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*Mar. 27.

*June 26.

JAMES J. BELL AND J. V. TEETZEL..APPELLANTS;

AND

WALTER H. WRIGHT AND OTHERS.RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Solicitor—Lien for costs—Fund in court—Priority of payment—Set-off—Jurisdiction of master—General directions.

In a suit for construction of a will and administration of testator's estate, where the land of the estate had been sold and the proceeds paid into court, J. J. B., a beneficiary under the will and entitled to a share in said fund, was ordered personally to pay certain costs to other beneficiaries.

Held, reversing the decision of the Court of Appeal, that the solicitor of J. J. B. had a lien on the fund in court for his costs as between solicitor and client in priority to the parties who had been allowed costs against J. J. B. personally.

Held also, that the referee before whom the administration proceedings were pending had no authority to make an order depriving the solicitor of his lien not having been so directed by the administration order and no general order permitting such an interference with the solicitor's *primâ facie* right to the fund.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the ruling of Rose J. that the solicitor of J. J. Bell had a prior lien on the fund in court for his costs.

The only question for decision on the appeal was whether or not the appellant, Teetzel, as solicitor of James J. Bell had a first lien for his costs as between solicitor and client on a fund in court arising from the sale of land belonging to the estate in administration of which, and in litigation to ascertain the construction of the will of the former owner, the said

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

(1) 16 Ont. P. R. 335.

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costs arose. The prior lien was contested on the ground that J. J. Bell had been ordered to pay costs personally to other parties to the litigation and that the lien could only attach to the balance remaining after these other parties were paid.

The referee before whom the administration proceedings were pending decided against the solicitor's priority. His decision was reversed by Mr. Justice Rose, but restored by the Court of Appeal.

Armour Q.C. and *McBrayne* for the appellants. For the purposes of the lien the fund in court is in the same position as if it were in the solicitor's possession. *Savage* v. *James* (1).

The solicitor has a lien in priority to his client and must have priority over other parties. *Haynes* v. *Cooper* (2).

We cannot be deprived of our lien unless *Ex parte Cleland* (3) is overruled.

Lefroy for the respondents the Wrights, and *Beck* for Houghton and Clarke, referred to *Pringle* v. *Gloag* (4); *Canadian Bank of Commerce* v. *Crouch* (5); *Brown* v. *Nelson* (6).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—I am of opinion that this appeal must be allowed, and the judgment of Mr. Justice Rose, who reversed the decision of the referee, must be restored.

In the first place, the referee had no jurisdiction to make the order or ruling which he states in his certificate, depriving the solicitor of James J. Bell of his lien for costs, and of his right to payment in virtue of that lien out of the share of his client payable under the ad-

(1) Ir. Rep. 9 Eq. 357.
(2) 33 Beav. 431.
(3) 2 Ch. App. 808.
(4) 10 Ch. D. 676.
(5) 8 Ont. P. R. 437.
(6) 11 Ont. P. R. 121.

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ministration decree. The authority of the referee to make such an order must be derived either under the administration decree or under some general order. I find no such direction in the administration order made by Mr. Justice Ferguson, which was reinstated by the judgment of this court and under which the referee was proceeding. Neither do I find any general order authorizing such an interference with the *primâ facie* right of the solicitor to a fund which he had recovered for his client. The parties should have asked that the payment of costs should be provided for in this way by the decree. The general directions as to the powers and functions of the master, or referee, contained in the general order defining the jurisdiction of the master in taking accounts, does not, in my opinion, extend to a case like the present. It is not within the general direction to make just allowances.

The parties who are entitled to recover costs against James J. Bell are in no other or better position than any other creditors of his, and general creditors could not enforce an execution against this fund in court, which is just as much in the solicitor's hands as if it had been paid to him directly and personally instead of into court, except by way of execution by means of a charging or stop order. Had the fund actually gone into the solicitor's hands, it is out of the question to say that it could be taken from him by a judgment creditor to the prejudice of his lien.

Whatever general observations of learned judges in some of the cases cited may seem to discountenance the view which I take, Lord Cairns L. J., in his considered judgment in *Ex parte Cleland, In re Davies* (1), points out, that to order a set off in such a case as that before him, and in such a case as the present, would be to disregard that principle of

(1) 2 Ch. App. 808.

mutuality which is the essential basis of set off. In the present case, as soon as the fund in court was recovered a lien was by operation of law immediately attached to it in favour of the solicitor of James J. Bell. Therefore, if we are to regard this as a case of set off, it would be a set off against money in the hands of the court due to James J. Bell and his solicitor conjointly of money due by James J. Bell alone. It cannot be said that the solicitor's lien is subject to the rights of all creditors of the client before any set off is ordered. Take the simple case of a debt recovered in an action at law, the money being paid into the hands of the solicitor of the plaintiff, no creditor can touch that money until the solicitor's lien is first satisfied. Then, as I have before stated, the rights of a solicitor as to money in court are exactly the same as if it was in his own hands (1).

In the case of *Ex parte Cleland* (2), Lord Cairns gives expression to the principle I have propounded in the following short passage in his judgment:

> The debt or claim, therefore, for costs is not the debt or claim of Cleland alone, it is in the view of a court of equity, and upon the principles of a court of equity, a debt or claim which has been assigned or encumbered, and the persons entitled to it are not Cleland alone, but Cleland and his solicitor, the claim of the solicitor being paramount to that of Cleland. That consideration, in my opinion, renders it impossible that the costs can be set off against the debt.

I should say that this case of *Ex parte Cleland* (2) does not appear to have been cited to the Court of Appeal.

This, it is true, is not strictly speaking a case of set off, but one in which execution against, or satisfaction out of, a fund is sought by creditors in priority to the solicitor, who recovered it, but viewed in that light, whilst the principle applied by Lord Cairns is also applicable here, its application is *a fortiori*.

(1) *Savage* v. *James* Ir. Rep. 9 Eq. 357. (2) 2 Ch. App. 808.

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The appeal must be allowed and Mr. Justice Rose's order of the 8th of May, 1894, must be restored with costs to the appellants both here and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellants: *Teetzel, Harrison & McBrayne.*

Solicitors for the respondents the Wrights: *Lefroy & Boulton.*

Solicitors for the respondents Houghton and Clarke: *Beck & Code.*