Referred Case.

1867. Sept. 27.

VINA'YAK VA'SUDEV v. RITCHIE, STEUART, & CO.

Sheriff's Poundage—"Debt levied by execution"—"Taking the body in execution for"—Subsequent discharge of debtor from custody—Ancient Instrument—Ambiguity—Construction—Usage and Practice of Court—Act VIII. of 1859, *Secs.* 273, 275—*Act XXIII. of* 1861, *Sec.* 8—*Act VI. of* 1855—*Act VIII. of* 1852—28 *Eliz., c.* 4—5 *&* 6 *Vict., c.* 98—24 *&* 25 *Vict., c.* 104, *Secs.* 11 *&* 15—*Charter* 20 *Charles II.* (27*th March* 1668)—*Letters Patent of Mayor's, Recorder's, and Supreme Courts, Bombay—Tables of Fees—Supreme Court Rules of April* 1852.

In a suit brought in the Bombay Court of Small Causes to recover Sheriff's Poundage on the amount indorsed on a warrant of arrest in execution of a decree obtained by the defendants, and under which the plaintiff, at the request of the defendants, arrested H., who applied to the High Court under Sec. 273 of Act VIII. of 1859, and was ordered to be discharged from custody; the Judge found for the defendants with costs, subject to the opinion of the High Court.

Held (1) that the words "debt levied by execution" used in the Table of Fees for the Recorder's Court, and continued in the subsequent tables, being ambiguous, the rule applies that "if an instrument be an ancient one, and its meaning doubtful, the acts of its author may be given in evidence, in aid of its construction;" (2) that as the Sheriff is the officer of the court, and his fees are received under its authority, it was unnecessary to refer the case back to the Small Cause Court in order that evidence of usage might be taken; (3) that, having regard, as well to the usage and practice of the Supreme Court, as to the liability of the Sheriff at the time the old Tables of Fees were settled, the words used must be construed as entitling the Sheriff to poundage upon his executing a warrant for the arrest of a defendant in execution of a decree; and (4) that if the Sheriff's right accrues upon his executing the warrant, the subsequent discharge, by the Court, of the defendant from custody ought not to divest him of it.

CASE stated for the opinion of the High Court of Judicature, pursuant to the provisions of Sec. 55 of Act IX. of 1850, by John O'Leary, Acting First Judge of the Bombay Court of Small Causes.

"This was a summons to recover the sum of Rs. 303-4-10, as sheriff's poundage on the amount indorsed on a writ of *capias ad satisfaciendum* issued by the defendants, and under which the plaintiff, at the request of the defendants, arrested the person of one Hattesing Kalliánji.

"The facts of the issue of the writ, of the arrest of Hatte-

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sing at the defendants' request, and of the amount claimed being the proper amount, if any poundage is recoverable, and the liability of defendants, if the Sheriff is entitled to poundage, were admitted at the hearing.

"Hattesing, having been arrested as aforesaid, applied to the High Court, under Sec. 273 of the Code of Civil Procedure, and was discharged, as was stated in evidence, under the 274th section of the same Act, but probably under Sec. 8 of Act XXIII. of 1861.

"It appeared in evidence before me that Sheriff's poundage had never been paid in a case similar to the present; and that only one case of discharge, under Sec. 274 of the Code, or Sec. 8 of Act XXIII. of 1861, had occurred in Bombay, namely, the case of Berámji Frámji Kámá, and that in that case no demand was made by the Sheriff for poundage.

"It was contended before me for the plaintiff that this was a case of a debt 'levied by execution,' within the meaning of Chapter VIII. of the High Court Rules, under which the Sheriff is entitled to poundage on every such debt.

"It was admitted by the plaintiff that, by the law and practice in Bombay, the Sheriff gets no poundage in cases where, after an arrest on a *capias*, the debtor is discharged under the Insolvent Debtors' Act.

"I was of opinion that this case was analogous to a discharge under the Insolvent Act, and that, in the absence of any express enactment or rule of court on the subject, the same rule should prevail as to poundage.

"Mr. Thacker, for the plaintiff, applied to me to state a case for the opinion of the High Court on the point. As the case appeared to me to be one of the first impression, to be of public importance, and not to be free from doubt, I consented to state a case under Sec. 55 of Act IX. of 1850.

"The question for the High Court is:—When a debtor is arrested on a writ of *capias*, and is discharged by the High Court under Sec. 274 of the Code of Civil Procedure, or under Sec. 8 of Act XXIII. of 1861, is the Sheriff entitled

to recover poundage from the plaintiff in execution, on the amount indorsed on the *capias?*

"Subject to the opinion of the High Court, I find for the defendant with costs; and I certify advocate's costs at Rs. 30. Should the High Court be of opinion that the Sheriff is entitled to recover, a verdict should be entered for the plaintiff for the amount claimed, or such other order as to costs or otherwise, as to the High Court may seem fit, should be entered."

Aug. 17. The case came on for hearing this day before COUCH, C.J., and WESTROPP, J.

Mayhew, for the plaintiff:—The Sheriff's right accrues immediately upon the writ being executed: *Graham* v. *Grill* (*a*); *Miller* v. *Abbott* (*b*); *Rawstorne* v. *Wilkinson* (*c*); *Lake* v. *Turner*. (*d*) The right to poundage accrues upon the arrest. "Levied by execution" must be taken to include the taking of the body in execution.

Howard, for the defendant:—In 28 Eliz., c. 4, there is a clear distinction between levying the debt and "take the body in execution for." "Levied by execution" means a sum that is realised. The rules of the court provide for the fees that are to be paid to the Sheriff. There is no provisiou for poundage in an arrest. The creditor ought not to have to pay poundage, where by the act of the court he is prevented from getting anything. The practice of the Sheriff's Office in cases of Insolvent Debtors binds the Sheriff.

Mayhew in reply.

Cur. adv. vult.

COUCH, C.J.:—This was a suit brought in the Bombay Court of Small Causes to recover the sum of Rs. 303-4-10, as Sheriff's poundage on the amount indorsed on a warrant of arrest in execution of a decree obtained by the defendants, and under which the plaintiff, at the request of the defendants, arrested one Hattesing Kalliánji, who applied to the High Court under Sec. 273 of the Code of Civil Procedure, and

(*a*) 2 M. & S. 94, *Ibid.* 296.
(*b*) 1 Stra. Mad. Ca. 182.
(*c*) 4 M. & S. 250.
(*d*) 4 Burr. 1981.

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was ordered to be discharged from custody. And the Acting First Judge of the court has reserved for the opinion of this court the following question:—"When a debtor is arrested on a writ of *capias*, and is discharged by the High Court under Sec. 274 of the Code of Civil Procedure, or under Sec. 8 of Act XXIII. of 1861, is the Sheriff entitled to recover poundage from the plaintiff in execution, on the amount indorsed on the *capias*;" and, subject to the opinion of this court, has found for the defendants with costs.

By the Stat. 24 & 25 Vict., c. 104 (an Act for establishing High Courts of Judicature in India), Sec. 15, it is enacted that each of the High Courts established under the Act shall have power to settle tables of fees to be allowed to the Sheriff, Attorneys, and all Clerks and Officers of Courts, and from time to time to alter any such table, and the tables so settled shall be used and observed in the said courts, provided that such tables be not inconsistent with the provisions of any law in force, and shall, before they are issued, have received the sanction in Bombay of the Governor in Council.

By virtue of this power, a table of fees was settled by the Judges of the High Court, and sanctioned by His Excellency the Governor in Council, and was, by an order of the court dated the 2nd of February 1863, ordered to be used and observed in the High Court from and after the date thereof. In this table amongst the fees to be allowed to the Sheriff is: "Poundage on every debt levied by execution, on every sum not exceeding Rs. 1,000, 2½ per cent.; on every sum exceeding Rs. 1,000, 1¼ per cent.;" and this table is now in force.

By Sec. 11 of the before-mentioned statute, it is enacted that upon the establishment of the High Courts in the Presidencies respectively, all provisions then in force in India of Acts of Parliament, or of any order of Her Majesty in Council, or Charters, or of any Acts of the Legislature of India, which at the time of the establishment of such High Courts are respectively applicable to the Supreme Courts at Fort William in Bengal, Madras, and Bombay respectively, or to the Judges of those courts, shall be taken to be applicable to the said High Courts and to the Judges thereof respectively.

so far as may be consistent with the provisions of the Act, and the Letters Patent to be issued in pursuance thereof, and subject to the legislative powers of the Governor General of India in Council.

The regard which is thus paid, by this, as well as by Sec. 15 (before mentioned), to the provisions of any law then in force, and the facts that the office of Sheriff of Bombay is an ancient office, and that the right to poundage was not given to the Sheriff for the first time in the establishment of the High Court, make it, we think, necessary that we should consider what his position and rights as to fees were under the Supreme Court.

Some faint traces of the existence of a Sheriff so early as the year 1671, or thereabouts, are to be found in the Government records of the island. The office was probably created by the local Government, with the assent of the London Company, under the Charter 20 Charles II. (27th March 1668), which made over Bombay to that company, and empowered the company to do all things necessary for the complete establishment of justice, and enabled them or the Governor of Bombay to delegate "judges and *other officers*" for that purpose.

However, the first direct recognition of the office of Sheriff by the Crown appears to have been by the Letters Patent to the East India Company dated the 24th of September 1726, by which the Mayors and Aldermen of Madras, Bombay, and Calcutta were constituted Courts of Record, by the name of the Mayor's Court, and the junior of the Council at each place at the time of the arrival of the Charter was appointed to be Sheriff, and was to continue in his office for one year, and until another should be duly elected and sworn into the office; and it was ordained that the Governor or President and Council, or the major part of them, should yearly, on the 20th of December, unless the same happened on a Sunday, and then on the next day, assemble themselves and proceed to the election of a new Sheriff.

The Letters Patent creating the Courts of the Recorders

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of Madras and Bombay, dated the 20th of February 1798, contain provisions that the person who shall be Sheriff at each of those places, at the time of the publication of the Charter, shall be and continue the Sheriff until another shall be duly appointed and sworn into the office, and that the Governor or President and Council for the time being, or the major part of them (whereof the Governor or President, or in his absence the senior of the Council, to be one) shall yearly, on the first Tuesday in December, appoint a new Sheriff for the year ensuing, to be computed from the 20th of December next after the appointment, and order and direct that the Sheriffs and their successors, or their sufficient deputies, shall, and they are authorised to execute all the writs, summonses, rules, orders, warrants, commands, and process of the courts, and to receive and detain in prison all such persons as shall be committed to their custody by the courts, or by the Recorders or any of the Judges thereof. And each of the courts is authorised and empowered to settle a table of fees to be allowed to the Sheriff, Attorneys, and all other the Clerks and Officers of the Court, for all and every part of the business to be done by them respectively, which fees, when approved by the Governor in Council, to whom authority is given to review the same, the Sheriff, Attorneys, Clerks, and other Officers shall and may lawfully demand and receive; and the Court is authorised, with the like concurrence of the Governor in Council, from time to time, to vary the table of fees as there shall be occasion. The Letters Patent establishing the Supreme Court of Judicature at Bombay contain the same provisions.

Amongst the records of the Recorder's Court of Bombay is a book without date, but which it appears probable was written in 1798, containing the following entries :—

"THE SHERIFF.

"For executing every writ, except summons and subpœna, and for every bill of sale, inventory, appraisement, and bail bond, Rs. 2.

"Poundage on every debt levied by execution, on every sum not exceeding 1,000 rupees, 5 per cent.; on every sum exceeding Rs. 1,000, 2½ per cent."

And amongst the records of the Supreme Court is the following table of fees:—

"THE SHERIFF.

"For executing every writ, except summons and subpœna and for every bill of sale, inventory, appraisement, and bail bond, Rs. 2.

"Poundage on every debt levied by execution, on every sum not exceeding 1,000 rupees, 5 per cent.; on every sum exceeding 1,000 rupees, 2½ per cent.

"For executing every writ of summons, subpœna, or other process or order of court on the Island of Salsette, for every two English miles, calculating only the distance out, Rs. 3.

"For ditto on the Island of Caranja, Elephanta, Butchers' Island, &c., Rs. 8."

"For ditto in the harbour of Bombay, Rs. 3."

On the 26th of April 1852 a new table of fees was substituted, which is to be found at page 200 of the printed Rules and Orders of the Supreme Court; and by that the fee for executing every writ, except summons and subpœna, was reduced to R. 1, and the poundage to 2½ per cent. on every sum not exceeding Rs. 1,000, and 1¼ per cent. on every sum exceeding Rs. 1,000, the same words being used as in the former table.

It thus appears that from the earliest time the words "levied by execution" were the only words used in the table of fees; and, unless they were applicable to the taking the body of a debtor in execution under a writ of *capias*, the Sheriff was entitled to no other fee upon executing that writ, unless the debt were paid, than two rupees, and since 1852 one rupee.

In the table of fees of the High Court the only other fee applicable to a warrant for arrest in execution is:—"For

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executing writs of execution against persons and effects, warrants for apprehension of witnesses, sequestration, and warrants for security to be furnished by defendants issued by the Court or by Mofussil authorities, for each defendant Rs. 2 ;" and the Sheriff, therefore, upon arresting and detaining a debtor in execution, if he is not entitled by this table to poundage, will, unless the debt be paid, receive only the same fee as upon apprehending a witness, and which fee he also receives upon executing a warrant for attachment of property.

The words used in the different tables of fees are not so precise as those of the Stat. 28 Eliz., c. 4, where the words " or take the body in execution for" are added; but in order to satisfy the word "levy" it is not necessary that the debt should have been paid: *Alchin* v. *Wells* (*e*), where the Sheriff was held to be entitled to his poundage for levying under a *fi. fa.*, though the parties compromised before he sold any of the goods; and we are of opinion that as the words " debt levied by execution" used in the table of fees for the Recorder's Court have been continued in the subsequent tables, without any apparent intention that they were to receive a different construction, we ought, in determining what is their meaning, to resort to evidence of usage. There is such an ambiguity in the table as to justify the application of the rule, that if an " instrument be an ancient one, and its meaning doubtful, the acts of its author may be given in evidence in aid of its construction."

The ambiguity is increased when we consider what at that time was the duty and liability of the Sheriff. By the law obtaining in the Recorder's Court, and in the Supreme Court until the passing of Act VI. of 1855 (and which was the law of England before the Stat. 5 & 6 Vict., c. 98), if a defendant taken in execution, was afterwards seen at large for any the shortest time even before the return of the writ, the Sheriff was liable to an action of debt for the escape, in which the plaintiff recovered the whole debt: *Hawkins* v. *Plomer* (*f*), and, per *Buller*, J., *Bonafous* v.

(*e*) 5 T. R. 470. (*f*) 2 W. Black. 1047.

Walker. (*g*) It can scarcely be supposed that it was the intention of the courts, by which the tables of fees were settled, that the Sheriff was to receive a sum of R. 1 or Rs. 2 only for performing a duty which was attended by such a liability, especially as a Sheriff in England was then entitled to poundage upon the whole debt: *Peacock* v. *Harris*. (*h*)

As the Sheriff is the officer of the Court, and his fees are received under its authority, we have not thought it necessary to refer the case back to the Court of Small Causes that evidence of usage may be taken, but have caused an examination to be made of the records in the Sheriff's office. From these it appears that until the year 1859 the Sheriff received poundage in all cases where the defendant was arrested, and sent to prison, and no part of the debt was paid; that bills were made out to the attorney for the plaintiff at the time of the arrest, and in most cases appear to have been paid at once. About the time above mentioned the late Deputy Sheriff, Mr. Leggett, was appointed, and from that time no poundage has been claimed where the defendant has been liberated from prison without any part of the debt being paid; and where a part of the debt has been paid, the Sheriff has received poundage on the amount of the decree, but not until the payment was made, a practice which a strict construction of the word "levied" would not authorise. In the case of Captain Haines, who was arrested in August 1854, the poundage was paid by the Government on the 29th of January 1857, although the debt for which he was arrested was never paid, and he was not discharged from prison until the 9th of June 1860. We consider that no weight can be attached to the change in 1859, as opposed to the long previous practice; and that, having regard, as well to the usage and practice of the Supreme Court, as to the liability of the Sheriff at the time the old tables of fees were settled, we must construe the words used as entitling the Sheriff to poundage upon his executing a warrant for the arrest of a defendant in execution of a decree; and this agrees with the decision in *Miller* v. *Abbot* at

(*g*) 2 T. R. 129. (*h*) 1 Salk. 331.

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Madras. (i) And if the right of the Sheriff accrues upon his executing the warrant, the subsequent discharge, by the court, of the defendant from custody ought not to divest him of it. The Sheriff is bound to execute the warrant, and cannot inquire whether it is a necessary or proper proceeding; whilst it would seem to be the duty of the plaintiff to do so, as he may be required by the court to show cause why he did not proceed against the defendant's property. The liability to pay the poundage may operate as a wholesome restraint, and prevent executions against the person being issued where they would be fruitless.

We have alluded to the Stat. 5 & 6 Vic., c. 98. By that it was enacted that after the 1st of March 1843 no poundage should be allowed to Sheriffs for taking the body of any person in execution; but it was at the same time enacted, that in the case of an escape, the Sheriff should be liable only to an action on the case for damages sustained by the person at whose suit the debtor was taken or imprisoned, and should not be liable to any action of debt in consequence of such escape. This is also, by Act VIII. of 1852, the law with regard to process from the Mofussil Courts executed by the Sheriff. And by Sec. 10 of Act VI. of 1855, in the case of writs of execution issued out of the Supreme Court the Sheriff was not to be liable, in an action for escape or other breach of duty, to pay damages beyond the amount of the loss which his breach of duty had really occasioned; but this enactment was not followed by any alteration in the table of fees of the Supreme Court. This alteration in the liability of the Sheriff would not, we think, justify us in now putting a different construction upon the words used in the present table of fees from what was put upon the same words by a long course of practice in the Supreme Court; and we are of opinion that the Sheriff is entitled to recover in this suit, and, accordingly, order a verdict to be entered for the plaintiff for the amount claimed with costs, and that the defendants do pay the costs of reserving the question, and stating it for the opinion of this court, and otherwise arising thereout or connected therewith.

(i) 1 Stra. Mad. Ca. 211.