

## COMMON LAW CHAMBERS.

(Repealed by ROBT.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

GILLESPIE ET AL. V. SHAW ET AL.

*Attorney—Costs—Attorney and Client—Party and party—Insurance—Special circumstances—Sheriff—Poundage.*

Where an attorney, having had for three years a judgment on confession for a large amount, gave defendants to understand that his charges against plaintiff were \$200, which defendants understood to mean all his charges, including as well costs between party and party as costs between attorney and client, which sum defendants, in consideration of forbearance, promised to pay and did pay, the attorney was not allowed afterwards to treat the \$200 as paid for costs between attorney and client only, and to proceed for costs between party and party incurred prior to the giving of the note.

Where defendants, in 1850, in consideration of forbearance, promised to pay a demand of \$200, which the attorney said he had charged to his clients, but which was not strictly in whole recoverable from defendants. It was held that it was too late in 1863 to call upon the attorney to deliver a bill of items for the \$200, although such a bill was demanded at the time the note was given; and it was also held that the pressure of an execution against lands in 1860 was not a sufficient "special circumstance" to entitle applicant to have his application succeed, notwithstanding the lapse of time.

*Quere*—The right of the sheriff to poundage where money is apparently made by pressure of executions in his hands, but not made by or through him? (Chambers, Feb. 2, 1864.)

Robert A. Harrison, on the 11th July last, on behalf of the defendants, obtained a summons, upon certain affidavits and papers, calling on the plaintiff's attorney (Hon. J. S. McDonald) to show cause—

1. Why he should not, within two weeks, or within such other time as should be appointed, deliver to the defendant James Shaw, or to his son Henry D. Shaw, their attorney or agent, a bill of costs, containing items of the services rendered by him in this cause as attorney for the plaintiff prior to 18th February, 1860, and for which he exacted the sum of \$200 from the said James Shaw and Henry his son.

2. Why he should not give credit for all sums of money received by him as such attorney from the defendant James Shaw or his son, for or on account of costs in the cause.

3. Why the bill, when delivered, with credits, should not be referred to the Master to be taxed.

4. Why the said attorney should not refund what, if anything, should, upon the taxation, appear to have been overpaid.

5. Why the Master should not tax the costs of the reference, and certify what, upon such reference, should be found due or owing to or from either party in respect of such bill and demand, and of the costs of such reference, to be taxed according to the event of such taxation, pursuant to the statute.

The summons also called upon the attorney to show cause—

1. Why he should not deliver a bill to James Shaw, containing items of all services rendered by him in this cause as attorney for the plaintiff, other than the services already mentioned; and for which, or some of them, the sheriff of the United Counties of Lanark and Renfrew was authorized by the attorney to levy upon the lands of the defendants the sum of £27 16s. 5d.

Then followed heads numbers 2, 3, 4, 5, the same as those above set out with respect to his first charge.

The summons then called upon the sheriff to show cause—

1. Why he should not be deprived of all poundage and claim of poundage in this cause.

2. Why he should not be deprived of the cost of advertising the defendants' lands, and all claims in respect thereof.

3. Why he should not deliver to the defendants a bill of his charges for all services necessarily and reasonably performed by him in relation to the writs of execution placed in his hands in this cause.

The 4th, 5th, 6th and 7th heads then follow, precisely as the 2nd, 3rd, 4th and 5th in the charges above stated.

The summons next called upon the plaintiffs to show cause—

Why, upon payment to the attorney and sheriff of what, if anything, should be found to be due to them or either of them, the plaintiffs should not cause satisfaction to be entered on the roll in this cause.

The summons then called upon the plaintiffs, the plaintiffs' attorney and the sheriff to show cause—

Why such other order as might be necessary should not be made as to costs or otherwise howsoever.

This summons was enlarged from time to time until the 16th December last, when it was argued before Mr. Justice Adam Wilson.

James Shaw, one of the applicants, swore that he and Richard Shaw gave a confession of judgment to the plaintiffs, on which judgment was entered on the 29th September, 1855; that J. S. Macdonald was the plaintiffs' attorney; that the plaintiffs' costs, taxed on entering judgment, were £7 14s. 4d.; that on the 17th September, 1857, a *fi. fa.* against lands was issued and delivered to the sheriff of Lanark and Renfrew (copy and endorsements annexed); that up to the month of February, 1860, various payments were made to the plaintiffs, when an arrangement was made with them that Henry D. Shaw should become security to the plaintiffs for payment of the greater part of the balance then due, and that he should give his promissory notes to the plaintiffs for the same, which he did; that when this arrangement was made the plaintiffs insisted that, as a part thereof, all the costs, charges and expenses which their attorney had up to that time a right to claim in any way, whether as between party and party and taxable against the defendants, or as between attorney and client and only claimable from the plaintiffs themselves, should be fully paid by the defendants to the said attorney; that, in the presence of A. J. Patterson, then acting as the plaintiffs' agent, and of H. D. Shaw, he applied to J. S. Macdonald, in his office at Corawall, for a bill of his costs, charges and expenses, so that he might know the amount, when the said J. S. Macdonald stated that the amount was £50; that, thinking the amount exorbitant, he asked J. S. Macdonald what it was for, and to give him a bill of particulars, which he refused to do; that a letter produced, marked B, is in the handwriting of J. S. Macdonald and is the letter enclosing the notes to be signed by his son Henry, in favor of the plaintiffs, in pursuance of the arrangement, and also the note for \$200 for the said costs, &c.; that the letter produced, marked C, is in the handwriting of J. S. Macdonald, wherein he replies to some remonstrances made by H. D. Shaw in regard to his claim; that on the 8th March, 1860, deponent made a note for the \$200, payable to and endorsed by his son, at six months, which was sent to the plaintiffs expressly for the said claim of \$200 by J. S. Macdonald, and which the plaintiffs transmitted to him, and which note was afterwards paid in full by Henry D. Shaw: that on the 6th February, 1863, the full balance of principal and interest was paid to the plaintiffs, and the receipt annexed, marked D, was given by the plaintiffs; that notwithstanding the payment of the \$200 to J. S. Macdonald, the sheriff has been instructed by him to levy from them the sum of £27 16s. 5d. upon the writ against lands; that the paper produced, marked E, was the certificate of the sheriff setting forth the items composing the £27 16s. 5d.; that, excepting three renewals of the writ against lands, and whatever necessary letters were written after February, 1860, all the items in the certificate were anterior to the payment of the \$200, and were abundantly covered and satisfied thereby; that he considered the claim for \$200 to be exorbitant at the time, but as the plaintiffs would not complete the arrangement unless it was paid, he and his son were obliged to submit to it, but considered the claim attempted to be enforced through the sheriff and levied (as if the \$200 had never been paid) a grievous imposition, and contrary to all that is just, fair or right; that notwithstanding it was agreed between the plaintiffs and defendants that in case H. D. Shaw met the payments which he had undertaken to make as aforesaid, the defendants' lands should not be advertised or brought to sale, the sheriff, without any authority from the plaintiffs, as appeared from the letter of one of them, annexed, marked F, advertised the defendant's lands for sale in the end of 1862, and has since kept such sale adjourned from time to time; that the sheriff threatened to proceed to a sale unless the costs and charges claimed by the plaintiffs' attorney, and also the sum of \$226 76c., which the sheriff claimed for poundage and other fees, as mentioned in the memorandum annexed, marked G, were paid to him; and that as no money had ever been paid to or through the sheriff, or had ever been collected by him, his claim for poundage was illegal.

Henry D. Shaw confirmed the affidavit of James Shaw, so far as he (Henry D. Shaw) is concerned, and verified, among others, the following documents, viz.:—A copy of letter sent by him to J. S.