

to me by the said Henry Smythies early in October, one thousand eight hundred and sixty-six, and I was not furnished with any other costs or accounts current, nor did he make any other or further claim against me until long after the settlement of this action, as hereinafter more fully appears.

8. That during said negotiations for settlement, I explained to the said Henry Howarth, as the fact was, that a large proportion of the costs I showed to him were not fairly chargeable against me, and that all the criminal proceedings against the defendant, George Elliott Barton, were undertaken for costs out of pocket; he, the said Smythies, stating to me at the time he urged me to commence them, that he required them to clear his own character before the Judges, because as the matter then stood it did not appear whether he or the said George Elliott Barton had committed perjury; and I say that he repeated the same statement in a letter which he published in the *Daily Times* Newspaper of the twelfth day of May, one thousand eight hundred and sixty-six, in which he wrote as follows:—

“With the view of having the case heard before Mr. Rees left Dunedin, so that I might be cleared before the public of the charge of perjury made by Mr. Barton, I assisted Russell with the information, but immediately upon his (that is Rees’) admission, I handed over the papers to Mr. Rees, and acted no more in the matter except as a witness; although I believe Mr. Rees considered me as solicitor to the prosecution. Mr. Smith seems to think that because Mr. Barton is the leader of the bar and I only his clerk, it was my duty to the profession to submit to the charge of perjury, and not attempt to clear myself at the expense of Mr. Barton; I think otherwise, but I may be wrong. The public can now judge of my conduct.—I am, &c., HENRY SMYTHIES.”

9. That the said Henry Howarth looked through the said costs, and expressed his opinion that said costs would tax below the amounts of the payments, and afterwards the said costs were, upon taxation, in fact reduced by the taxing officer considerably below the said amount so paid and by the said Smythies appropriated in the said account current to the payment thereof.

10. That on the fourth day of December, one thousand eight hundred and sixty-six, the day previous to the final settlement with the said Howarth, I called upon Henry Smythies, and informed him that I had that day had an interview with Howarth, and I informed him of the terms Howarth had offered to me; and that I, on my part, had offered to take four hundred pounds in full of all demands; and I say that on that occasion the said Henry Smythies again endeavoured to dissuade me from settlement, and we together walked up High Street to the residence of a Mr. Fisher, quite at the top of the said street, and we were discussing the said settlement, and the said Smythies still endeavouring to dissuade me from it; but when he found that I was so determined upon settlement, he at last said, “Well, if you can get the four hundred pounds in cash, you had better take it;” and he then informed me that the costs of the action against the Sheriff would amount to about twenty-five pounds or thirty pounds, and that I ought to endeavour to get these costs added on and included in the settlement.

11. That on the following day, the fifth day of December, one thousand eight hundred and sixty-six, I settled all the said actions and proceedings with the said Howarth for the sum of four hundred and twenty pounds, the odd twenty pounds being for the costs of the said action against the Sheriff, which the said Smythies had on the previous day suggested to me to get added.

12. That on the afternoon of the same day, I wrote to the said Henry Smythies informing him that I had settled, and said letter was also written by me in the said shop of Ure and Company, and was by Mr. Ure, in my presence, handed to the said porter for delivery; and I saw him leave with it to deliver it at the office of the said Smythies, and I have no doubt that he did duly deliver it.

13. That on the seventh day of December, one thousand eight hundred and sixty-six, two days after the settlement, I called on Mr. Smythies, and then informed him, personally, of the said settlement; and I showed to him, and I believe left with him, my copy of the deed of settlement, of which the deed set forth in his affidavit of the fifth day of May, one thousand eight hundred and sixty-eight, is, I believe, a correct copy. And I say that during that interview, the said Smythies advised me not to enter up satisfaction on the judgment in this action until the bills of exchange given by the said Howarth to me, in part payment, were all paid.

14. That during all these several interviews the said Smythies never said or pretended that the settlement was made in fraud of his rights, and it was not until the seventeenth day of December, one thousand eight hundred and sixty-six, long after the said settlement, that the said Smythies furnished me with other and further costs, and with another account current, in which he claimed from me eight hundred and twenty-seven pounds fourteen shillings for costs, and showed the balance due from me as four hundred and thirty-four pounds sixteen shillings.

15. That so far from my being indebted to him in said sum of four hundred and thirty-four pounds sixteen shillings, I claim that rightfully he is indebted to me on foot of said accounts and costs.

16. I deny most positively that the settlement aforesaid was made without the knowledge of the said Smythies, and I say that during all the time of the negotiations I was in constant and almost daily communication with him, and for a considerable time after said settlement, continued to do business with him, and he had several cases of mine in his hands; and in corroboration of that fact I refer to a statement of the said Henry Smythies, in the seventeenth paragraph of an affidavit sworn by by him and the said Henry Waddington Smythies, on the twenty-first day of January, one thousand eight hundred and sixty-seven, and filed in this Court, wherein he says:—

“That he (Russell) was constantly in my office as is shown by the Call-book, in which his name appears upon eighty-six days upon which he saw me on business, between the sixteenth day of June last and the twenty-first day of December last; besides which, he was many times at my private residence, and many of such attendances extended over two hours.”

17. That on the twenty-fourth day of December, one thousand eight hundred and sixty-six, after the delivery to me of the said further costs and accounts current, I received from the said Henry Smythies the following letter:—

“DEAR SIR,—

“Rattray Street, 24th December, 1866.

“I hope you will help me through the Christmas by giving me some part of the spoil obtained from Mr. Howarth. You know we are told not to muzzle the ox that treadeth out the corn.

“I have no objection to wait for your award to settle up.

“Faithfully your’s,  
“HY. SMYTHIES.”

“J. U. Russell, Esq.”