeal not being expressly incorporated with this Act: 32-33 Vic. cap. 31, sec. 68 (Dom.) Rev. Stat. cap. 74, ss. 3 to 6. As to the amendment of convictions and orders generally, see *R.* v. *Smith*, 35 U. C. R. 518; *R.* v. *Lake*, 7 P. R. 235; *R.* v. *Sutton*, 42 U. C. R. 220; *R.* v. *Lawrence*, 43 U. C. R. 164; *R.* v. *Black*, 43 U. C. R. 180; Sec. 50 (*r*); *R.* v. *Clarke*, 44 U. C. R. 385; *R.* v. *Lennon*, 44 U. C. R. 456. The appeal, being in effect a new trial of the case, fresh evidence can be given on both sides: see note (*s*) to section 50; *Kent* v. *Freehold L. and Brick-making Co.*, L. R. 3 Ch., at page 495. If any objections appear on the face of the proceedings they should be stated at once; but if none should be taken, then the respondent should open his case on the merits, and call his witnesses, and the trial would otherwise be conducted as would the trial of an ordinary civil action. Should the respondent not appear, the order would be quashed at once with costs: *R.* v. *Padwick*, 8 E. & B. 704; *R. Purdey*, 5 B. & S. 909. Should the Justice of the Peace be in any way pecuniarily interested in the matter, the conviction or order could not be upheld: Sinclair's D. C. Act, 17; *R.* v. *Huntingdonshire* (*J.*), 4 Q. B. D. 522; *R.* v. *Milledge*, 4 Q. B. D. 332; *McRossie* v. *Pro. Ins. Co.*, 34 U. C. R. 55; *Romanes* v. *Fraser*, 17 Grant, 267; *In re Vashon* v. *East Hawkesbury*, 30 C. P. 194; *Baird* v. *Almonte*, 41 U. C. R. 415; Paley on Convictions, 6th Ed., 43, *et seq.*, and 406. If the appellant should not support his appeal it would be dismissed with costs (*Ex parte L. B. & S. C. Ry. Co.*, 5 D. & L. 597; *Freeman* v. *Read*, 9 C. B. N. S. 301); but if the necessary conditions of appeal should not be complied with, and the Judge should refuse to hear the appeal on that account, it is submitted that costs could not be imposed on the party attempting to appeal: *R.* v. *Padwick*, 8 E. & B. p. 709, *per* Lord Campbell, C. J. No provision appears to be made for allowing costs in such a case. It would appear doubtful whether or not the words of the General Appeal Acts could be strained so as to be made applicable to abortive appeals under this Act. Should a Judge erroneously refuse to hear an appeal, *mandamus* would lie against him: *R.* v. *Surrey* (*Justices*), 3 D. & L. 573; *R.* v. *Kent* (*Justices*), L. R. 6 Q. B. 132; *Liverpool Gas Company* v. *Everton*, L. R. 6 C. P. 414; Sinclair's D. C. Act, 48. The Judge could not by any arbitrary rule of his own prevent an appeal or superadd a condition to the right of appeal not imposed by Statute: *R.* v. *Pawlett*, L. R. 8 Q. B. 491. There is no statutory limit to the time within which the appeal must be heard, as was experienced in the case of *In re Hunter* v. *Griffiths*, 7 P. R. 86. For a more extended reference to the authorities on this subject the reader is referred to notes (*g*), (*h*) and (*i*) to section 21, and to Paley on Convictions, 6th Ed. 375, and following pages.

(*j*) *Judgment in Appeal.*

After the rising of the Court (9 U. C. L. J. 217; 10 U. C. L. J. 20), and after judgment duly given in the appeal, the Judge would be *functus officio* (Paley on Con., 6th Ed., 393, *et seq.*; *G. N. Ry Co.* v. *Mossop*, 17 C. B. 139; *Irving* v. *Askew*, L. R. 5 Q. B. 208; *Yearke* v. *Bingleman*, 28 U. C. R. 551. A decision on the form of conviction or order (*R.* v. *Colam*, 26 L. T. N. S. 661; *R.* v. *Middlesex*

levying of any moneys or costs (*k*) awarded or ordered to be paid, and in the event of any such moneys or costs being payable by the appellant, which have not been levied under execution against the goods of the appellant, the Judge may order the bond to be delivered up to the respondent, who shall be entitled to recover the amount due him with costs in any Division Court having jurisdiction.

(*Justices*), 2 Q. B. D. 516), or the notice of appeal, would be of the same effect and as conclusive as an adjudication on the merits: Paley on Con., 6th Ed., 393; *R.* v. *Firman*, 6 P. R. 67. As will be seen from the remarks made, and the authorities cited in note (c) to section 50, there can be no new trial after the determination of the appeal. The decision of it would be final, even if there was perversity in the verdict of the jury (see *Yearke* v. *Bingleman*, 28 U. C. R. 551), or the opinion of the Judge was erroneous in point of law: *R.* v. *Carnarvon* (*Justices*), 4 B. & Ald. 86; *R.* v. *Middlesex* (*Justices*), 2 Q. B. D. 516. The judgment of the Court is either to confirm the conviction, order or decision, or dismiss the appeal, according to section 53.

It is difficult to see what the legislature meant by the words, "the Judge may order and adjudge the offender to be punished according to the conviction or order," used in this section. By the 12th section of the Master and Servants' Act, power only is given to the Justice of the Peace in case of non-payment of the wages and costs ordered to be paid, to "issue his or their warrant of distress for the levying of such wages, together with the costs of conviction and of the distress." Nothing whatever is said about *imprisonment*. The 12th section of the old Consolidated Act (Chapter 75, C. S. U. C.) is still in force in respect to complaints against the master or employer concerning any "misusage, refusal of necessary provisions, cruelty or ill-treatment." Probably, for a contravention of that section, punishment might be imposed as for an offence in its nature criminal, but here the 12th section of the present Masters and Servants' Act (Revised Statutes, Chapter 133) does not prescribe *punishment* as the alternative of non-payment of wages and costs, nor, perhaps, could such be imposed, under the Act respecting summary convictions, before Justices of the Peace, for offences in violation of Provincial Statutes: Rev. Stat., cap. 74. As to the power of the Ontario Legislature to impose punishment, see *R.* v. *Boardman*, 30 U. C. R. 553; *R.* v. *Roddy*, 41 U. C. R. 291; *R.* v. *Black*, 43 U. C. R. 180; *R.* v. *Lawrence*, 43 U. C. R. 164; *R.* v. *Clarke*, 44 U. C. R. 385; *R.* v. *Cuthbert*, 45 U. C. R. 19. This section declares that the Judge "*may* direct execution to issue," &c., and may order the bond to be delivered up to the respondent if successful. These words have a compulsory force as here used: Maxwell on Statutes, 219; *Macdougall* v. *Paterson*, 11 C. B. 755; *R.* v. *Oxford* (*Bishop*), 4 Q. B. D., at page 553.

(*k*) *Costs.*

The costs need not, it is submitted, be taxed by the Judge in analogy to the practice of the General Sessions in appeal cases. The costs may be taxed by the Clerk in the ordinary way, under the 38th section of the Division Courts Act, and the 68th section of this Act. The Clerk would be entitled to the fees that would be payable to him, on similar proceedings in an ordinary suit, for the amount which the Justice had ordered to be paid. Costs should, it is submitted, be given or refused, according to the rules which obtain in ordinary actions and in appeals generally. See notes to section 21 of this Act, and note (*i*) of this section, and Sinclair's D. C. Act, 171 (*l*), for further reference on the question of costs of appeal. See also *R.* v. *Lennon*, 44 U. C. R. 456.

Preceding sections not to apply in certain cases.

54. The next preceding four sections shall not apply to any appeal from or against any order, conviction or decision made under the twelfth section (*l*) of the seventy-fifth chapter of the Consolidated Statutes of Upper Canada, on any matter not within the jurisdiction of the Legislature of Ontario.

MISCELLANEOUS.

Section 94 repealed.

55. Section ninety-four (*m*) of the Division Courts Act is repealed and the following substituted therefor:—

Where set-off exceeds amount due to plaintiff.

"94. If the set-off, proved to the satisfaction of the Judge, "exceeds the amount shewn to be due to the plaintiff, the "plaintiff shall be non-suited or the defendant may elect to "have judgment for such excess, provided such excess be "an amount within the jurisdiction of the Court, and if "such excess be greater in amount than the jurisdiction of "said Court the Judge may adjudicate that an amount of "such set-off equal to the amount shewn to be due to the "plaintiff be satisfied by such claim, but such adjudication "shall be no bar to the recovery by the defendant in any "subsequent suit for the residue of such set-off."

Clerk to mail notice of payment of money.

56. The Clerk of every Division Court shall immediately (*n*) after the receipt of any sum of money whatever (*o*), for any party to a suit, forward (*p*), through the post-office,

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(*l*) This section will be found at page 1191 of the Revised Statutes (small type): see also note (*j*) to section 53. Is the word "conviction" not improperly introduced in these appeal clauses in respect to the non-payment of wages? see *Ramney qui tam* v. *Jones*, 21 U. C. R. 370; and note (*j*) to section 53.

(*m*) See Sinclair's D. C. Act, 123. The Court would have the right under this section, indeed would be compelled, to determine the question of the plaintiff's liability on the set-off to an amount beyond the jurisdiction of the Court if necessary.

(*n*) The words "shall immediately" here used, denote both an imperative and peremptory command. They imply "prompt, vigorous action, without any delay."

(*o*) It will be observed that the words here employed are "*any* sum of money whatever." Whether the sum be large or small, the notice is required to be given by the Clerk. The party entitled to the notice could of course waive the giving of it; but in order to justify a Clerk in omitting to give it, he should, for his own protection, take the waiver *in writing*. Should the Inspector find that such notice had not been given in any case where not dispensed with, he would probably reprimand the officer, and if such practices became general, it would be his duty to report such conduct to the Government, under section 23 of this Act, sub-section 6, for their action upon it.

(*p*) The remissness of many Clerks throughout the country has rendered this and many other provisions of the present Act necessary. The omission on the

to the party entitled to receive the same, a notice (*q*), enclosed in an envelope addressed to such party (*r*) or in the case of a transcript of judgment from another Court, then to the Clerk who issued the same (*s*), at his proper post-office address, informing him of the receipt of such money. The notice thus sent shall be pre-paid and registered (*t*), and the Clerk shall obtain, and file among the papers in the suit the post-office certificate of such registration, and shall deduct the postage and charge for registration from the moneys in his hands, but he shall charge no fee for such notice. The absence from amongst the papers in the suit of any such certificate of registration shall be *prima facie* evidence against the Clerk that such notice has not been forwarded.

Renewal of executions by County

57. When the books, papers and other matters in the possession of any Clerk, by virtue of or appertaining to his

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part of some Clerks to advise parties when moneys paid into Court on their suits, was under the law formerly a frequent source of trouble and complaint. Should the provisions of this section be disregarded, the Executive has, under section 32, the power to exercise a summary remedy.

(*q*) No particular form of notice is necessary, provided it gives to the person entitled to it the necessary information. It may be in the following form, or to the like effect:

In the Division Court for the County of .

A. B., Plaintiff, *v.* C. D. Defendant.

Take notice that the sum of $ has this day been paid into Court to your credit in this cause.

Dated this day of 188 .

Clerk.

To A. B., the Plaintiff (or as the case may be).

[We would suggest the propriety of Clerks keeping a supply of blank notices on hand.]

(*r*) The Clerk should, under rule 125, obtain the address of the parties to a suit, so that he may know where to send this notice to.

(*s*) This appears to be one of the most salutary provisions of the Act. The neglect hitherto of some Clerks to make returns, not only of the money they received but to the transcripts themselves, has brought discredit, and in many cases disgrace, on the Division Court system. It is to be hoped that a stop will now be put to practices that had become disreputable, and which had in many cases been indulged in with impunity.

(*t*) It may appear to the Clerk an unnecessary requirement of the law, that this notice should be given by registered letter. It must, however, be done, and the omission to conform strictly to the law in this respect might get the Clerk into trouble. Creditors will no doubt gladly pay the small charges for the advantage of being advised of their money being paid into Court.

(*u*) As the absence of this certificate has been by the Legislature made *prima facie* evidence of the omission to give the notice, it is to be hoped that every

Attorney in certain cases.

office, become the property of the County Crown Attorney, under the forty-fourth section (*v*) of the Division Courts Act, or in case of the suspension (*w*) of a Clerk, such County Crown Attorney may, during such suspension, or until the appointment and qualification of another Clerk, when the same shall be presented for that purpose, renew (*x*) any writ of execution issued out of such Court, which may lawfully (*y*) be renewed, and such renewal shall have the same force and effect as if the same had been renewed by a Clerk of the Court, and he shall be entitled to the same fees (*z*) therefor as a Clerk for like services.

Returns by Judges of judgment debtors committed.

58. Every Judge of a County Court shall make (*a*) a return to the Provincial Secretary on or before the fifteenth day of January in every year, shewing the number of judgment debtors who, during the twelve months ending the thirty-first of December previously, were ordered to be committed under each of the five heads mentioned in the one hundred and eighty-second section of the Division Courts Act.

Clerk will, for his own interest as well as those of the suitor, make sure to have the certificate among the papers.

(*v*) See Sinclair's D. C. Act, page 34.

(*w*) Any Clerk may be suspended by the Judge under sections 34 and 36 of this Act. Under the 34th section, he can only do so, however, "for cause;" but under the 36th section, he may do so "at pleasure."

(*x*) As to how and when an execution can be renewed, see Sinclair's D. C. Act, 182. This section does not comprehend the renewal of a warrant of commitment: see Sinclair's D. C. Act, 261. As to an action against a Bailiff for not arresting, see *Burnham* v. *Hall*, 44 U. C. R. 297, and cases cited. It applies to any "writ of execution" only.

(*y*) For the law bearing on the renewal of writs and under what circumstances such can lawfully be done, see Sinclair's D. C. Act, 182; and as to when an abandonment of seizure takes place on an execution, in addition to the cases there cited, see *Hincks* v. *Sowerby*, 4 App. R. 113. It is submitted that the renewal here referred to may be made in the same way, and as often as may be done by the Clerk under the 163rd section of the D. C. Act.

(*z*) As to the fees now chargeable on the renewal of an execution, see item 20 of the Tariff of 28th November, 1879.

(*a*) This is made an imperative duty of the Judge. Clerks should make a return to the Judge of the cases under this section in their Courts, under the "five heads" mentioned in the 182nd section (Sinclair's D. C. Act, 192), *before* the 15th of January in each year, so as to enable the Judge accurately to make this return to Government.

Sec. 177 amended: affidavit required before judgment summons.

59. Section one hundred and seventy-seven (*b*) of the Division Courts Act is amended by adding thereto the following: "Provided, nevertheless, that before (*c*) such summons shall issue, the plaintiff, his Attorney or agent shall make and file (*d*) with the Clerk of the Court from which the summons may issue an affidavit stating (1) That the judgment remains unsatisfied in the whole or in part; (2) That the deponent believes that the defendant sought to be examined is able to pay the amount due in respect of the judgment or some part thereof; (3) or, that the defendant sought to be examined has rendered himself liable to be committed (*e*) to gaol under the Division Courts Act."

(*b*) The 177th section of the Division Courts Act is that one which allows creditors to examine their debtors before the Judge on a judgment summons.

(*c*) The affidavit required by this section must be made *before* the judgment summons issues, and if not made until afterwards, the summons would be irregular; but if the debtor appeared on it, and was examined without objection, he could not afterwards question its validity: *R.* v. *Smith*, L. R. 1 C. C. 110; *R.* v. *Widdop*, L. R. 2 C. C. 3; *Blake* v. *Beech*, 1 Ex. D. 320; *R.* v. *Hughes*, 4 Q. B. D. 614; *Fox* v. *Money*, 1 B. & P. 250); but appearing to object would not waive the necessity for the affidavit: *R.* v. *Cornwall*, 2 L. J. N. S. 157.

(*d*) The affidavit must be made by "the plaintiff, his attorney or agent." A stranger could not make the affidavit: *Herschfeld* v. *Clarke*, 11 Ex. 712; *Christopherson* v. *Lotinga*, 15 C. B. N. S. 809; *Barwick* v. *DeBlaquiere*, 4 P. R. 267; *Tiffany* v. *Bullen*, 18 C. P. 91; *Frederici* v. *Vanderzee*, 2 C. P. D. 70; *The Bank of Montreal* v. *Cameron*, 2 Q. B. D. 536. The affidavit must be *filed* by the Clerk before the summons issues: see Sinclair's D. C. Act, 25 (*r*). As the right to examination of a debtor depends on the making, by one of the persons mentioned in this section, of this affidavit and of the due filing of it, care should be taken to see that such is done. This is the more important in cases where the defendant does not appear, for should an order of commitment be made against him, and enforced without these requirements being first complied with, the Judge, Clerk, and Execution Creditor would probably be liable as trespassers: see Sinclair's D. C. Act 201 and 227; *Hill* v. *Managers of Met. Asylum District*, 4 Q. B. D. 433.

(*e*) When a defendant is liable to be committed, and under what circumstances, see Sinclair's D. C. Act, 192, 194. It would seem to be law that a married woman can be examined on a judgment summons: *Dillon* v. *Cunningham*, L. R. 8 Ex. 23; see *Collett* v. *Dickenson*, 4 Ex. D. 285; 11 Chan. D. 687, s. c.; *Lawson* v. *Laidlaw*, 3 App. R. 77; *Poole* v. *Canning*, L. R. 2 C. P. 241. As to a second commitment for the same cause, see *Horsnail* v. *Bruce*, L. R. 8 C. P. 378; *Evans* v. *Wills*, 1 C. P. D. 229. By section 67, this section does not apply to actions or proceedings pending when the Act was passed, so that in cases where judgment summonses were issued before the 5th of March, 1880, proceedings could be taken upon them the same as if the Act had never been passed. On old judgments, upon which no proceeding by judgment summons was pending when this Act was passed, and on all judgments recovered since, the affidavit is required. If the affidavit should be in the *alternative* form it would probably be held bad: *Quackenbush* v. *Snider*, 13 C. P. 196.

Sec. 183 amended: one service of judgment summons only.

60. Section one hundred and eighty-three (*f*) of the said Division Courts Act is amended by striking out the word "twice" in the fifth line thereof.

R. S. O., c. 67, not affected.

61. This Act shall not affect or apply to the sixty-seventh (*g*) chapter of the Revised Statutes of Ontario or anything therein contained.

Substitutional service.

62. When it is made to appear to the Judge upon affidavit (*h*) that reasonable efforts have been made to effect

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The affidavit may be in this form:

In the Division Court for the County of .

A. B., Plaintiff, against C. D., Defendant.

I of the of , in the County of , and Province of Ontario, , make oath and say:

1. That I am the above-named plaintiff [or the attorney or agent for the above-named plaintiff, as the case may be] in this cause.

2. That judgment was recovered in this cause on the day of in the year of our Lord one thousand eight hundred and , for the sum of dollars debt (*or* damages *or* costs, as the case may be), and the sum of dollars for costs of suit, and that the whole [*or* dollars part] of the said judgment remains unsatisfied.

3. That I believe C. D., the defendant, sought to be examined herein, is able to pay the amount due in respect of the said judgment, or some part thereof [*or* that C. D., the defendant, sought to be examined herein, has rendered himself liable to be committed to gaol under "the Division Courts Act"].

Sworn, &c.

(*f*) The amendment here made renders a second judgment summons unnecessary. In most cases this was a useless piece of expense which properly has been abolished. This section will not apply to pending proceedings: see note (*e*) to section 59. It is to be regretted that when this amendment was made, it was not also enacted that a defendant should be personally served with a judgment summons, unless the Judge should, for good cause, dispense with it. Under the 177th section of the Division Courts Act, service of a judgment summons may be effected "by leaving a copy thereof at the house of the party to be served, or at his usual or last place of abode, or with some grown person there dwelling" Notwithstanding this provision in regard to the service of the judgment summons other than personal, Bailiffs should *in all cases* use their best endeavours to effect personal service, and should only make service at the house when they have exhausted all reasonable efforts to effect personal service. The consequences of not attending on a judgment summons are now so serious to a defendant, that his liberty should not be dependent on the contingency of his attention being called to the summons by some one else.

(*g*) This is the Act respecting arrest and imprisonment for debt, and will be found at pages 817-824 of the Revised Statutes.

(*h*) *Affidavit for substitutional service, what it should contain, and the order thereon.*

As to the formalities and general requirements of an affidavit, see note (*x*) to section 8, and Sinclair's D. C. Act, 134 and 269. This section requires that "reasonable efforts" be made "to effect personal service of the summons upon

personal service of the summons upon the defendant, primary debtor or garnishee and either that the summons has come to the knowledge of the defendant, primary debtor or garnishee, or that he wilfully evades service of the same, or has absconded, such Judge may, by order, grant leave to the plaintiff to serve the writ in such manner, at such place, or upon such person for the defendant, primary debtor or garnishee, as to him may seem proper, and may grant leave to the plaintiff to proceed as if personal service had been effected, subject to such conditions as the Judge may impose.

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the defendant," and has in most part been taken from the 20th section of the C. L. P. Act. It further provides for substitutional service where the defendant, primary debtor, or garnishee, has absconded. This last provision is not in the C. L. P. Act. It will therefore be seen that the cases which have been decided under our C. L. P. Act, and the corresponding section of the English Act, will have a direct application to the two first alternatives of this section. The order can be granted on some one of the three grounds here mentioned, and the affidavit must shew sufficient, on one or more of such grounds, to warrant the order being made. It is a common law right, which very defendant has, to be served personally with the summons, and it can only be taken away by statutory enactment: see Sinclair's D. C. Act, 155, 157; Potter's Dwarris on Statutes, 480, *et seq.* As remarked by the learned author of Lush's Practice, 3rd Ed., at page 375, in commenting on the similar section in the English Act, who says, "Before any order will be made under this section the Judge must be satisfied that the process-server has done all that could be reasonably expected of him to serve the defendant personally, or to ascertain his dwelling-place, and the affidavit must shew what those efforts were." In *Firth* v. *Bush*, 9 Jurist, N. S. 431, V. C. Kindersley, in an application for an order for substituted service in an equity case, said, "Your affidavit is insufficient. It must state what steps have been taken to effect personal service, and that all means to do so have been exhausted. The Court is obliged to be very vigilant in directing substituted service, and will never order it unless personal service is impracticable. It is not here shewn that application has been made at the residences mentioned, to one of which, it is possible, the defendant may have returned." These words are quite apposite to the question under consideration. What are "reasonable efforts" must be a question for the Judge, with reference to the circumstances of each particular case: *per* Erle, C. J., in *Tomlinson* v. *Goatley*, L. R. 1 C. P. 231. The affidavit properly should shew, as strongly as possible, where the defendant resided or does reside, what business he had been, or was then engaged in, what specific efforts were made to effect personal service on him, and why it was not done, and, if founded on the fact that the defendant had absconded, the additional fact should be stated, namely, whether or not he had any (and, if so, what) friends or relations residing in the Province: see *Stephen* v. *Dennie*, 3 U. C. L. J. 69. In *Flower* v. *Allan*, 2 H. & C. 688, Bramwell, B., at page 694, in speaking of the expression "reasonable efforts" in the English C. L. P. Act, says that "reasonable efforts" do not mean simply "reasonable" in the mind of the man who makes them, according to his belief of the facts, but "reasonable" according to the *actual* facts." In the same case Channell, B., says, at page 695, "It appears to me that, if the person who proposed to serve the writ had gone once only to the defendant's warehouse, and received the answer which he got on the first occasion, that would have afforded no ground for contending that he had made reasonable efforts

to effect personal service; and it does not appear that, on any subsequent occasion, he got any answer which would lead him to suppose that service could at any time be effected at the warehouse. I agree that substitution for personal service must be of such a nature that, if the service had been in fact effected, it would have been good." It would not be enough to shew that a defendant had gone abroad, and had no private residence in this Province; the affidavit should shew on the face of it reasonable grounds for inducing the Judge to conclude that he was wilfully evading service of the summons or had absconded: *Kitchin* v. *Wilson*, 4 C. B. N. S. 483. In common parlance "wilful" is used in the sense of *intentional*, as distinguished from accidental or involuntary: *State* v. *Clarke*, 29 N. J. L. 96 (Amer.). Substitutional service cannot be ordered in any case if it would have been impossible to have effected personal service. For instance if a defendant should reside without the limits of the Province, and could not be personally served there with a summons from a Division Court (for the reason that our Acts do not allow such a summons to run beyond the limits of Ontario), neither could substitutional service be ordered in such a case. In *Flower* v. *Allan*, 2 H. & C., at page 694, Bramwell, B., is reported as saying: "That substituted service supposes the *possibility* of actual service, and in this case there could have been none." At page 695, Pigott, B., says that he agrees with the rest of the Court in thinking that a case had not been made out for ordering substituted service, "because, upon these affidavits, I am not satisfied that the defendant was within the jurisdiction of the Court at the time they (reasonable efforts) were made." In *Sloman* v. *Government of New Zealand*, 1 C. P. D. 565, James, L. J., said, "When an order for substituted service is made there ought to be some person or persons, or body corporate, on whom there could be original service." The writer is therefore of opinion that, if a person absconds, a summons cannot be issued from the Division Court against him, and such remedies and proceedings had and taken upon it, under this section, as could not *possibly* have been taken otherwise. The summons must have been at some time the subject of personal service, before substitutional service could be ordered: see also *Ex parte North Kent Bank, In re Holdsworth*, 9 Chan. D., p. 335, *per* Bacon, C. J. As to when a person can be said to have "*absconded*," see Sinclair's D. C. Act, 199 (*b*), and note (*g*) to section 4 of this Act. An order will not be made where the defendant is a lunatic, and where his relations or keeper have refused admission to him (*Ridgway* v. *Cannon*, 2 W. R. 473; *Holmes* v. *Service*, 15 C. B. 293; *Williamson* v. *Maggs*, 28 L. J. Ex. 5); but, if the summons should be mentioned to him, it would have sufficiently "come to the knowledge" of the defendant to warrant an order for substituted service: *Kimberley* v. *Alleyne*, 2 H. & C. 223; *Raine* v. *Wilson*, L. R. 16 Eq. 576. The order is generally *ex parte: Barringer* v. *Handley*, 12 C. B. 720. To save delay the application for the order should be made to the Judge in Chambers: *Todd* v. *Evans*, 2 W. R. 53. If the defendant has, ever since the commencement of the action, been residing out of the jurisdiction, no order could properly be made, and would be set aside if granted; *Hesketh* v. *Flemming*, 1 Jur. N. S. 475; 24 L. J. Q. B. 255, s. c., *per* Coleridge, J. In such an application the defendant would have to shew where his residence was when the summons issued: *Naef* v. *Mutter*, 12 C. B. N. S. 816. As to the time and manner of making an application to set aside proceedings improperly taken on substitutional service, see *Willis* v. *Ball*, 1 Dowl. N. S. 303; *Morris* v. *Coles*, 2 Dowl. 79; *Atwood* v. *Chichester*, 3 Q. B. D. 722; *Emerson* v. *Brown*, 8 Scott, N. R. 219; *Giles* v. *Hemming*, 6 Dowl. 325; *Johnson* v. *Smallwood*, 2 Dowl. 588; *Williams* v. *Piggott*, 1 M. & W. 574. An application may, it seems, be made to set aside the order, on affidavits contradicting those on which it was obtained, and not disclosing any defence on the merits: *Hall* v. *Scotson*, 9 Ex. 238; *Thelwall* v. *Yelverton*, 16 C. B. N. S. 813. In Lush's Practice, 3rd Ed., it is laid down, at page 376, thus: "It is presumed that, where there are two or more defendants, an order (for substituted service) may be

obtained against some of them, though the others have not been served." The plaintiff should detail in the affidavit the attempts at service, and then shew why service had not been effected: *Miller* v. *O'Brien*, 1 Irish Jur., N. S. 109; *Grady* v. *Kearney*, 8 Irish C. L. R. App., XLIV. Although the facts may not shew a good personal service, yet they may shew a case where the summons came to the knowledge of the defendant within the meaning of this section: see the cases cited at pages 93 and 94 of Sinclair's D. C. Act. The plaintiff's proceedings, subsequent to the order, must strictly conform to it, and to the terms which the Judge has in it imposed: *Weeks* v. *Wray*, L. R. 3 Q. B. 212. If the order was properly granted, it would not be rescinded in consequence of an event which subsequently occurred: *Borradaile* v. *Nelson*, 14 C. B. 655. Should the defendant be in prison it is probable that the Judge would not be satisfied with service of the summons on an official in the gaol in which he was confined, unless there was a reasonable probability that the contents of the summons became known to the defendant: *Bland* v. *Bland*, L. R. 3 P. & D. 233. An order properly made could, for good cause, be set aside by the Judge on the merits, and the defendant allowed in to defend, but the Judge could impose terms: *Watt* v. *Barnett*, 3 Q. B. D. 183, 363. The Judge would, by the order, prescribe what is to be done instead of personal service. and, if it appeared that the defendant had absconded, leaving a wife, service on her would probably be made one of the terms of the order (*Bank of Whitehaven* v. *Thompson*, W. N. 1877, 45), or that a copy of the summons be left at the defendant's last place of abode or of business: see *Cook* v. *Dey*, 2 Chan. D. 218. Under the 20th section of the C. L. P. Act, if the Judge finds that the writ has come to the knowledge of the defendant, or that he wilfully evades service of it and has not appeared, he may order that the suit proceed as if personal service had been effected. Under this section the knowledge of the summons, or the wilful evasion of the service of it, or that the defendant has absconded, are matters to be established to the satisfaction of the Judge, *before* an order *for substitutional service* can be granted. If the Judge is of opinion that a case has been made out for making the order, he may do so by directing that the summons may be served, "in such manner, at such place or upon such person, for the defendant, primary debtor or garnishee, as to him may seem proper." After everything has been done which the order prescribes, "substitutional service" will have been effected, and both parties will have the same rights, in every respect, as if personal service had been *then* effected. The legislature has, under certain circumstances, allowed personal service to be dispensed with, but has not, in other respects, altered the rights of the parties in the suit. Before the next step can be taken, on behalf of the plaintiff, there must be an affidavit filed, shewing a due observance of the Judge's order. On this being done, the suit is in the same position as if an affidavit of personal service had been made and filed. The service would only be complete, and the time for entering defence would only commence to run from the performing of the *last* act, in regard to substitutional service, which the terms of the Judge's order had imposed. In the foregoing remarks, for brevity only, the case of a defendant has been taken, but what has been or may be said, in regard to that party to a suit, has equal application to the case of a primary debtor or garnishee as well. The section does not require the affidavit to be made by any particular person, so that it can be made by any person acquainted with the facts; but, as the attempts at service must be shewn, it is suggested that the affidavit of the Bailiff would be the best on which to apply. Care will require to be taken in granting orders, under this section, for fear that Bailiffs may too often take advantage of its provisions to save themselves the trouble of making proper exertions to effect personal service. As the rule is that no mileage is taxable to the Bailiff, unless service of the summons has actually been effected by him, and, as that rule must, it is submitted, apply here, it will probably be found that a prospective loss of mileage will be an incentive to increased vigilance. It will be observed that

the evasion of service must be *wilful*, so that the mere *passiveness* of the defendant, without some attempt on the part of the officer to effect service, and of his being hindered or prevented from doing so, would not be sufficient. What inquiries were made to discover the defendant's residence should be shewn: *Nugee* v. *Swinford*, 9 Dowl. 1038. The calls made by the Bailiff, to see the defendant, should, if possible, unless there was something extraordinary in the circumstances, be made on separate days: *Cross* v. *Wilkins*, 4 Dowl. 279; *Jamieson* v. *Wilkins*, 2 Dowl. N. S. 331; see Chitty's Forms, 11th Ed. 78. The affidavit should shew where the calls were made, and set out with reasonable detail the answers that were given, and by whom, and, if they represented the party to have been from home, circumstances must be shewn to falsify the statement, if that is relied on: *Price* v. *Bower*, 2 Dowl. 1; *Whitehorne* v. *Simone*, 1 C. & J. 402; *Smith* v. *Hill*, 2 Dowl. 225; *Waddington* v. *Palmer*, 2 Dowl. 7; *Houghton* v. *Howarth*, 4 Dowl. 749. Where, however, there is clear *prima facie* proof that the defendant knew of the proceeding and avoided it, these particulars would be unnecessary: *Gibson* v. *Wilson*, 3 Jur. 24. In the case of *Johnson* v. *Disney*, 2 Dowl. 400, the servant, upon being told by the person who went to serve the process, that legal proceedings would be taken, went upstairs, and said, on her return, that her mistress, the defendant, would call and pay the claim, it was held that subsequent proceedings could be taken. Where the defendant's residence could not be discovered, but a copy of the writ had been sent to an address to which letters had been directed, and which defendant had answered, and he had subsequently corresponded with the plaintiff's attorney on the subject of the claim, this was held sufficient on which to found a distringas though no calls or appointments had been made (*Gorringe* v. *Terrewest*, 2 L. M. & P. 12), and which, it is submitted, would be sufficient to obtain an order for substitutional service under this section. It is here suggested, as one of the most effectual means of bringing a summons to the knowledge of a defendant, the leaving by the Bailiff of a copy of it at the residence or place of business of the defendant, or by transmitting it to his post-office address. Taken in connection with other circumstances, which should be stated in the affidavit, it would, in many cases, presumably shew "that the summons had come to the knowledge of the defendant." It must not, however, be supposed that such a course would, *in itself*, be sufficient, as will be seen from what has already been said under this section. Necessary attempts at service of the defendant, and reasonable inquiries, could not be dispensed with. It is difficult to reconcile the case of *Davies* v. *Westmacott*, 7 C. B. N. S. 829, with the other authorities on this subject.

The following is given as a general form of affidavit for order for substitutional service, but it must be borne in mind that seldom are the facts of two cases alike, so that each must depend on its own circumstances, and be framed accordingly:

In the Division Court for the County of .

A. B., Plaintiff, against C. D., Defendant.

I, E. F., of the of , in the County of , Bailiff of the above-mentioned Court (or as the case may be), make oath and say:

1. That on or about the day of last past (or instant), I received from the Clerk of this Court the annexed summons and particulars of claim thereto attached, for service on the above-named defendant.

2. That, in accordance with my duty in that respect, I did, on the day of instant (or last past), attend for the purpose of serving the said summons and claim on the defendant, at his place of residence at the of , and, on enquiring for the said defendant, was informed by a person at and in the said place of residence, who represented herself to be, and whom I believe to have been, the wife (or as the case may be; and if the name of the

other person is known, it had better be stated) of the said defendant, that the said defendant was not at home (here state the answer given), and I then stated to the said person the nature of my business, and told her (or him) that I called to serve the defendant with the said summons and claim, and that I would call again for that purpose, at the said place of residence, on the day of then next, at or about of the clock in the noon. [*Here state what calls and other attempts were made to effect service, what, if anything, was done, and what the wife or other members of the family said in reply to the questions asked about the defendant, and his knowledge of the proceedings. If the defendant has absconded, the affidavit should here state when he absconded, and where he has gone to, if that can be ascertained, and his post-office address there, and for what purpose or with what object he went away. The post-office address of the defendant while he lived in Ontario should also be given, and generally such facts and circumstances should be shewn as to make a Judge believe that all reasonable efforts had been made to effect personal service, and that either the summons had come to the knowledge of defendant, or that he wilfully evaded service of the same, or had absconded.*

3. That I have used all due means in my power to serve the said defendant personally with a true copy of the said summons and claim, but have not been able to do so; and for the reasons aforesaid, I verily believe that the said summons has come to the knowledge of the defendant (*or* "that he wilfully evades the service of the same," *or* that he has absconded to," naming the place, particularly, if possible, to which he went, and when.)

Sworn, &c.

The affidavit should state that the calls have been made at the defendant's place of *residence*, unless the defendant has no known place of residence, and that reasonable efforts had been made to ascertain it: Chitty's Forms, 11th Ed. 77. What the officer said (*Dubois* v. *Lowther*, 4 C. B. 228), and the answers to his inquiries (*Fisher* v. *Goodwin*, 2 C. & J. 94), should be distinctly stated in the affidavit.

The following is given as a form of order:

In the Division Court for the County of .

A. B., Plaintiff, *v.* C. D., Defendant.

Upon reading the affidavit of E. F., and upon hearing the plaintiff, by his attorney (or agent), I do order that substitutional service of the summons and claim herein, and service of this order, may be made on the defendant by leaving a copy of each with G. H., at the defendant's (last known) residence (or place of business), and by sending another copy of each prepaid to the defendant at (*here state his P. O. address in Ontario, or if he has absconded, his P. O. address elsewhere, if known, and any other terms that the Judge may deem necessary*); and upon such being done, the plaintiff may proceed in this action as if personal service had been effected on the defendant.

Dated this day of , 188 . Judge.

As has already been remarked, on the plaintiff's doing *all* that the order prescribes, service will then be considered as complete, but not before. The defendant would have all the rights of a personal service. A copy of the order had better be served with the copy (or copies) of summons and claim, and the original with the affidavit of service of both of them left with the Clerk. It is suggested that the Bailiff had better not undertake these proceedings himself, as being neither part of his duty, nor likely to be sufficiently accurate. His duty would be performed by reporting the matter to the Clerk or the plaintiff, or his attorney or agent, and being ready to make affidavit of the facts when required. The words "such Judge," here used, refer to the Judge of the Court out of which the summons issues, or if the suit became a cause in another Court, then by the Judge of that Court.

Costs of witnesses in certain cases.

63. Where the defendant having disputed the plaintiff's claim (*i*) afterwards and before the opening of Court confesses judgment (*j*) or pays the claim so short a time before the sitting of the Court that the plaintiff cannot in the ordinary way be notified thereof, (*k*) and without such notice the plaintiff *bona fide* and reasonably incurs expenses (*l*) in procuring witnesses or in attending at Court, (*m*) the Judge may, in his discretion, (*n*) order the defendant to pay such costs or such portion thereof as to him may seem just.

Sec. 163 amended: renewal of execution.

64. Section one hundred and sixty-three is amended by striking out the words "thirty days" where the same occurs in the fourth line thereof, and by substituting therefor the words "six months." (*o*)

Costs in garnishee cases.

65. The Judge in any case brought to garnish a debt, (*p*) may, in giving judgment on behalf of the primary creditor,

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(*i*) It is not necessary for a defendant, technically speaking, to dispute any claim, except in an action brought on a specially endorsed summons: Sinclair's D. C. Act, 99, 242, *et seq.*

(*j*) As to when the defendant may confess the debt, see Sinclair's D. C. Act, 170, 268; Arch. Pract., 12th Ed., 942, and following pages.

(*k*) It is the duty of the Clerk, under the 95th Rule, forthwith to notify any party for whom he may receive money by virtue of his office. See also section 56 of this Act.

(*l*) What expenses have been "*bona fide* and reasonably" incurred in procuring witnesses must always be a fact to be determined by the Clerk on taxation, subject to appeal to the Judge (Sinclair's D. C. Act, 32), with reference to the circumstances of each particular case. In regard to witness fees in such a case, it may be said that "the costs of all witnesses will be allowed whom a prudent Attorney, having regard to the interests of his client, would have brought, though they may not have been called:" Lush's Pract., 3rd Ed., 895; Sinclair's D. C. Act, 328; *Swift* v. *Jewsbury*, L. R. 9 Q. B. 560.

(*m*) A party to a suit is, under certain circumstances, entitled to his fees as a witness: see *Howes* v. *Barber*, 18 Q. B. 588; *Fox* v. *Toronto & Nipissing Ry. Co.*, 7 P. R. 157; Sinclair's D. C. Act, 327, and cases there cited.

(*n*) As to the manner in which a Judge should exercise his discretion, see note (*u*) to section 16.

(*o*) The 163rd section of the Division Courts Act, as it now stands, allows an execution to be renewed from time to time for six months from the date of each renewal. It is here suggested that this is a most dangerous provision, and appears to be holding out a premium to Bailiffs to be lax in the performance of their duties on executions. It must, however, be kept in mind that executions can only be renewed "at the instance of the execution creditor."

(*p*) In what cases and under what circumstances a debt can be garnished, the reader is referred to Sinclair's D. C. Act, 147, and the following pages. In addition to the cases there cited, reference is made to the following authorities. All "debts," whether legal or equitable, owing or accruing to the judgment debtor are garnishable: *Wilson* v. *Dundas*, W. N. 1875, 232; *Summers* v. *Mor-*

phew, 61 L. T. Journ. 140; see, however, *Boyd* v. *Haynes*, 5 P. R. 15. Under the law formerly rent accruing due was not attachable (*Com. Bank* v. *Jarvis*, 5 U. C. L. J. 66; *McLaren* v. *Sudworth*, 4 U. C. L. J. 233); but since chapter 136 of the Revised Statutes, it is submitted that the rent can be apportioned so as to render that part of it which has accrued garnishable: see *Jones* v. *Thompson*, E. B. & E. 63, *per* Crompton, J. As to attaching money in a Sheriff's hands, on the authority of *Murray* v. *Simpson*, 8 Irish C. L. R. App. xlv., see the doubt cast on the authority of that case by the decision of *O'Neill* v. *Cunningham*, 6 Irish C. L. R. 503, and *Williams* v. *Reeves*, 12 Irish Chan. R. 173. A verdict for unliquidated damages not reduced to judgment is not of course garnishable (*Dresser* v. *Johns*, 6 C. B. N. S. 429); nor did it pass to the assignee in insolvency (*In re Newman, Ex parte Brooke*, 3 Chan. D. 494; *White* v. *Elliott*, 30 U. C. R. 253), even after judgment: *Ex parte Vine; In re Wilson*, 8 Chan. D. 364. The debt must be one in which the debtor is beneficially interested (*Westoby* v. *Day*, 2 E. & B. 605; *Wise* v. *Birkenshaw*, 29 L. J. Ex. 240); and the assignee of the debt need not give notice of his assignment: *Pickering* v. *Ilfracombe Ry. Co.*, L. R. 3 C. P. 235, and *Robinson* v. *Nesbitt*, L. R. 3 C. P. 264, and the cases cited at page 151 of Sinclair's D. C. Act. Money paid into the hands of a Deputy Clerk of the Crown, Clerk of a County or Division Court, would not, it is submitted, be garnishable as a "*debt*" due from such officer to the judgment debtor: *Dolphin* v. *Layton*, 4 C. P. D. 130. In *Richardson* v. *Elmit*, 2 C. P. D. 9, it was held that a mere notice to treat under the English Land Clauses Act did not constitute a debt which could be attached. As to attaching superannuation allowances and pensions, in addition to *Innes* v. *East India Co.*, 17 C. B. 351, at page 148 of Sinclair's D. C. Act, see *Dent* v. *Dent*, 1 P. & D. 366; *Ex parte Hawker*, L. R. 7 Ch. 214; *Willcock* v. *Terrell*, 3 Ex. D. 323; *Sansom* v. *Sansom*, 4 P. D. 69. The creditor must be one who can enforce immediate payment; therefore the holder of a bond of a corporation, containing a condition that all bondholders should be paid *pari passu*, was held not to be such a creditor, since attachment would have given him priority over other bondholders: *Kennett* v. *Improvement Commissioners*, 11 Ex. 349. A debt due to a testator's estate may be attached on a judgment against his executors as such: *Fowler* v. *Roberts*, 2 Giff. 226; *Burton* v. *Roberts*, 6 H. & N. 93. Where the order is made against the executors of the debtor of the judgment debtor, the fact that they are sought to be charged as such executors should appear on the face of the proceedings: *per* Mellish, L. J., in *Stevens* v. *Phelips*, L. R. 10 Chan. 417, 423. In addition to *Lowe* v. *Blakemore*, L. R. 10 Q. B. 485, and the other cases cited with it at page 150 of Sinclair's D. C. Act, see *Slater* v. *Pinder*, L. R. 6 Ex. 228, affirmed L. R. 7 Ex. 95; *Ex parte Rocke*, L. R. 6 Ch. 795; *In re Stanhope Silkstone Collieries Co.*, 11 Chan. D. 160. As to the effect of an assignment by the debtor for the benefit of his creditors, see *Wood* v. *Dunn*, L. R. 2 Q. B. 73; and if the assignment is an equitable one, see *Brice* v. *Bannister*, 3 Q. B. D. 569: *Ex parte Hall, In re Whitting*, 10 Chan. D. 615; *Mitchell* v. *Goodall*, 44 U. C. R. 398; Sinclair's D. C. Act, 158 (*a*); and of a composition deed, see *Kent* v. *Tomkinson*, L. R. 2 C. P. 502; *Culverhouse* v. *Wickens*, L. R. 3 C. P. 295. The Judge has no power to go into the state of accounts between the garnishee and the judgment creditor, or to allow the former to deduct any amount whatever from the latter, but must order execution to issue for the whole amount due from the judgment debtor to the judgment creditor (*Sampson* v. *Seaton and Beer Ry Co.*, L. R. 10 Q. B. 28), but he may, however, go into the state of accounts between the judgment debtor and the garnishee, and give effect to any set-off or cross-debts arising before the order or summons (under the 130th section of the Division Courts Act, *ib.*), but not after the date of such order or summons: *Tapp* v. *Jones*, L. R. 10 Q. B. 591. A claim for unliquidated damages by the garnishee against the debtor could not be gone into, although in England that probably could be done under their Judicature Acts: see *Young* v. *Kitchin*, 3 Ex. D. 127. Under the 310th section of

award the costs of the proceeding (*q*) to the primary creditor out of the amount found due from the garnishee to the primary debtor, anything in the Division Courts Act to the contrary notwithstanding.

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the C. L. P. Act, there must be a *bona fide* dispute on some substantial ground, otherwise an order for payment would be made, and not an order for a writ (see *Newman* v. *Rook*, 4 C. B. N. S. 434); but, in general, an order will be made for an issue where there is a doubt about the garnishee's liability for the debt: *Seymour* v. *Corporation of Brecon*, 29 L. J. Ex. 243. If the judgment creditor should decline to proceed by an issue, the attachment would be discharged, and he ordered to pay the costs: *Wintle* v. *Williams*, 3 H. & N. 288. As remarked by Pollock C. B., at page 290, in the report of the last case: "The judgment creditor m[illegible] either go on, or retire and pay the costs. If he does not demand the writ, i[illegible] because he knows he is in the wrong." If he proceeds, the successful part[illegible] recovers his costs, though nothing be said about them in the order: *Johnson* v. *Diamond*, 11 Ex. 431. In the Division Court, the Statute of course prescribes a different practice. The summons or attaching order only takes effect from the service of it: *Hamer* v. *Giles*, 11 Chan. D. 942. It is important for a garnishee to see that the particular Division Court, in which the proceeding is, has jurisdiction to entertain or hear the matter before paying over the amount due by him: *Parkinson* v. *Clendinning*, 7 P. R. 367. In *Wilson* v. *The Corporation of Huron and Bruce*, 8 U. C. L. J. 136, it was held that money in the hands of a Sheriff, arising from a sale of lands for taxes, could not be attached at the instance of creditors of the County Corporation as being a debt due from the Sheriff to such Corporation. In the same case it was also held that redemption moneys paid to the County Treasurer by the owners of land sold for taxes within one year from the day of sale, and banked in the name of the County Treasurer, could not be attached at the instance of a creditor of the Corporation of the County, as a debt due by the Bank to such Corporation: 8 U. C. L. J. 135. The defendants raised money, by the issue of capital stock, to complete a portion of their railway line. By an arrangement between them and the D. Railway Company, confirmed by Act of Parliament, the line was worked by the latter Company, who provided and paid to the defendants, half-yearly, a sum of money for the payment of interest on the stock. Judgment having been recorded by the plaintiff against the defendants, and one of the half-yearly instalments being due, *held* that it could not be attached in the hands of the D. Railway Company as a debt under the C. L. P. Act: *Bouch* v. *Sevenoaks, Maidstone and Tunbridge Ry. Co.*, 4 Ex. D. 133. A debt due by the garnishee to a person who is a trustee of it for the judgment debtor, cannot be attached. It was so held, in *Boyd* v. *Haynes*, 5 P. R. 15, and that there must be a legal debt, due by a legal debtor to a legal creditor, to justify an attachment. In view of *Wilson* v. *Dundas*, W. N. 1875, 232, and *Summers* v. *Morphew*, 61 L. T. Jour. 140, it would probably be held now that an equitable debt is also garnishable. It has been held that neither a rule or order for the payment of costs (*Re Frankland*, L. R. 8 Q. B. 18; *Cremetti* v. *Crom*, 4 Q. B. D. 225), nor an order for the costs of an interpleader issue (*Best* v. *Pembroke*, L. R. 8 Q. B. 363), nor an order of the Court of Chancery for the payment of money (*Re Price*, L. R. 4 C. P. 155), could be enforced by attachment of debts. It is submitted that the same rules of law must prevail under the C. L. P. Act and this Act. See also *Picken* v. *Victoria Ry. Co.*, 44 U. C. R. 372.

(*q*) Where there is a sufficient sum in the hands of the garnishee to pay the costs, there is no reason why so much as is necessary to do so should not be so applied: see Sinclair's D. C. Act, 156 (*m*). This would only be applicable to

66. The Board of County Judges, (*r*) or any three of them, may frame general rules and forms concerning the practice, and in relation to the provisions of this Act, in as ample a manner as they may now make and frame such rules and forms under the powers conferred by the Division Courts Act, but subject nevertheless to the like restrictions and conditions, and to the approval, disallowance or amendment thereof by the Judges of the Superior Courts of Law, as in the case of rules and forms framed by them by virtue of the powers conferred by the said Division Courts Act. Board of County Judges to make rules.

67. This Act shall not affect any action or proceeding pending (*s*) at the time of the passing thereof (*t*). Pending proceedings not affected.

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cases in which the garnishee summons was issued on or since the 5th of March, 1880.

(*r*) This section gives the Board of County Judges, or any three of them, power to "frame general rules and forms" in reference to the practice, and in relation to the provisions of this Act, in as full and ample a manner as they can frame *such* rules and forms under the General Act. By section 238, subsection 3, of the Division Courts Act, power is given to such Board to make rules in relation to the duties and services to be performed by Clerks and Bailiffs, "*and to the fees to be received by them.*" Any such words have apparently been purposely omitted here, and certainly they cannot be introduced or supplied: *Galloway* v. *Mayor and Commonalty of London*, L. R. 1 H. L. 34. The 68th section, however, declares that this Act "shall be read with and as part of the Division Courts Act, and the general rules, forms, practice, procedure *and fees* applicable to Division Courts, shall apply thereto and to proceedings thereunder." It may be argued that by these general words (independently of the special provision made under this section as to the power of the Board of Judges over the general rules and forms), that power is here given to frame a new tariff of fees for services performed by Clerks and Bailiffs under this Act. In view of these two sections, it is difficult to say what the power of the Board of Judges is in respect to fees under this Act. All Statutes imposing a tax other than to the Government are, as a general rule, construed strictly. It is laid down in a standard work on the interpretation of Statutes, that "Statutes which impose pecuniary burdens, also, are subject to the rule of strict construction. It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties. The subject is not to be taxed, unless the language by which the tax is imposed is perfectly clear and free from doubt. In a case of doubt, the construction most beneficial to the subject is to be adopted:" Maxwell on Statutes, 259, see also p. 261. Whatever doubt there may be in this matter, the writer leaves it without comment to the Board of Judges to solve or the Legislature if necessary to remove.

(*s*) An action or proceeding may be said to be pending after the issue of the summons and before judicial determination of the subject matter of it. If an ordinary summons or judgment summons was issued when this Act came into force, the Act would not apply to such proceeding, but it would apply to any summons issued or proceeding taken *since* the Act, though upon a judgment recovered *before* the 5th of March, 1880. This Act would, it is submitted, apply to what was known as a second judgment summons, and render an affidavit

Act part of D. C. Act.

68. This Act shall be read with and as part (*u*) of the Division Courts Act, and the general rules, forms, practice, procedure and fees applicable to Division Courts shall apply thereto, and to proceedings thereunder.

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under section 59 of this Act necessary for all judgment summonses issued since the Act.

(*t*) This Act came into force on the 5th of March, 1880, and took effect from the earliest moment of that day: *R.* v. *Edwards*, 9 Ex. 32; *Converse* v. *Michie*, 16 C. P. 167.

(*u*) Statutes on the same subject must be construed together: *Anon.* Lofft, 398. If there are several Acts upon the same subject, they are to be taken together as forming one system, and as interpreting and enforcing each other: *R.* v. *Palmer*, 2 East P. C. 893. It is a rule of construction that several Statutes on the same subject are to be read as *one* Statute: *McWilliam* v. *Adams*, 1 Macq. H. L. 120. It was declared by the 3rd section of the English County Courts Act of 19 & 20 Vic. cap 108, that that Act and the former County Court Act of 9 & 10 Vic. cap. 95, should be "read and construed as one Act as if the several provisions in the said recited Acts contained, not inconsistent with the provisions of this Act, were repealed and re-enacted in this Act." In remarking on these words, in *Waterloo* v. *Dobson*, 27 L. J. Q. B. 55, Lord Campbell, C. J., said, "That clause is frequently inserted in modern Acts of Parliament, but if the two Acts be in *pari materiâ*, the construction would be the same without it." The repealed clauses of the General Division Courts Act may be referred to for the purpose of construing this Statute: *Ex parte Copeland*, 22 L. J. Bank. 17. As remarked by Sir Peter Maxwell, in his work on the Interpretation of Statutes, at pages 27 and 28, that "where there are earlier Acts relating to the same subject, the survey must extend to them, for all are considered as forming one homogeneous and consistent body of law, and each of them may explain and elucidate every other part of the common system to which it belongs." At page 29 the same learned author says: "Not only is the latter Act construed by the light of the earlier, but it sometimes furnishes a legislative interpretation of the earlier."

FORMS IN APPEALS FROM THE COUNTY COURT.

FORM OF STAY OF PROCEEDINGS PREPARATORY TO APPEAL.

In the County Court of the County of .

A. B., *Plaintiff*,

v.

C. D., *Defendant*.

Upon the application of the plaintiff (or defendant), I hereby order that proceedings herein be stayed for ten days from the day of A.D. 188 , in order to afford the plaintiff (or defendant) time to give the security required to enable him to appeal in this cause; which security I hereby direct to be by a bond in the sum of $ or the sum of $ paid into Court.

Dated this day of A.D. 188 .

Judge.

APPEAL-BOND WHERE THE PLAINTIFF APPEALS AGAINST A VERDICT FOR THE DEFENDANT OR A NONSUIT.

Know all men by these presents, that we, A. B., of, &c., and E. F., of, &c., and G. H., of, &c., are jointly and severally held and firmly bound to C. D., of, &c., in the penal sum of dollars of lawful money of Canada (*usually double the probable amount of defendant's costs in the Court below and in appeal, and where the defendant has a verdict in his favour on a plea of set-off of such sum too*), to be paid to the said C. D., or to his certain Attorney, executors, administrators or assigns. For which payment well and faithfully to be made we bind ourselves, and each and every of us in the whole, our and each and every of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this day of in the year of our Lord one thousand eight hundred and eighty .

Whereas a certain action [*or* "a certain interpleader issue," *or as the case may be,*] is now depending in the County Court of the County of , wherein the above-bounden A. B. is plaintiff and the above-named C. D. is defendant; and whereas the said action (or cause) came on to be tried at the last June (or December) sittings of the said Court [*or* "at the last April or October sittings of the said Court for trials of causes without a jury," *or* "on the day last past (or instant) when the Judge of the said Court held a special sittings thereof for trials of causes without a jury,"] when a verdict was rendered therein for the said C. D. [*or* "when the said A. B. was nonsuited."]

And whereas the said A. B., in due course, moved in said cause for and obtained a Rule *Nisi* from the said Court to set the said verdict (or nonsuit) aside, and for a new trial to be had between the parties [*or* "and to enter a verdict therein for the said A. B. instead," *or as the case may be,*] which, after argument, was discharged.

And whereas the said A. B., being dissatisfied with the decision of the Judge of the said Court upon said Rule *Nisi*, is desirous of appealing therefrom to the Court of Appeal for the Province of Ontario, and, in pursuance of the Statute in that behalf, this bond is given as security to enable the said A. B. so to appeal; and whereas the above-bounden E. F. and G. H., at the request of the said A. B., have agreed to enter into the above-written obligation for the purposes aforesaid.

Now, therefore, the condition of this obligation is such, that if the above-bounden A. B. shall abide by the decision of the said cause by the said Court of Appeal, and pay all sums of money and costs, as well of the said suit as of the said appeal, awarded and taxed to the said C. D., then this obligation shall be void, otherwise the same shall remain in full force and effect.

Signed, sealed and delivered by the above-bounden A. B., E. F. and G. H., in the presence of J. K.

A. B. [Seal.]
E. F. [Seal.]
G. H. [Seal.]

APPEAL BOND WHERE THE DEFENDANT IS APPELLANT.

Know all men by these presents, that we, C. D., of, &c., and E. F., of, &c., and G. H., of, &c., are jointly and severally held and firmly bound to A. B., of, &c., in the penal sum of dollars of lawful money of Canada (*usually double the amount of the verdict and costs in the Court below and the probable costs of the appeal, or such lesser sum as the Judge directs*), to be paid to the said A. B., or to his certain Attorney, executors, administrators or assigns. For which payment, well and faithfully to be made, we bind ourselves, and each and every of us in the whole, our and each and every of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this day of in the year of our Lord one thousand eight hundred and eighty .

Whereas a certain action [*or* "a certain interpleader issue," *or as the case may be,*] is now depending in the County Court of the County of wherein the above-named A. B. is plaintiff, and the above-bounden C. D. is defendant; and whereas the said action (or cause) came on to be tried at the last June (or December) sittings of the said Court [*or* "at the last April or October sittings of the said Court for trials of causes without a jury," *or* "on the day of last past (or instant), when the Judge of the said Court held a special sittings thereof for trials of causes without a jury,"] when a verdict was rendered therein for the said A. B.

And whereas the said C. D. in due course moved in said cause for and obtained a Rule *Nisi* from the said Court to set the said verdict aside and for a new trial to be had between the parties [*or* "and to enter a verdict therein for the said C. D. instead," *or as the case may be,*] which, after argument, was discharged.

And whereas the said C. D., being dissatisfied with the decision of the Judge of the said Court upon said Rule *Nisi*, is desirous of appealing therefrom to the Court of Appeal for the Province of Ontario; and in pursuance of the Statute in that behalf, this bond is given as security to enable the said C. D. so to appeal; and whereas the above-bounden E. F. and G. H., at the request of the said C. D., have agreed to enter into the above written obligation for the purposes aforesaid.

Now, therefore, the condition of this obligation is such that if the above-bounden C. D. shall abide by the decision of the said cause by the said Court of Appeal, and pay all sums of money and costs, as well of the said suit as of the said appeal, awarded and taxed to the said A. B., then this obligation shall be void, otherwise the same shall remain in full force and effect.

Signed, sealed and delivered by the above-bounden C. D., E. F. and G. H., in the presence of J. K.

C. D. [Seal.]
E. F. [Seal.]
G. H. [Seal.]

APPEAL BOND ON DEMURRER.

Know all men by these presents, that we, A. B., of, &c., and E. F., of, &c., and G. H., of, &c., are jointly and severally held and firmly bound to C. D., of, &c., in the penal sum of dollars of lawful money of Canada (*usually double the probable amount of costs in the Court below and in appeo , and if the demurrer determines the suit, then also in double the amount depending upon the decision, in addition, or such lesser sum as the Judge directs*), to be paid to the said C. D., or to his certain Attorney, executors, administrators or assigns. For which payment, well and faithfully to be made, we bind ourselves, and each and every of us in the whole, our and each and every of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this day of in the year of our Lord one thousand eight hundred and eighty .

Whereas a certain action is now depending in the County Court of the County of wherein the above-bounden A. B. is plaintiff, and the said C. D. is defendant; and whereas certain questions of law arose in said cause by way of demurrer, and whereas also said demurrer was duly set down for argument, and was argued in said Court; and thereupon, in due course, judgment was given on the said demurrer in favour of the said C. D.

And whereas the said A. B., being dissatisfied with the decision of the Judge of the said Court upon the said demurrer, is desirous of

appealing therefrom to the Court of Appeal for the Province of Ontario; and in pursuance of the Statute in that behalf, this bond is given as security to enable the said A. B. so to appeal; and whereas the above-bounden E. F. and G. H., at the request of the said A. B., have agreed to enter into the above written obligation for the purposes aforesaid.

Now, therefore, the condition of this obligation is such that if the above-bounden A. B. shall abide by the decision of the said cause by the said Court of Appeal, and pay all sums of money and costs, as well of the said suit as of the said appeal, awarded and taxed to the said C. D., then this obligation shall be void, otherwise the same shall remain in full force and effect.

Signed, sealed and delivered by the above-bounden A. B., E. F. and G. H. in the presence of J. K.

A. B. [Seal.]
E. F. [Seal.]
G. H. [Seal.]

[If the defendant appeals, the above form can easily be adapted.]

AFFIDAVIT OF JUSTIFICATION.

In the County Court of the County of

A. B., *Plaintiff*,

AGAINST

C. D., *Defendant.*

I, E. F., of, &c., one of the sureties for A. B., within named, the above-named plaintiff [*or* "for C. D., within named, the above-named defendant,"] in this cause, on the annexed appeal-bond, make oath and say:

That I am a householder, [*or* "freeholder," *as the case may be*,] residing at (*give particular description of the place of residence*); that I am worth property to the amount of dollars ("*the amount of the penalty of the bond*," Rev. Stat. cap. 43, s. 38), over and above what will pay all my just debts (*if bail or security in any other action add*, and every other sum for which I am now bail or security); that I am not bail or security for any plaintiff or defendant except

in this action (*or, if bail or security in any other action or actions, add*), except for C. D., at the suit of E. F., in the Court of in the sum of $, for G. H., at the suit of J. K., in the Court of in the sum of $, (*specifying the several actions, with the Courts in which they are brought, and the sums in which the deponent is bail or security*). Sworn, &c.

[See County Court Rule 84, and the form of affidavit of justification there given. The affidavit of the other surety will be the same *mutatis mutandis.*]

AFFIDAVIT OF EXECUTION.

In the County Court of the County of .

A. B., *Plaintiff,*

AGAINST

C. D., *Defendant.*

I, J. K., of, &c., make oath and say :

1. That I was personally present and did see the annexed appeal-bond duly signed, sealed and executed by A. B. (*or* C. D.), E. F. and G. H., the obligors therein mentioned.

2. That I am personally acquainted with the said parties.

3. That I am a subscribing witness to the execution of the said appeal-bond by all of the said parties; and that the signature "J. K." affixed thereto, in attestation of such execution, is in my own proper handwriting; and that such bond was so executed at, &c. Sworn, &c.

[For the law relating to appeals generally, see the notes to sections 17 to 22, inclusive, *ante.*]

PAY LIST OF JURORS

Summoned to attend at a Sittings of the Division Court of the County of on the day of A.D. 18 .

No. on List.	NAMES OF JURORS.	DATE OF SERVICE.	ATTENDANCE. 1st Day.	ATTENDANCE. 2nd Day.	AMOUNT DUE EACH JUROR. $	AMOUNT DUE EACH JUROR. c.	SIGNATURE OF JUROR ACKNOWLEDGING RECEIPT OF MONEY.
1							
2							
3							
4							
5							
6							
7							
8							
9							
10							
11							
12							
	Total amount paid by Clerk $						

I, , presiding Judge of the above-mentioned Court, do hereby, in pursuance of the forty-seventh section of the Division Courts Act, 1880, certify to the Treasurer of the said County of that the above is a true statement of the amount paid by the Clerk of the said Court to each of the Jurors mentioned in the above list, who were summoned and attended said Sittings, and neither of whom so attended as a witness in any cause or as a litigant in his own behalf, amounting in the whole to $.

Dated this day of 188 .

Judge.

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ADDITIONAL

RULES AND ORDERS

FOR

THE DIVISION COURTS.

(Annotated by the Author of "Sinclair's Division Courts' Act.")

PROVINCE OF ONTARIO.

We, the undersigned, "the Board of County Judges," acting under and in pursuance of the powers vested in us by "the Division Courts Act," have framed the following additional *(a)* General Rules and Orders, to be in force from and after *(b)* the first day of January, A.D. 1880, until otherwise ordered; and we do certify the same to the Honourable the Chief Justice of the Court of Queen's Bench of the Province of Ontario accordingly.

RULES.

RULE No. 171.—From and after the first day of January,

(a) These new Rules are in addition to those now existing, and do not alter them except where so expressed. The old Rules will be found at pages 236-278 of "Sinclair's Division Courts Act," where also the annotations of them appear.

(b) The first day of January is a legal holiday in the Division Courts [Rev. Stat., p. 5], and Clerks and Bailiffs need not do anything that day unless they please, but any act done on any legal holiday is nevertheless valid, but if done on Sunday it is void: *In re* Cooper and Cooper, 5 P. R., 256. The words "from and after" here mean *exclusive* of the first of January: Haggart *v.* Kernahan, 17 U. C. R., 341; Young *v.* Higgon, 6 M. & W., 49; Weeks *v.* Wray, L. R. 3 Q. B., 212, so that these new Rules and Tariff come into force on the *second* of January, 1880.

A.D. 1880, Rule No. 170 *(c)* of the Supplementary General Rules of the 26th June, 1874, and Schedule of Clerks' Fees (Form 127), and Schedule of Bailiffs' Fees (Form 128) shall be rescinded; and from and after the said first day of January, 1880, the fees set forth in the tariff hereto annexed, marked "Schedule of Clerks' Fees" (Form 130), and "Schedule of Bailiffs' Fees" (Form 131), shall be the fees to be received by the several Clerks and Bailiffs of Division Courts in Ontario, for and in relation to the duties and services to be performed by them, as officers of the said Courts, and shall be in lieu of all other fees heretofore receivable.

RULE No. 172.—At the opening of every Court, *(d)* and at such other times as the Judge shall require, the Clerk shall lay before the Judge the returns of Bailiffs under Rule 93, duly certified under Rule 94.

RULE No. 173.—The Clerk shall, at every sitting *(e)* of the Court, report in writing to the Judge as to the several sureties of himself and the Bailiff or Bailiffs of his Court, whether any

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(c) The original Rule, promulgated in 1874, was that on which the old tariff was based. It will be found at page 278 of "Sinclair's Division Courts Act." The present Rule prescribes a new tariff both for Clerks and Bailiffs, which having been duly approved of under the 240th section of the Division Courts Act, will come into force at the prescribed time. The new tariff, hereinafter given, will have to be consulted and used *exclusively* after the first of January, 1880. The fees therein prescribed are declared to be "in lieu of all other fees heretofore receivable." No other fees of any kind are properly chargeable by any Clerk or Bailiff.—*Sinclair's Division Courts Act* 338 *(a)*.

(d) By the 93rd and 94th Rules a certain return of business done by the Bailiff has to be made by him. This new Rule makes it the duty of the Clerk to lay such return before the Judge. It will hereafter be the duty of the Clerk to see that this return is duly made to him by the Bailiff. Should the Bailiff omit making this return to the Clerk he would be censurable, and if the omission were repeated without good cause, it would merit his dismissal or suspension.

(e) The Clerk is presumed to know the standing and position of the sureties not only of himself, but the Bailiff, better than the Judge. For that reason, among others, this Rule renders it incumbent upon him to report on that subject, in writing, mentioning any facts connected therewith, at "*every sitting of the Court.*" The object is evidently to so inform the Judge that he may, if necessary, for the security of the public and the protection of their interests, direct a new covenant to be filed.

of them have died, become insolvent *(f)* or left the County since his last report, and mentioning any facts connected therewith which ought to be made known to the Judge.

RULE No. 174 *(g)*.—Every Clerk is expected and enjoined to answer promptly all reasonable inquiries made touching their suits by the parties thereto, their attorneys or agents; if no postage stamp is sent him for reply, then such answer may be by post card.

RULE No. 175.—On payment of a fee of 5cts. *(h)* every Clerk, when required by parties paying costs, shall give a statement, in writing, of items in detail or transmit the same by postal card.

RULE No. 176.—The Bailiff receiving an execution shall immediately *(i)* endorse on the same a correct statement of the day and hour of the day when he receives such execution, and in addition to the formal return (Form 124) on every execution returned, he shall give a correct and full statement of the par-

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(f) The term "insolvent" here used does not mean insolvency under the Act merely, but it "is a man's not being in a condition to pay twenty shillings in the pound in satisfaction of all demands:" per Garrow, B., in Teale *v.* Younge, McClel. & Younge, 506; "Sinclair's Division Courts Act," 27 *(a)*.

(g) Promptitude of the Clerk in answering "all reasonable inquiries" is for his interest as well as that of the suitor. Neglect in that respect soon gives a Clerk a bad name among business people. The Clerk is not bound to answer any inquiries unless he is prepaid the postage, but if he chooses to do so, he may communicate by post card.

(h) The object of this is to compel Clerks, on payment of a small fee, to give such a "statement in writing of items *in detail*" as may enable parties to see if the charges for costs are such only as the law allows. It will be observed that the Clerk "shall" do so. The duty is imperative on him, and should he refuse, a mandamus would lie against him: Reg. *v.* Fletcher, 2 E. & B., 279; *In re* Linden and Wife *v.* Buchanan, 29 U. C. R. 1; and it would probably be granted with costs: Rev. Stat. 730; Reg. *v.* Langridge, 24 L. J. Q. B. 73.

(i) The meaning to be attached to the word "immediately" here is "forthwith," "without delay," or "at once," according to circumstances. Should a Bailiff be handed an execution on the street, the same despatch in making the endorsement would not be expected as if he received it at the Clerk's office. The better rule to adopt is to make it *at once*. The propriety of a Bailiff's doing that which this Rule directs will be found discussed at page 174 of "Sinclair's Division Courts Act."

ticulars, in detail, *(j)* of all his charges made for fees and disbursements in the execution thereof; and a similar statement in making returns of Writs of Replevin and Warrants of Attachment.

RULE No. 177*(k)*.—In case of any process or paper received for service or execution from a "Foreign Court," the Clerk so receiving the same and procuring the service or execution thereof shall, on returning the same, give a full and correct statement, in detail, of the items of all charges made for fees and disbursements in respect of such service or execution of process, and the Clerk who receives the same shall report to the Judge of his own county any charge made by the Clerk of the "Foreign Court" in excess of the allowance for fees made by the tariff.

RULE No. 178.—Rule 89 of the General Rules of the 1st of July, 1869, is amended as follows:—All the words after the word "Summons" in the said Rule are struck out, *(l)* and the following are substituted in lieu thereof:—"And the Bills given under Form 129 show the forms in which such Bills may be made out, and are to be taken as guides in framing and taxing such Bills."

(j) A general statement will not be sufficient. It must be given "*in detail*," showing particularly each item, and with reasonable distinctness what it is for. It will be observed that the necessity for it is not confined to Writs of Execution, but is made to apply to Writs of Replevin and Warrants of Attachment as well.

(k) This is a most necessary rule, and will be found exceedingly beneficial. The abuses that have been practised under the late system have been numerous, and in many cases flagrant. It is the *duty* of the Clerk to report to his Judge any improper charge on the part of any other Clerk, so that such Judge may call the attention of a brother Judge to the improper conduct of his Clerk. This will have a most salutary effect on Clerks disposed to exact more than their proper fees.

(l) The amendment can easily be made with the pen to Rule 89 (S's D. C. Act, 258). The Clerk is to be guided by the forms of the bills of costs, not only in "framing," but in "taxing" bills of costs. They are given in *illustration* and as *explanatory* of the schedule of fees, and should be rigidly observed by all Clerks.

RULE No. 179.—Form 114 *(m)* in the Schedule of General Forms is hereby rescinded, and Form 129 is substituted therefor.

RULE No. 180.—When any notice required to be given to any of the parties to a suit is sent through the Post Office, the Clerk shall register *(n)* the letter containing such notice, and shall obtain and preserve with the other papers in the suit, a certificate of such registration.

Dated 28th November, 1879.

JAS. ROB'T GOWAN,
Senior Judge C. S., Chairman.

S. J. JONES,
County Judge, Brant.

D. J. HUGHES,
County Judge, Elgin.

Approved.

JOHN H. HAGARTY, C.J.,
ADAM WILSON, C.J., C.P.,
THOMAS GALT, J.,
M. C. CAMERON, J.Q.B.,
F. OSLER, J.C.P.

(m) See "Sinclair's Division Courts Act," 329.

(n) This will be a useful Rule for two reasons, first, to ensure safe transmission of the notice; and, second, as evidence of the date when notice mailed, which frequently becomes important. See "Sinclair's Division Courts Act," 116, 117.

FORMS.

FORM 129.

BILL OF COSTS upon a claim for, say, $20 up to and including judgment entered by the Clerk, upon special summons, no notice of defence being given.

Clerk's Fees.

Receiving claim, numbering and entering in Procedure Book	$0 15
Issuing summons, with necessary notices and warnings thereon	0 30
Copy of summons, including all notices and warnings thereon	0 20
Receiving and entering Bailiff's return to summons	0 10
Affidavit of service and administering oath to the deponent	0 25
Notice to plaintiff, when defendant has failed to give notice of defence, 10c.; postage and registration, 5c	0 15
Entering final judgment by the Clerk	0 40
Total Clerk's fees	$1 55

Bailiff's Fees.

Service of summons	$0 20	
Return of service, and attending Clerk's office to make necessary affidavit	0 10	
	$0 30	
Total Bailiff's Fees		0 30
Total costs		$1 85

Taxed this day of 18 .

Clerk.

BILL OF COSTS upon claim for, say $60.00, defended, cause tried, and judgment entered for plaintiff, with costs.

Clerk's Fees.

Receiving claim, &c	$0 15
Issuing summons, &c	0 40
Copy of summons, &c	0 20
Receiving and entering Bailiff's return, &c	0 10
Affidavit of service, &c	0 25
Subpœna to witness	0 10
Three copies	0 15
Notice of defence, &c., to plaintiff, and mailing same, 10c.; postage and registration, 5c.	0 15
Recording and entering judgment rendered at the hearing	0 40
Total Clerk's fees	$1 90

Bailiff's Fees.

Service of summons, &c	$0 30	
Attending to return, &c	0 10	
Service of subpœna (3 witnesses)	0 30	
Calling parties and their witnesses	0 15	
	$0 85	
Total Bailiff's fees	——	0 85
Total costs		$2 75

Taxed, this day of 18 .

Clerk.

N.B.—Mileage and fees to witnesses, if any, to be added.

FORM 130. *(o)*

SCHEDULE OF CLERKS' FEES.

1. Receiving claim, *(p)* numbering and entering in Procedure Book $0 15

   (This item to apply to entering in the procedure book a transcript of judgment from another court, but not an entry made for the issue of a judgment summons).

2. Issuing summons with necessary notices and *(q)* warnings thereon, or judgment summons (as provided in the forms), in all,

   Where claim does not exceed $20 ..... 0 30

   " " exceeds $20 and does not exceed $60 0 40

   " " exceeds $60..... ..... 0 50

   [N.B.—In replevin and interpleader suits the value of goods to regulate the fee.]

3. Copy of summons, *(r)* including all notices and warnings thereon 0 20

4. Copy of claim *(s)* (including particulars) when not furnished by plaintiff (to be paid by the plaintiff) 0 20

(o) This is in substitution of Form 127 ("Sinclair's Division Courts Act," 336). Many of the items, it will be observed, are changed, more explained and some added.

(p) There is a change in this item as explained in the parenthesis. Taking this in connection with the thirteenth item the charge of forty cents which has hitherto been pretty generally made by Clerks on entering transcripts, and thereby making them for ulterior proceedings, judgments of their Courts, is disallowed. See "Sinclair's Division Courts Act," 135 *(s)*, 274 *(m)*, 340 *(k)*.

(q) In the old tariff the words were "notices *or* warnings." The words, "(as provided in the forms) in all," and these in brackets are new. On this item, see "Sinclair's Division Courts Act," 239 and 338.

(r) It will be observed that all notices and warnings on the Copy of Summons form part of it. See "Sinclair's Division Courts Act," 339 *(d)*, and Form 129 herewith.

(s) This also is to prevent Clerks charging for claim and particulars as *separate* copies. See "Sinclair's Division Courts Act," 239, 338, 339 (*b*), (*c*), (*d*). When not furnished by the Plaintiff (as he should do under Section 68 of the Act, and Rule 3, "Sinclair's Division Courts Act," 90 and 239), he has to pay the Clerk for the copy himself, and it is not taxable against the Defendant.

5. Copy of set-off *(t)* (including particulars), when not furnished by the defendant (to be paid by the defendant)	$0 20
6. Receiving and entering *(u)* Bailiff's return to any summons, writ or warrant issued under the seal of the Court (except summons to witness and return to summons, or papers from another Division)	0 10
7. Entering notice of set-off, plea of payment, or other defence requiring notice to the plaintiff, or notice of admission *(v)*	0 20
(To be paid in the first instance by the defendant or other person entering it—but it may be afterwards taxed against the plaintiff should costs be given against him.)	
8. Taking confession of judgment *(w)*	0 10
(This does not include affidavit and oath, chargeable under item 9.)	
9. Every necessary affidavit, *(x)* if actually prepared by the Clerk, and administering oath to the deponent	0 25
10. Copies of papers, *(y)* for which no fee is already provided,—necessarily required for service or transmission to the Judge,—each	0 10
11. Every notice *(z)* required to be given by Clerk to any party to a cause or proceeding, or to the Judge in respect to the same, and mailing	0 10

(t) See the next preceding note (*s*).

(u) A change is here made. The words of the old tariff were, "Receiving and entering Bailiff's return to process or Judge's order."

(v) In the last tariff the words "as to payment" appeared after the word, "admission." See "Sinclair's Division Courts Act," 340 (*i*).

(w) The words in parenthesis are new.

(x) The words in the last tariff were, "Drawing every necessary affidavit and administering oath." It would appear from this item as it now stands, that the Clerk must "*actually*" draw the affidavit to entitle him to the fee.

(y) This is in form a new item. See "Sinclair's Division Courts Act," 339, (*d*). The charge is reduced one half.

(z) No change has been made in this item. See "Sinclair's Division Courts Act," 340 (*j*).

12. Entering final judgment, *(a)* by Clerk, on special summons: where claim not disputed..... $0 40

13. Entering every judgment rendered at the hearing, or final order made by the Judge..... 0 40

[This one fee of 40cts. will include the service of recording at the trial and afterwards entering in the procedure book the judgment, decree and order in its entirety, rendered or made at the trial. In a garnishee proceeding before judgment, the fee of 40cts. will be allowed for the judgment in respect to the primary debtor, and a like fee of 40cts. for the adjudication whenever made in respect to the garnishee.]

14. Subpœna to witness *(b)*..... 0 10

(The Subpœna may include any number of names therein, and only one original subpœna shall be taxed, except the Judge otherwise orders.)

15. For every copy of Subpœna required for service *(c)* 0 05

16. Summons *(d)* for each juryman, when called by the parties..... 0 10

(Only 25cts. in all is to be allowed for returning a Judge's jury.)

17. Every order *(e)* of reference or order for adjournment made at hearing, and every order requiring the signature of the Judge, and entering the same.... 0 15

(a) This and the next succeeding item are intended to cut off the second fee of forty cents frequently charged on certain judgments. See a discussion of the subject in Sinclair's D. C. Act 340 (*k*). In garnishee cases where there is a judgment against a primary debtor and an adjudication on the garnishee matter, the two fees of forty cents are still allowed. This only applies to a "proceeding *before* judgment."

(b) This is substantially the old item. See Sinclair's D. C. Act, 339 *(c)*.

(c) The words of the old item were "for every copy to serve." The mode of expression only appears to be changed.

(d) There is no substantial change in this item. The words in parenthesis are varied slightly.

(e) The words of the old tariff were, "order of reference, attaching order, or other order *drawn* and entered by the Clerk." The present item allows the fee in the cases mentioned whether the order is drawn by the Clerk or not. The warning on a garnishee order is, for the purposes of this item to be considered as part of it, and must *not* be charged for as a separate copy.

(Any warning necessary with order, *e. g.*, the warning in form 42, forms part of the order.)

18. Transcript of judgment *(f)* (under sections 161 or 165)	$0 25
19. Every writ of execution, *(g)* warrant of attachment, or warrant for arrest of delinquent and delivering same to Bailiff	0 40
20. Renewal of every writ of execution *(h)* when ordered by the judgment creditor	0 10
21. Every bond *(i)* when necessary and prepared by the Clerk (including affidavit of justification)	0 50
22. For necessary entries *(j)* in the debt attachment book in each case (in all)	0 20
23. Transmitting transcript of judgment; *(k)* or transmitting papers for service to another division, or to Judge on application to him, including necessary entries, but not postage	0 20
24. Receiving papers *(l)* from another division for service, entering the same, handing to the Bailiff, receiving and entering his return, and transmitting the same (if return made promptly, not otherwise)	0 30

(This fee does not include a charge for receiving transcript of judgment, for which a fee of 15 cents is taxable under item 1.)

(f) No change has been made in this item.

(g) The words "and delivering same to Bailiff," were not in the old tariff.

(h) Instead of the fee of forty cents, which was usually charged for renewal of an Execution, the sum of ten cents only is here given. The renewal must be ordered by the judgment creditor. It could not be renewed otherwise. "Sinclair's Division Courts Act." 341 (*l*).

(i) The change in this item, is that unless the bond is prepared by the Clerk, he is not entitled to any fee for it.

(j) This is the same as formerly.

(k) A very reasonable charge for transmitting a transcript of judgment to another division is here allowed for the first time. "Sinclair's Division Courts Act," 342 (*m*). Otherwise the item is as before.

(l) The words "and entering" are here inserted after the word "receiving." The words in parenthesis are new.

25. Search *(m)* by person not party to the suit or proceeding to be paid by the applicant, 10c.; search by party to the suit or proceeding where service is over one year old $0 10

(No fee is chargeable for search to a party to the suit or proceeding, if the same is not over one year old.)

FORM 131.

SCHEDULE OF BAILIFF'S FEES.

1. Service of summons, *(n)* writ or warrant, issued under the seal of the Court, or Judge's summons on each person (except summons to witness, and summons to juryman),

Where claim does not exceed $20 ..... 0 20
" " exceeds $20 and does not exceed $60 0 30
" " " $60..... 0 40

[In interpleader suits the value of the goods to regulate the fee.]

2. For every return *(o)* as to service of summons, attending at the Clerk's office and making the necessary affidavit (as provided by Rule 90) 0 10

3. Service of summons *(p)* on witness or juryman, or service of notice..... 0 10

4. Taking confession of judgment, *(q)* and attending to prove 0 10

(m) There is no substantial change in this item. See "Sinclair's Division Courts Act, 342 (*o*).

(n) The words of the corresponding item in the former tariff were "Service of summons, order, or other process on each person (except summons to witness and summons to juryman)." The words in brackets are new.

(o) This is a new item, and a very just one.

(p) There is no change in this item.

(q) This also is unchanged.

5. For calling parties *(r)* and their witnesses at the sittings of the Court in every defended case, as provided by Rule 91, amended by Rule 168 ..... $0 15

6. Enforcing *(s)* every writ of execution, or summons in replevin, or warrant of attachment, or warrant against the body,—each,

Where claim does not exceed $20	0 40
" " exceeds $20 and does not exceed $60	0 60
" " " $60.....	0 80

(Executing summons in replevin, includes service on defendant. The value of the goods to regulate the amount of the fee.)

7. Every mile necessarily travelled *(t)* to serve summons or process, or other necessary papers, or in going to seize on attachment, or in going to seize on a writ of execution, where money made or case settled after levy 0 11

(In no case is mileage to be allowed for a greater distance than from the Clerk's office to the place of service or seizure.)

8. Mileage *(u)* to arrest delinquent under a warrant to be at 11 cents per mile, but for carrying delinquent to prison, including all expenses and assistance, per mile 0 20

9. Every *(v)* schedule of property seized, attached or re-

(r) This is as formerly. See "Sinclair's Division Courts Act," 259. The Bailiff is only entitled to one fee on calling the parties and their witnesses on both sides, not to a separate fee for calling each party or witness.

(s) The words, "summons in replevin or," are new, otherwise it is substantially the same as the old tariff. The last sentence in the parenthesis is new.

(t) There is no change in this item. For a discussion of the question of mileage, See "Sinclair's Division Court Act," 343 (*r*).

(u) No change has been made in this item.

(v) This is the same as formerly.

plevied, including affidavit of appraisal, when necessary,

Not exceeding $20	$0 30
Exceeding $20 and not exceeding $60	0 50
Exceeding $60	0 75

10. Every *(w)* bond when necessary, when prepared by the Bailiff, (including affidavit of justification)..... 0 50

11. Every notice *(x)* of sale not exceeding three, under execution or under attachment, each 0 15

12. There shall be allowed *(y)* to the Bailiff, for removing or retaining property seized under execution or attached, reasonable and necessary disbursements and allowances, to be first settled by the Clerk, subject to appeal to the Judge.....

13. There shall be allowed to the Bailiff five per cent. *(z)* upon the amount realized from the sale of property under any execution, but such percentage not to apply to any overplus thereon .....

The subjoined table will shew the amount of costs (in three grades) properly chargeable under the foregoing tables of fees, in an ordinary suit for a money demand against one defendant and in the several stages specified in the table.

(w) The words, "when prepared by the Bailiff," are new. If prepared by some one else, the Bailiff would not be entitled to charge for it.

(x) No change has been made in this. See "Sinclair's Division Courts Act," 345 *(u)*.

(y) This item is the same as formerly. See "Sinclair's Division Courts Act," 345 *(r)*.

(z) The identical words are here used that appeared in the former tariff. This item is discussed at page 345 *(w)*, of "Sinclair's Division Courts Act." It appears that the Board of Judges did not see their way to alter this item in the direction there suggested.

Officers' Fees—Clerk and Bailiff.	Claim under $20.	Claim $20 to $60.	Claim over $60.
	$ cts.	$ cts.	$ cts.
Up to and including the issuing of summons and delivering the same with copy to Bailiff, where claim paid or case settled before service of summons by Bailiff.....	0 65	0 75	0 85
Up to hearing, but not including the hearing, where case settled or claim paid before hearing	1 45	1 65	1 85
[If claim settled before notice to Plaintiff of defence, &c., 15 cents to be deducted from each of these items.]			
Up to and including the entry of judgment after the hearing by Judge, and case settled after the hearing and judgment	2 00	2 20	2 40

N.B.—The amounts in the above table do not include fees for services only occasionally rendered (found in the table of fees) or extra postage or jury cases, or mileage, or summoning witnesses, or disbursements to witnesses, which will vary in each case.

Dated 28th November, 1879.

JAS. ROBT. GOWAN,
Senior Judge, C.S.

S. J. JONES,
County Judge, Brant.

D. J. HUGHES,
County Judge, Elgin.

Approved:

John H. Hagarty, C.J.
Adam Wilson, C.J., C.P.
Thos. Galt, J.
M. C. Cameron, J.Q.B.
F. Osler, J.C.P.