

Present: De Sampayo J. and Schneider A.J.

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PERERA v. DON MANUEL.

134—D. C. (Inty.) Chilaw, 4,637.

Costs—Proctor's lien—Death—Prescription.

A proctor's lien is not destroyed by his death, but may be enforced by his legal representative.

The Court has power to order payment of a sum found to be due as costs to a proctor, though the bill has not been formally taxed by the Secretary of the Court. Section 215 of the Civil Procedure Code is a necessary preliminary only to an action, and a lien over a fund in Court in the very case in which the proctor acted and recovered money for his client does not amount to an action. A valid lien is never prescribed, and can be enforced even after the debt is barred.

THE facts appear from the judgment.

A. St. V. Jayawardene, for the appellant.

Amarasekere, for respondent.

March 14, 1919. DE SAMPAYO J.—

This appeal involves one or two important points of law with regard to a proctor's lien. On September 2 and 8, 1912, for which the case had been fixed for trial, the Court ordered the plaintiff, who was in default of appearance, to pay the costs of those two days to the defendant before the next date of trial. The defendant's proctor was Mr. G. V. de Silva, and he had the bill of costs taxed at Rs. 325.63, and this sum was on September 23, 1912, deposited in Court by the plaintiff. Judgment was ultimately entered in favour of the plaintiff, and under writ of execution issued by him the money in Court was seized on July 9, 1913. When the plaintiff moved to draw the money, Mr. Perera filed a bill of costs due to him from his client, the defendant, with an affidavit verifying the items, and showing that, after crediting the defendant with moneys which he had paid in respect of the expenses of the litigation, there was due by the defendant to him a sum of Rs. 434.57, and he moved that his lien on the sum in Court be recorded, which was accordingly done. The matter remained in this condition until February 15, 1918, when the widow and administratrix of Mr. Perera, who had in the meantime died, appeared in Court and moved to draw the money in Court, and notice of this application was issued to the parties. The plaintiff stated that he had no cause to show, as the judgment in his favour had been fully satisfied.

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but the defendant resisted the claim on various grounds. The District Judge eventually allowed the application, and the defendant has appealed.

It was urged in the District Court, on behalf of the defendant that the administratrix had no status in Court, and that the proctor's lien died with him. This objection was rightly abandoned in appeal by Mr. Jayawardene, who appeared for the defendant. A proctor's lien is not destroyed by his death, but may be enforced by his legal representative. (See the *Laws of England*, vol. 26, page 818, and the authorities therein cited.) Mr. Jayawardene, however, pressed two other points, which require consideration.

The bill of costs filed by Mr. Perera in connection with the claim of a lien has not been taxed by the Secretary of the Court, and it is contended that, by reason of the provisions of section 215 of the Civil Procedure Code, the lien cannot be enforced. The District Judge is of opinion that, as a matter of fact, the defendant, against whom the money had been seized in execution, knew all about his proctor's claim and consented to it, and I think the circumstances justify that conclusion. It further appears that in the present proceedings the defendant was given a chance of calling evidence to prove that the amount claimed was not due to Mr. Perera as costs, but no such evidence was called. In view of these circumstances, it will be inequitable to refuse the claim, unless the law requires a proctor's bill of costs to be taxed before the lien can be enforced. If such taxation be a condition precedent, I should certainly allow the administratrix an opportunity of having the bill taxed, but I do not think the law goes that-length. All that is provided by section 215 of the Code is that no proctor shall commence or maintain action for costs until the expiration of one month after he shall have delivered to the party charged a bill of costs, and the section proceeds to provide that after such delivery the party or the proctor may obtain an appointment from the taxing officer and have the bill taxed. I shall assume that, not only the delivery of a bill, but the taxation of it is made a necessary preliminary to the commencement of an action. But a step taken to enforce a lien over a fund in Court, especially where it is in the very case in which the proctor acted and recovered the money for his client, does not amount to an action. He is under no necessity to bring an action at all. By virtue of his lien he has a right to ask the Court for its intervention whenever he is likely otherwise to be deprived of his costs (*Mercer v. Graves* ¹). He is therefore entitled to apply to the Courts, if the fund is in Court, for payment of his costs out of it (*Moore v. Smith* ²). This is exactly what happened in this case, and I do not think that the Court is prevented from making an order for payment of a sum which is found to be due as costs, though the bill has not been formally taxed.

¹ (1872) L. R. 7 Q. B. 499.

² (1851) 14 Beav. 393.

The other objection taken is that prescription has run out, and that the claim of the administratrix cannot be maintained. Here, again, a distinction must be observed. An action might not be brought by reason of section 11 of the Prescription Ordinance, but, as pointed out above, the present proceedings do not constitute an action within the meaning of the Ordinance. A valid lien may, however, be enforced even after the debt is barred. Under the Solicitors Act, 23 and 24 Vict., c. 27, no doubt the Court cannot make a charge on the property if the right to recover the costs is barred. That Act does not apply to Ceylon, nor is a lien, existing independently of a charging order, affected by the provisions of the Act. The common law right to enforce a lien still exists. Before the Solicitors Act the solicitor's lien remained enforceable, though limitation prevented the debt being recovered by action (*Higgins v. Scott*¹). The reason is that the Statute of Limitations bars the remedy by action, but does not extinguish the debt. See also *Re Hepburn ex parte Smith*,² where Cave J. put the matter thus: "There is in law no right without a remedy, and if all remedies for enforcing a right are gone, the right has in point of law ceased to exist. In the case of a debt the ordinary and universal remedy is by action against the debtor. There may, however, and sometimes does, exist another remedy, not by action against the debtor, but arising out of the possession of the property of the debtor which by law or contract may be detained by the creditor until the debt is paid. This latter remedy may exist, although the remedy by action is barred, and in that case the debt continues to exist so far as is necessary for the enforcement of this right of lien, but not for enforcing the remedy by action."

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Even this does not appear to be a complete statement of the effect of the Statute of Limitations. For it was explained in *London and Midland Bank v. Mitchell*³ that the statute only barred the personal action, but that an action might be maintained, notwithstanding the statute, to enforce any security for the debt by sale or otherwise. The law so expounded equally applies to our Ordinance of Prescriptions, and, in my opinion, the proctor's lien in this case can be enforced by applying for payment out of the fund in Court.

For these reasons I would dismiss the appeal with costs.

SCHNEIDER A.J.—I agree.

Appeal dismissed.

¹ (1831) 2 B. & Ag. 413.

² (1884) L. R. 14 Q. B. D., at page 399.

³ (1899) L. R. 2 C. D. 161.