

C. L. Cham.]

DAVIDSON ET AL. V. GRANGE.

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\$30,000 over and above their debts, and generally had on hand \$25,000 worth of goods.

The partner of plaintiffs' attorney stated in his affidavit, that on the Saturday he saw Mr. P. between two and three o'clock, when he stated he would place the *fi. fa.* in the sheriff's hands. He told him that he knew nothing about the matter, it being attended to by his partner exclusively, who would return that evening from Hamilton, and suggested waiting until Monday, as the banks were then closed and the money could not be obtained before Monday. Mr. P. however declined to wait, alleging as his reason for his urgency that he had been treated sharply by Mr. F. in the case and would not wait. He was then requested to delay until he could advise the plaintiff of the amount of costs and get their cheque, which cheque his clerk got. He also stated that Mr. P. did not affect to doubt or dispute that the plaintiffs' were in good circumstances, but he told him his reason for pressing was in retaliation for something that Mr. F. had practised towards him. The plaintiffs' attorney's clerk, among other things, swore that when Mr. P. refused the cheque payable to Mr. F. he (P.) suggested that the cheque should be drawn payable to the order of his Toronto agents, but on leaving to get such a cheque he called after him saying he would not accept a cheque, he wanted the money. Notwithstanding his saying so, the clerk went to the plaintiffs' for a cheque so drawn. But on getting there he found the deputy sheriff with the *fi. fa.*

Mr. P. in reply filed his own affidavits, from which it appeared that he received Mr. F.'s letter of the 24th instant, but on that date he had made arrangements to enter his judgment, and so he did not reply to it. He also annexed the original note of Mr. F. of the 27th instant, as shewing that he did not intend to object to the revision of the bill. The affidavit contained much matter quite immaterial and irrelevant to the merits of the application, and in some respects contradicted the affidavit filed on the part of the plaintiffs.

The plaintiffs paid to the agents of defendant's attorneys \$204 72 pending this application.

Harrison, Q. C., shewed cause.

Fenton, contra, cited *Perkins v. National Assurance Association*, 2 Ex. N. S. 71; *Cruikshank v. Moss*, 8 L. T. N. S. 439; *Anon*, 4 Pr. Rep. 242; *Cullen v. Cullen*, 2 Chan. Cham. R. 94; *Reeves v. Slater*, 7 B. & C. 486.

MORRISON, J.—After hearing the arguments an order was made that the bill of costs should be referred to the Master for a revision of the taxation as to the item of \$25, charged and taxed to the defendant's attorney as witness fees, paid him for attendance at the trial of this cause. The Master has since reported his disallowance of that item.

Upon inspection of the *fi. fa.* and its indorsement it is evident that it was taken out in a great hurry; on its face the plaintiffs by name are styled defendants; the true name of the defendant is George John Grange, while in the writ he is styled John George Grange; by the indorsement the writ is issued by Mr. L. styling himself plaintiffs' attorney; and the direction to the sheriff to levy is to make the amount out of "the within defendants," and signed by Mr. L.

as plaintiffs' attorney. The writ and indorsement are all irregular. The main point however is in respect to the conduct of the defendant's attorney.

When the rule *nisi* for a new trial was refused the defendant was entitled to enter his judgment and to recover his costs. In the case referred to in 4 Prac. Rep. 242, I had to deal with an application somewhat analogous to the one before me, and there I felt it to be my duty to remark upon the conduct of the attorney. The successful party has a right to the entry of his judgment, but, as I said in that case, where the person against whom the execution may be issued is desirous of paying the amount so as to avoid the annoyance of a visit from a sheriff's officer and a levy being made on his goods, and gives clear notice that he is willing and ready to pay the amount forthwith, and there is no reason to suspect that he is acting other than *bona fide*, and that the recovery of the amount is in no way prejudiced; in the absence of some reasonable excuse, under such circumstances the placing a *fi. fa.* in the sheriff's hands is, in my judgment, *prima facie* vexatious, and the more so in a case like this, where the amount sought to be recovered was merely costs.

I have read carefully over all the affidavits, and I cannot arrive at the conclusion that the defendant's attorney was justified in the course that he took, for immediately after the rule *nisi* for a new trial was refused, he had a clear intimation that the amount of his costs would be paid when ascertained, and again, after the taxation of costs by the note of the 27th inst. he had a better intimation, with an undertaking from the plaintiffs' attorney that costs would be paid without further delay, while the obtaining the cheque, although it required the endorsement of Mr. F., indicated the strongest intention and desire of paying the amount. On the other hand I see not the slightest pretence for the harsh proceeding of instructing the deputy sheriff instantly to make a levy, while it is also evident from the affidavit that the step was taken in retaliation for some alleged sharp practice on the part of the plaintiffs' attorney, which is no justification, but rather goes to shew that the proceedings so taken were an abuse of the process of the court. I am therefore of opinion that besides the irregularities appearing on the face of the *fi. fa.*, and in the indorsement thereon, that the placing the writ under the circumstances in the sheriff's office, and instructing the sheriff at once to place a bailiff in possession, was a vexatious and oppressive act.

I think it proper to notice the way in which the affidavits filed by the defendant's attorney are drawn up. The affidavit should state only facts pertinent to the application, and upon which the party relies; it is for the court to draw the inferences and judge of their value. An attorney, who is presumed to know better, ought not to make and swear to statements such as I see in one paragraph of his first affidavit. In explaining why a change was made in the bill for attendance at the trial as the attorney and \$5 a day as a witness, he says: "It was too absurd to contend that such was meant in the face of my contention, and the affidavit of disbursements made, in which the amount sworn as paid to me was as witness alone;" and again in another paragraph, "as-