

It also provides that although the defendant may have to pay it in the first instance, yet he gets reimbursed the sum in the event of his succeeding. This item, 25c., is clearly not allowable.

The next item, 21 in the bill, is more difficult to decide. The 9th item of the clerk's tariff, under which it is claimed, is in these words: "Every necessary affidavit, if *actually prepared* by the clerk, and administering oath to the defendant, 25c." The affidavit of disbursements was not actually prepared by the clerk of the court, but by one of the solicitors for the plaintiff. I do not see any reason why the charge is not allowable, no matter by whom prepared, but I cannot disregard the plain and imperative language of the tariff. I have already expressed my views on this item (Sincclair's D. C. Act, 1886, pp. 107 and 108), and I see no reason to change them. The affidavit purports to have been prepared by some other than the clerk, and it is for him to show that it was so prepared with his authority and for him: *Myles v. Thompson*, 23 U. C. R., at pp. 554-555. I will not strike this item off now, but will allow one week for a necessary affidavit of the fact to be filed, consistently with the views I have heretofore expressed, but if such is not done I see no ground upon which it can be allowed. The words "actually prepared by the clerk," must have been intended to limit the allowance of the item to the circumstances mentioned: *Jackson v. Kassel*, 26 U. C. R. 341; *Northcote v. Brunker*, 14 App. R. p. 378.

The next item, No. 22, is "Notice to defendant and postage, 5c. (of disbursements) 20c." There is no notice of taxation in the Division Court, nothing to give the unsuccessful party an opportunity of being heard in opposition to the taxation. If there had been I would (if the party had attended in pursuance of it), have gone a long way to try and find some means of allowing compensation for it. But nothing of the kind has been done here. The costs are taxed *ex parte*, and then the defendant is informed by letter or formal notice, if you will, of the amount of them. This may be courteous on the part of the clerk, but the tariff precludes any charge for it. The kindness may be requited in some other way, but not by any allowance under the tariff. The sum of 20c. must come off this item.

There are only two items remaining of the clerk's fees that are objected to. The first is

No. 26, "Execution ordered by plaintiff and held b. request of defendants, 50c.," and the other of 28th March (in pencil), in these words, "Transmitting papers to judge, 25c., postage 5c.—30c.

In regard to the first item it appears that the solicitors on both sides agreed for a stay of execution, as the defendants are well-known business men, and I suppose did not want execution issued against them, and the plaintiff well knew he would have no difficulty in making his money, when the amount of debt and costs was ascertained. But to make an arrangement or understanding of the parties a groundwork of this charge is to my mind entirely unwarranted by any authority I know of. If the clerk had received authority to issue execution it was countermanded by the plaintiff, and if he was not instructed to do so either expressly or otherwise he could not do so of his own mere motion. This would be converting the clerk of the court into the plaintiff in every suit entered in his court. On this point I refer to the words of GALT, J., in *Ross v. McLay*, 26 C. P. at p. 199, who says: "It is sufficient to say that he (the officer) has charged the plaintiff for services which he did not render, and therefore the charge must be disallowed."

As to the last item, I am of opinion that it cannot be allowed where the defendants have succeeded on their appeal. The clerk should bear it himself, and it must be struck off too.

Now as to the bailiff's costs.

I disallow the expenses of serving the subpoena on George Roach, John Roach, Captain Armstrong, and Captain Zealand. They must come off. They were subpoenaed to disprove a counter-claim, which was not part of the record. The plaintiff opposed the allowance of this counter-claim to be added, and succeeded in having its allowance rejected at the trial, and now asks for attendance of his witnesses brought to disprove the anticipated defence. The plaintiff cannot take this anomalous position. The amount of the bailiff's expenses for serving the four witnesses named, and \$3.00 allowed for their witness fees, cannot be charged the defendants. The amounts must be struck off. This is not intended to exonerate the plaintiff from such costs as he has voluntarily incurred to the clerk, but are not chargeable to the defendants, according to my opinion.