

Chan. Ch.]

WINTERS v. KINGSTON PERMANENT BUILDING SOCIETY.

[Chan. Ch.]

that a mortgagee was not obliged to file a claim, but was at liberty, in lieu thereof, to exercise the power of sale contained in his mortgage.

## CHANCERY CHAMBERS.

(Reported by ALEX. GRANT, ESQ., Barrister-at-Law, Reporter to the Court.)

## WINTERS v. THE KINGSTON PERMANENT BUILDING SOCIETY.

*Sheriff's poundage—Con. Stat. U. C., c. 22, sec. 271.*

The plaintiff had obtained a decree in this cause against the defendants, by which money was ordered to be paid, and on which the plaintiff issued execution and lodged it in the hands of a sheriff. After seizure under the writ, but before the money was levied, the defendant moved for and obtained leave to re-hear the cause, and a stay of the execution, on the terms of paying the money into court, which was done: *Held*, that the sheriff, not having actually levied the money under the execution, was not entitled to poundage, but to fees only for services actually rendered, to be settled by a judge in chambers.

A decree had been pronounced herein in favor of the plaintiff, directing the defendants to pay him a certain sum of money and his costs of the suit. Execution had been sued out by the plaintiff to enforce the payment of these amounts, and placed in the hands of the sheriff of Frontenac; after the sheriff had seized under the execution, but before any sale had taken place, or any money been levied, the defendants moved for and obtained leave to re-hear the cause, and the execution had been stayed on the terms of paying the money into court, and the costs to the plaintiff's solicitors, they undertaking to pay them if the decree should be reversed. The money and costs had been duly paid accordingly, and a re-hearing had taken place, and the decree been upheld; and now the sheriff presented his petition, praying payment, by the defendants, of his poundage on the money and costs.

*S. H. Blake*, for the petitioner. The sheriff is entitled to poundage if goods are seized and the money made, though the money be not paid to him or pass through his hands: *Morris v. Boulton*, 2 U. C. Cham. R. 60, 67, 70; *Thomas v. Cotton*, 12 U. C. Q. B. 148; *Brown v. Johnson*, 5 U. C. L. J. 17.

*Sullivan contra*. The application is improperly made by the sheriff; the sheriff's remedy is against the plaintiff, not the defendants.\* The case of *Morris v. Boulton* was decided on the authority of English cases which have since been overruled on this point, by the case of *Miles v. Harris*, 31 L. J. C. P. 361; 6 L. T. N. S. 649.

*S. H. Blake*, to cure the objection as to the mode of the application, appeared for the plaintiffs also, and consented to the order going.

*VANKOUGHNET, C.*—The execution having issued out of this court under the decree originally made in the cause, the sheriff seized under certain mortgages of the defendants for the purpose of making the money. The defendants thereupon presented a petition for re-hearing, and applied to have execution stayed in the meantime. Both applications were granted on the defendants paying into court, as they subse-

quently did, the full amount of the debt, interest and costs, not including the sheriff's fees or poundage, as to which no provision was made. The petition of re-hearing was dismissed, and the money in the court paid out to the plaintiff. The sheriff now presents a petition, asking that the defendants may be ordered to pay his fees and poundage upon the money brought into court, alleging that he would have made that money under the writ in his hands, had not its execution been stayed by the order of this court. Independently of the statute to which I shall presently advert, there seems to have been no settled notion, as to the practice which prevails here in similar cases at law. *Morris v. Boulton*, 2 U. C. Cham. R. 60, before Burns, J., decides, that, under such circumstances as the present, the sheriff is entitled to poundage; see on the same subject *Brown v. Johnson*, 5 U. C. L. J. 17; *Thomas v. Cotton*, 12 U. C. Q. B. 148. The language of the two judges, Erle, C. J., and Willes, J., who expressed their opinions on this question in the recent case of *Miles v. Harris*, 31 L. J. C. P. 361, is not quite reconcilable, although they concurred in judgment. The 271st section, however, of the Common Law Procedure Act, ch. 22, of the Con. Stats. of U. C., which assumes to condense and explain, though it materially alters in this respect, the provisions of the Statute 9th Vic., ch. 56, sec. 2, enacts that "In case the real or personal estate of the defendant be seized or advertised on an execution, but not sold by reason of satisfaction having been otherwise obtained, or from some other cause, and no money be actually levied on such execution, the sheriff shall not receive poundage, but fees only for the services actually rendered; and the court out of which the writ issued, or any judge thereof in vacation, may allow him a reasonable charge for any service rendered in respect thereof, in case no special fee be assigned in any table of costs." The practice of this court is, by statute, made analogous to that at law, on proceedings by execution. It seems plain, therefore, under the clause of the statute just quoted, that the sheriff is not entitled to poundage, but only to fees for services actually rendered, to be fixed by the court or a judge in Chambers. The words "money actually levied," contrasted with the preceding words, mean, I think, money actually obtained by the sheriff himself, out of the goods. There would have been a difficulty in the application at the instance of the sheriff, had not the plaintiff appeared in support of it. The immediate remedy of the sheriff is ordinarily against the party who sets him in motion, and the plaintiff might have made such arrangements with the defendants as would have deprived him of any right, and the sheriff of any right in his name, to proceed against them. The plaintiff, however, consenting, and the proceedings having been stayed for the benefit of the defendants, let the petition stand over with liberty to the sheriff to produce before me evidence, to satisfy me what charges it would be reasonable to allow him, for his action in the matter, and for the recovery of these he may be allowed to proceed on the execution which is now in abeyance.\*

\* See *Thomas v. Great Western Railway Co.*, Q. B., Hilary Term, 1865.—Eds. L. J.

\* See Editorial remarks on page 86, ante.