Present: Lascelles C.J. and Middleton J. 1911.

APPU SINNO *et al.* *v.* DE SILVA.

164—D. C. Galle, 10,353.

Proctor's lien for costs on money deposited in Court for the use of his client—Claim for set-off by party depositing money—Civil Procedure Code, ss. 75 and 212—Taxation of bill of costs.

Defendant deposited in Court a sum of Rs. 200 for the use of the plaintiffs. Judgment was entered for plaintiffs for that sum, but plaintiffs were ordered to pay defendant's costs.

Held, that plaintiffs' proctor had a lien on the sum deposited for his costs.

MIDDLETON J.—Here the defendant seeks to set off his order for costs against the sum decreed by the Court to be paid by him to the plaintiffs; and I think section 212 preserves the plaintiffs' proctor's lien on that sum.

As regards the proctor's costs not having been taxed at the time the motion was made asserting the right of lien, I cannot see how this would prevent the right of lien arising, which apparently extends no further than for the amount of the costs taxed.

THE facts are set out in the judgment.

Bawa, for the plaintiffs, appellants.—The money was deposited in Court to plaintiffs' credit. The ninth appellant, who is the proctor

[1] *L. R. 3 Tr. 299.*

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for the plaintiffs, has a lien over that sum for costs due to him from the plaintiffs. See Civil Procedure Code, sections 75 and 212, and *Perera v. Perera.*[1]

A solicitor who succeeds in an action has a lien over the amount recovered; the lien may be compared to salvage over property recovered at sea. See *Charlton v. Charlton.*[2]

[Their Lordships stopped counsel and called upon the respondent.]

A. St. V. Jayewardene, for the defendant, respondent.—The lien that is now claimed does not exist under the Roman-Dutch law. See *Thomson's Institutes, vol. I., p. 556; Pereira's Laws of Ceylon, vol. II., p. 486; 2 Maas. 254.*

Sections 75 and 212 do not apply to a case of this kind. They contemplate a decree for costs in favour of the client of the proctor claiming the lien. In the present case there is no such decree. *Perera v. Perera*[1] also does not apply to the facts of this case.

The ninth appellant must bring a separate action to recover his costs, and the procedure laid down in section 215 of the Civil Procedure Code must be followed.

The bill of costs was not taxed at the time when the motion was made to have the lien made a matter of record; no lien can exist with respect to an unascertained sum.

Bawa, in reply.—It will be unreasonable to hold that because the plaintiffs have been denied their costs that their proctor has no lien over the money recovered by him.

Sections 75 and 212 do not create the lien; they only recognize the lien. [Lascelles, C.J.—If the money was in the proctor's hands there may be a lien, but if the money was deposited in Court, would the proctor have a lien?] The money was won for the plaintiffs by the proctor. The principle of salvage applies to a proctor who has succeeded in an action.

Sections 75 and 212 have not been carefully worded. See the observations of Hutchinson C.J. in *Perera v. Perera.*[1]

The words " under the decree " in the sections have no special meaning, and may be disregarded.

Section 215 only indicates the manner of proceeding to recover costs; it does not affect the lien.

The Roman-Dutch law as to a proctor's lien was not adopted in Ceylon. It is the English law that applies.

The fact that the bill of costs was not taxed at the time when the motion was made does not matter. Counsel cited *De Bay v. Griffin;*[3] *Greer v. Young;*[4] *In re Suffield;*[5] *Pereira's Laws of Ceylon, vol. II., p. 417.*

Cur. adv. vult.

[1] *(1907) 11 N. L. R. 1.*
[2] *(1883) 52 L. J. Ch. 971.*
[3] *(1875) 2 L. R. Ch. 291.*
[4] *24 Ch. D. 687.*
[5] *(1888) 20 Q. B. D. 693.*

November 29, 1911. LASCELLES C.J.— 1911.

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This appeal raises the question whether the plaintiffs' proctor is entitled to a lien for the costs on a sum paid into Court by the defendant in discharge of the claim, in a case where the plaintiffs were ordered to pay the defendant's costs.

On December 21, 1910, the defendant deposited Rs. 200 in Court for the use of the plaintiffs. Judgment for that amount was entered in favour of the plaintiffs on March 15, 1911, the plaintiffs being ordered to pay the defendant's costs. The defendant on May 4 got his bill of costs taxed, and on May 9 the ninth appellant, who is the plaintiffs' proctor, moved the Court that his lien on the sum of Rs. 200 be made matter of record.

Some delay took place in taxing the ninth appellant's bill of costs, and before taxation the defendant on July 17 seized the sum of Rs. 200 under his writ. When the matter came on for discussion, the learned District Judge decided adversely to the lien claimed by the ninth appellant, and the present appeal is against this decision.

It appears to be at least doubtful whether the Roman-Dutch law would allow the lien for which the appellant contends. According to Maasdorp (*2 Maasdorp 254*), an attorney or conveyancer has a lien on documents in his possession for the costs of professional services rendered by him or expenses incurred by him upon or with respect to such documents, but it does not appear to be settled that a legal practitioner has such a lien for his costs upon the amount of a judgment obtained by him in favour of his client. The appellants' case thus depends upon the view that the Civil Procedure Code has by implication introduced the principle of the English common law with regard to a solicitor's lien for costs rather than upon any principle of the Roman-Dutch law.

The only sections of the Civil Procedure Code which bear on the question are sections 75 (*e*) and 212. These sections run as follows. Section 75 (*e*): " When the defendant sets up a claim in reconvention, the answer must contain a plain and a concise statement of the facts constituting the ground of such claim which the defendant makes in reconvention. A claim in reconvention duly set up in the answer shall have the same effect as a plaint in a cross action so as to enable the Court to pronounce a final judgment in the same action both on the original and on the cross claim; but it shall not affect the lien upon the amount decreed of any proctor in respect of the costs payable to him under the decree." Section 212: " The Court may direct that the costs payable to one party by another shall be set off against a sum which is admitted or is found in the action to be due from the former to the latter. But such direction shall not affect the lien upon the amount decreed of any proctor in respect of the costs payable to him under the decree. "

The construction of these sections is not free from difficulty, as decrees, under the practice which prevails in Ceylon, do not

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specifically direct the payment of costs to the proctor. The difficulty appears to arise from the phraseology of section 111 of the Indian Civil Procedure Code of 1882 having been adopted without the modification required by the procedure in force in Ceylon.

In *Perera v. Perera*[1] Hutchinson C.J., commenting on these sections, observed: "What are the costs payable to him under the decree? The decree never orders any costs to be paid to the proctor. I do not see what the phrase can mean, unless it means such of the costs which the other party is ordered to pay to the proctor's client, as the proctor is entitled to recover from his client. These enactments appear to me to assume that for those costs the proctor has a lien or charge on the amount decreed, and to enact that that charge shall not be affected by a claim in reconvention or a set-off. I do not see how any effect can be given to these enactments without holding that a proctor has such a charge. I therefore hold that a proctor has such a charge."

For the appellants it is contended that it is a necessary inference from the language of sections 75 and 212 that the principles of the English common law as embodied in the Solicitors' Act (*23-24 Vict. c. 127*) have been recognized and incorporated into our system, and that the proctor has a charge in the nature of salvage upon property recovered or preserved by him, and we were referred to *Greer v. Young*,[2] *In re Suffield*,[3] *Charlton v. Charlton*,[4] and other cases cited in the *Annual Practice*.

It is true that sections 75 and 212 assume the existence of the lien contended for only as regards costs directed to be paid by the decree. But assuming, as we are bound by the decision in *Perera v. Perera*[1] to assume, that a proctor possesses a lien on the fruits of litigation for costs decreed to be paid to his client, can a distinction be drawn between costs which the opposing proctor is ordered to pay to the proctor's client and costs which the proctor is entitled to have taxed and to recover from his own client? It seems to me that such a distinction would be artificial and unfair. The lien which is recognized, not created, by sections 75 and 212 can hardly be any other than the lien which is allowed by English law, a right depending upon the principle that a proctor is entitled to a charge upon property recovered or preserved when meritorious services of the proctor result in such recovery or preservation.

It is difficult to think of any good reason why a plaintiff's proctor should be entitled to a charge for his costs when the action succeeds and the Court orders the defendant to pay the plaintiff's costs, but that he should not have such a charge if the defendant brings into Court the amount claimed and so saves an order as to costs. In either case the principle of salvage is involved, for it is by reason of the proctor's service that the money has been made available. I

[1] *(1907) 11 N. L. R. 1.*
[2] *24 Ch. Div. 545.*
[3] *(1888) 20 Q. B. D. 693.*
[4] *52 L. J. Ch. 971.*

would set aside the order of the District Judge, and declare that the plaintiffs' proctor has a charge, to the extent of his taxed costs, on the money brought into Court by the defendant. The appellants are entitled to the costs of this appeal and to costs of the application in the District Court.

MIDDLETON J.—

This was an appeal against an order of the District Judge holding that the plaintiffs' proctor had no lien for costs as against his clients upon a sum of Rs. 200 paid into Court by the defendant in satisfaction of the plaintiffs' claim in the action, on the ground that the proctor had no lien against a creditor of his clients, and that the proctor's bill had not been taxed.

In the action itself the plaintiffs had been given judgment for the Rs. 200 paid into Court, but had been ordered to pay the defendant's costs, and the defendant's proctor had taxed his bill and moved for a charging order on the money in Court, and having subsequently obtained a writ seized the money in Court, when the plaintiffs moved for and obtained discussion of the question of their proctor's lien on the money in question, upon which the order appealed from was made. Subsequently to this order the plaintiffs' proctor taxed his costs.

The Roman-Dutch law would not appear to give a proctor a lien on the instruments of the cause—presumably documents—except for expenses incurred on such documents. *Voet 3, 1, 6; Thompson, vol. I., p. 536; Pereira, vol. II., p. 486.*

The decision, however, in *Anderson v. Loos*[1] and sections 75 and 212 of the Civil Procedure Code seem to recognize the proctor's lien for costs, both as regards documents and upon the amount of a decree, derived no doubt from the principles of the English common law on this question, now embodied, as regards a lien on a fund recovered, in the Solicitors' Act (1860), section 28.

Kay L.J., in *Ex parte Collier, In re Taylor*,[2] quotes Sir Thomas Pluner as saying in 1820 (*Worrall v. Johnson*[3]) " there are two kinds of lien which a solicitor has for his bill of costs, one on the funds recovered and the other on the papers in hands " . . . and the Lord Justice added that the lien extends to all those items which are properly included in the bill of costs, or, as the learned Lord Justice amplified it, to all such claims against his client as the taxing master has a right to consider and if necessary moderate.

In *Mackenzie v. Macintosh*[4] it was held that a solicitor's lien on a fund recovered extends only to the costs of recovery of the particular fund, while a lien on documents may extend to all costs due to him from his client.

[1] *(1892) 2 C. L. R. 66.*
[2] *(1891) 1 Ch. 599.*
[3] *2 Jacob & Walker 214, 218.*
[4] *64 Law Times 706 (C. A.).*

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The wording of the two sections of our Code in regard to the question before us is unfortunate, but in my opinion the reading suggested by Mr. Bawa is the correct one, *i.e.*, that the words " under the decree " are both surplusage and out of place.

It is clear no costs are ever decreed to be paid to a proctor, and that the words " under the decree " are unnecessary, even if they were placed following the word " decreed," but in that position they do no more than excessively emphasize and reiterate the preceding word.

I cannot see that the point raised by Mr. Jayewardene is applicable, *i.e.*, that there must be a decree to create the lien. There is, in fact, a decree in the action itself to the effect that the sum brought into Court be paid by the defendant to the plaintiffs.

It must be remembered also that under the English law the right of lien is said to be a charge in the nature of salvage (*Greer v. Young*[1]) and applies to property of the proctor's client, and sometimes even to money paid into Court for his benefit (*Hunt v. Austin*,[2] *Emden v. Carte*[3]). Under the decree in the action here the plaintiffs are held entitled to have the Rs. 200 paid out of Court to them. I cannot, therefore, see that it is proposed to extend the lien as against the creditor of the plaintiffs, as the District Judge holds.

In *Perera v. Perera*[4] Hutchinson C.J. construed the words of sections 75 and 212 as enacting that the proctor has a lien or charge on the amount decreed, and that that charge was not to be affected by a claim in reconvention or a set-off, and that no effect could be given to the enactment unless it was held a proctor had such a charge. With his view not only do I entirely agree, but we are bound by it.

Here the defendant seeks to set off his order for costs against the plaintiffs as against the sum decreed by the Court to be paid by him to the plaintiffs; and I think section 212 preserves the plaintiffs' proctor's lien on that sum.

As regards the proctor's costs not having been taxed at the time the motion was made asserting the right of lien, I cannot see how this would prevent the right of lien arising, which apparently extends no further than for the amount of costs as taxed (*De Bay v. Griffin*[5]).

In my opinion the order of the District Judge should be set aside, and the motion of the plaintiffs and the proctor allowed to the extent of the taxed costs in this action for the recovery of the money now in Court. The defendant must pay the costs of this appeal and of the discussion and order in the Court below.

Set aside.

[1] *24 Ch. Div. 455 at page 552.*
[2] *9 Q. B. D. 598.*
[3] *19 Ch. Div. 311.*
[4] *(1907) 11 N. L. R. 1.*
[5] *(1875) L. R. 10 Ch. 291.*