

UPPER CANADA REPORTS.

COMMON PLEAS.

(Reported by S. J. VANROUGENET, Esq., M.A., Barrister-at-Law, Reporter to the Court.)

BUCHANAN ET AL. V. FRANK.

Sheriff—Poundage.

Held, that under Con. Stats., U. C. ch. 22, sec. 271, a sheriff is not entitled to poundage unless he actually levies the money due under the writ in his hands; notwithstanding that in consequence of the pressure exerted by seizure of his property the defendant has paid or otherwise settled the debt.

[C. P., II. T., 28 Vic.]

T. Ferguson obtained a rule nisi on behalf of the sheriff of Middlesex calling on the plaintiff to shew cause why the order made by the Chief Justice of this court on the 7th of February of the present year, whereby it was ordered that the said sheriff should be disallowed all poundage claimed by him for proceeding on the writ of *feri facias* in this cause, should not be rescinded, on the ground that the sheriff is by law entitled, under the circumstances, to the said poundage, or to some part thereof, and to tax the same against the plaintiff, and on grounds disclosed in affidavits and papers filed.

The affidavits referred to shewed, that the sheriff received an execution against the defendant's goods to levy for debt, interest and costs, \$3,465 60; that the sheriff seized of the defendant's goods sufficient to satisfy the amount of the execution; that after such seizure, and without any sale by the sheriff, and without any money having been paid to the sheriff by the defendant, or made by the sheriff, the plaintiffs and defendant arranged the claim between themselves; that the sheriff was requested to render a bill of his fees, which he did, making the total \$103 64, of which the poundage constituted \$96 64; that the bill was taxed and the poundage was allowed to the sheriff; that the arrangement made with the plaintiffs by the defendant was brought about by the pressure of the seizure which the sheriff had made upon the goods so taken.

Downey shewed cause.—This whole question must be determined by the construction to be placed upon the Con. Stats. U. C. ch. 22 ss. 270, 271. The following cases shew that the sheriff, in such a case as this, is not by that statute entitled to poundage, but only to such remuneration in the stead of poundage as shall be specially awarded to him: *Winters v. The Kingston Permanent Building Society*, Chy. Chamb. Rep. 276; 1 U. C. L. J. N. S. 107; *Gillespie v. Shaw*, 10 U. C. L. J. 100.

Robert A. Harrison, with him *Ferguson*, supported the rule.

The statute should not be so rigidly construed as it has been: the sheriff should receive his poundage after a levy has been made; and, if necessary, section 271 should be read as applicable only to cases where there are different writs of execution in the hands of different sheriffs, which would be giving effect to the previous law when it is clear no change was intended by the consolidation, and would harmonize the two sections of the statute:

Alchin v. Wells, 5 T. R. 470; *Chapman v. Bowlby*, 8 M. & W. 249; *Morris et al. v. Boulton*,

2 Chamb. Rep. U. C. 60 *Thomas v. Cotton*, 12; U. C. Q. B. 148; *Brown v. Johnston*, 5 U. C. L. J. 17; *Walker v. Fairfield*, 8 U. C. C. P. 75; *Miles v. Harris*, 31 L. J. C. P. 361, S. C. 12 C. B. N. S. 550; *Colls v. Coates*, 11 A. & E. 826; *Corbett v. McKenzie*, 6 U. C. Q. B. 605; *Gates v. Crookes*, 3 U. C. R. O. S. 286; *Leeming v. Hagerman*, 5 U. C. R. O. S. 38; *Watson on Sheriff*, 2nd ed. 110; 9 Vic. c. 56, s. 2, 3, Con. Stats. U. C. c. 2.

A. WILSON, J., delivered the judgment of the court.

As the sheriff is not an officer who at the common law is entitled to recover any fees as remuneration for his services, his sole claim to them being based on positive enactment, we must see whether he has clearly made out his right to the amount he demands, for the burden of establishing them is upon him, before we can rescind the present order which disallows this poundage.

The whole legislative provision is contained in the two sections of the C. L. P. A., ch. 22, secs. 270 and 271. Sec. 270 provides that,

"Upon any execution against the person, lands or goods, the sheriff may, in addition to the sum recovered by the judgment, levy the poundage, fees, expenses of execution, and interest upon the amount so recovered from the time of entering the judgment."

Sec. 271 provides that,

"In case a part only be levied on any execution against goods and chattels, the sheriff shall be entitled to poundage only on the amount so levied, whatever be the sum endorsed on the writ, and 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."

Since the case of *Alchin v. Wells* it has been settled that after a levy has been made by the sheriff he is entitled to the poundage, although no sale is made, and further proceedings are stayed, in consequence of a compromise between the parties. That decision was made upon the 29 Eliz. c. 4, which provides that the sheriff shall receive his poundage "on the sum he shall levy, extend and deliver in execution;" and this "levy," as is said by counsel in *Holmes v. Sparkes* (12 C. B.) may be either actual or constructive; for the money is considered to have been levied by "the sheriff when he enters upon the possession of the goods, and by the compulsion of the levy the defendant has been compelled to pay the debt;" *Chapman v. Bowlby*, 8 M. & W. 249. Until a seizure has been made the sheriff is not entitled to poundage; therefore, when the debt is paid to him without a seizure he cannot claim poundage: in such a case there has been no levy made—*Graham v. Grill*, 2 M. & S. 296; *Colls v. Coates*, 11 A. & E. 826, either actual or constructive.

A seizure, however, is not properly a levy: it does not become a levy until the goods seized have been turned into money: *Miles v. Harris*,