[HIGH COURT OF AUSTRALIA.]

LEEPER AND ANOTHER . . . . . APPELLANTS;

AND

PRIMARY PRODUCERS' BANK OF AUSTRALIA LTD. (IN VOLUNTARY LIQUIDATION) . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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SYDNEY, *Mar.* 27, 28; *April* 17.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Lien—Solicitor—Document obtained from client by solicitor's agent—Undertaking by agent to redeliver document to client upon completion of specified purpose—Authority of agent—Liability of solicitor—Unpaid costs—Solicitor's retaining lien.

A solicitor's general lien extends to documents which have come into his possession in his professional capacity for a particular purpose, if that purpose has been served, but any undertaking by a solicitor to redeliver a document on completion of a sole purpose for which the document has been held is inconsistent with its retention under a general lien.

A solicitor acting for a bank commenced proceedings on behalf of the bank through another solicitor as his agent against a customer of the bank. Judgment was obtained and execution issued. The bank held a certificate of title of certain land in which the customer had an interest and which was mortgaged to the bank. The bank purchased the customer's equity of redemption, and to complete the transaction handed over the certificate of title to the solicitor's agent. A receipt dated 8th November 1929 was given by the agent to the effect that the document was received for the sole purpose of registering a transfer to the bank, upon completion of which the agent undertook to deliver the document to the bank. The solicitor had become ill and the bank dealt with the agent until the conclusion of the transaction. After registration had been effected the solicitor retained the certificate of title claiming a lien for his unpaid costs. On proceedings being taken by the bank for the recovery of

the document the uncontradicted oral evidence of the solicitor and his agent, which was inconsistent with the documentary evidence, was that the document, had been handed over to the agent in October 1929 and the receipt was not signed until the 8th November 1929.

Held:—

(1) That the solicitor held the document upon the conditions expressed in the receipt and that he did not have a general retaining lien over the document.

(2) That the agent's authority to act in the transaction on behalf of the solicitor was wide enough to enable him to give the receipt, which operated as an acknowledgment defining the nature and conditions of the bailment.

Decision of the Supreme Court of Queensland (Full Court) affirmed.

APPEAL from the Supreme Court of Queensland.

An action was commenced in the Supreme Court of Queensland by the Primary Producers' Bank of Australia Ltd. (in voluntary liquidation) against Richard John Leeper and Richard John Leeper the younger, in which the bank claimed to recover possession of a certain certificate of title. The defendant Richard John Leeper was a solicitor in practice at Warwick. The defendant Richard John Leeper the younger was the son of Richard John Leeper and carried on practice as a solicitor at Stanthorpe independently of his father at Warwick. The action was defended, the defendant Richard John Leeper claiming that he was entitled to retain the certificate of title by virtue of a lien for unpaid costs in respect of work performed as solicitor for the bank. The defendant Richard John Leeper the younger alleged that he never had possession of the certificate of title on his own account, and that any *de facto* possession on his part was solely as the agent of the defendant Richard John Leeper. The action was heard by *Hart* A.J. without a jury, in Brisbane, who found for the defendants. The bank appealed to the Full Court of Queensland and that Court reversed the decision of the trial Judge on the grounds that the evidence of the defendants, although uncontradicted, was inconsistent with the documentary evidence and should not have been acted on, and allowed the appeal and set aside the judgment of the trial Judge.

From this decision the two defendants now appealed to the High Court.

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Webb (with him *Robert Smith*), for the appellants. The documents on the face of them show that from a certain stage onwards the father had ceased to be the solicitor for the bank, and the son had become the bank's solicitor. The father had possession of the deed and was entitled to a lien. The son had the document in his possession as *de facto* possession. The receipt of the 8th November 1929 was given in the ordinary course of business but not in due course of business. The son did not sign the receipt for any purpose other than a receipt. There is a general lien. The *Statute of Limitations* does not affect liens (*In re Margetts* (1)).

[DIXON J. referred to *Colmer* v. *Ede* (2).]

Even though the document were lodged in the terms of the receipt, the lien still subsists. As to the case where deeds were deposited for a particular purpose, see *Ex parte Pemberton* (3) and *In re Messenger*; *Ex parte Calvert* (4). Even if there is an undertaking to lend the document to the bank, the matter has never been completed. If there was an agreement to return the deed upon completion, the matter is not complete until the costs are paid. A solicitor is entitled to say in the ordinary course of events that he has a lien on a deed for his costs. It is an equitable charge and the document cannot be tendered to the Registrar-General's office to be registered free from any encumbrance. If there is an encumbrance, there cannot be completion of the registration until the costs are paid. The receipt was not signed by the son with the understanding of either the bank or the son that it should give any contractual rights. The trial Judge heard the witnesses, observed their demeanour and accepted the explanation of the appellants as to the receipt. The bank brought no evidence in reply as to the lien. A solicitor has a lien on documents for the balance of costs in respect of all documents (*In re Faithful and In re London, Brighton and South Coast Railway Co.* (5)). The receipt could not destroy the solicitor's general lien, because the bank manager and the son as agent had no power to enter into any agreement which would destroy the solicitor's general lien. If any costs are due to the solicitor, there is a lien on the deed

(1) (1896) 2 Ch. 263.
(2) (1870) 23 L.T. 884.
(3) (1810) 18 Ves. Jun. 282; 34 E.R. 324.
(4) (1876) 3 Ch. D. 317.
(5) (1868) L.R. 6 Eq. 325.

so that the deed is encumbered, and until that encumbrance is removed the matter cannot be completed. Assuming the receipt amounts to a special agreement to waive the solicitor's general lien in the particular circumstances, the receipt was not signed within the apparent scope of the agent's authority. It cannot be inferred that the agent had a right to sign any document, which would waive not only the particular lien, but the general lien. The receipt was not intended by the parties thereto to give rise to any rights whatsoever. The receipt was the customary document used by the bank in handing over deeds to people other than its own clients. It was not a practice of the bank to ask its solicitor when handing over documents to him to obtain an undertaking as set out in the receipt. The trial Judge found that the receipt was not signed as a document which would give rise to any obligations at all. If a document is given to a solicitor in the ordinary course of business, and if he receives a document for a particular purpose in connection with professional work, then unless he excepts his lien by a completed agreement the solicitor is entitled to have recourse to the document for all his bills of costs (*In re Faithful and In re London, Brighton and South Coast Railway Co.* (1)). There is nothing in the facts which could take the matter out of the ordinary transaction in which the deed is received and in the ordinary circumstances of which a lien arises in operation of law, and when the undertaking is signed it is signed as a receipt. It was not suggested at any time that the solicitor's retainer was withdrawn.

Dovey K.C. (with him *Brian O'Sullivan*), for the respondents. Firstly, on the undisputed facts the debt was the debt not of the father but of the son, that is to say, the son was, except at the very early stages, the principal and not the agent. Secondly, the reason for the existence of the receipt was that there was no lien in respect of this particular document, and therefore the lien could not be successfully set up by either appellant. If the son were the principal, then he had been paid and no question of lien would arise. If the father were the principal and the son merely the agent, then the father has been expressly excluded by the receipt from any lien he

(1) (1868) L.R. 6 Eq. 325.

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might have. The Full Court came to the proper conclusion when it said that the evidence of the appellants was so unreliable that it could not be reasonably accepted in the face of the documents. The evidence of the appellants as to their obtaining possession of the certificate of title is at variance and opposed to the documentary evidence. In all matters in which the evidence of the father and son could be checked it was found to be unreliable. This case falls within the three exceptions mentioned in *Federal Commissioner of Taxation* v. *Clarke* (1). The position is not altered in law whether the receipt was signed on the day the deed was actually taken or subsequently, because it was simply an acknowledgment by the agent of the terms on which he held the document. Whenever the receipt was given it must be taken to mean that there was a reduction into writing of an acknowledgment by the signatory that the deed had been received in accordance with the terms therein expressed, and that it was simply an acknowledgment in writing of an undertaking which had been given verbally at some other date. Assuming that the son was the father's agent, then undoubtedly he had authority far greater than is ordinarily given by a solicitor principal to a solicitor agent, because in this case all subsequent communications were with the son direct who had taken the matter over completely. The son was clothed with full authority, and he has never been divested of that authority, and has retained the document and rendered bills of costs signed by him. Whether the son signed on his own behalf or his father's behalf, both are bound. Whether the son was the agent of the father or whether he was principal in the transaction, both are bound by the receipt, and a lien is thereby excluded. With regard to solicitors' liens, see *Cowell* v. *Simpson* (2). In the case of a bank such a receipt is necessary, as the bank may require the deed immediately and a solicitor may not render his bill of costs for some considerable time.

Webb, in reply. This land was later sold by contract and further legal work was done in connection with it. Obviously, if the title deed were given for a specific object, there was additional work done which is not covered by the undertaking. Supposing a document

(1) (1927) 40 C.L.R. 246, at p. 264. (2) (1809) 16 Ves. Jun. 275; 33 E.R. 989.

is given in such circumstances that no lien arose in regard to a particular transaction and that it was promised to be handed back when something was done, and subsequently to that other legal work was done and there is no agreement as to that, the original arrangement is varied and a lien could be claimed. The case does not fall exactly within *Ex parte Pemberton* (1). The father was the solicitor throughout the whole transaction. The son was simply the agent.

Cur. adv. vult.

April 17

The following written judgments were delivered :—

RICH, DIXON, EVATT AND MCTIERNAN JJ. The appellant, R. J. Leeper the elder, was employed by the respondent bank before it went into liquidation to act as its solicitor in a number of transactions. His costs in respect of several of them have not been paid. The question upon this appeal is whether his solicitor's general retaining lien enables him to withhold from the liquidators a certificate of title of the bank which came into his possession in the course, as he says, of the performance of professional work in one of these matters. He carried on a solicitor's practice at Warwick in Queensland. At the neighbouring town of Stanthorpe his son, who bore his father's names, carried on an independent practice as a solicitor.

In May 1929, the manager of the Warwick branch of the bank instructed the father to take proceedings against a customer for the recovery of the amount of his indebtedness to the bank.

At Stanthorpe there is a registry of the Supreme Court. Father and son acted as agents for one another, and the father instructed his son to issue the writ and cause it to be served, and no doubt afterwards, to sign judgment and issue execution. In July the father caused a search to be made against the judgment debtor to discover what land he owned. The search did not disclose any property of the judgment debtor, except an undivided moiety as tenant in common of a parcel of about eighty-one acres which he had already mortgaged to the bank. The bank decided to take in execution and sell the equity of redemption in the interest of the judgment debtor in this land. But, at that stage, R. J. Leeper the

(1) (1810) 18 Ves. Jun. 282; 34 E.R. 324.

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elder had fallen ill. On 22nd August 1929 he went into hospital and there remained until 5th September 1929. He says that he informed the local manager that his son would do all that was necessary during his absence. On 29th August 1929 the Warwick branch of the bank wrote direct to the son at Stanthorpe furnishing him with the number of the certificate of title and the description of the land, and requested him to advertise it for sale as soon as possible. On 5th September the son issued a fi. fa. and notified the bank that the land would be sold on 16th October at the Court house at Stanthorpe. On that day the manager of the Warwick branch attended and bought in the equity of redemption. On 25th October the Deputy Sheriff signed a transfer to the bank which the son had prepared. On 8th November 1929 the transfer was presented at the office of the Commissioner of Stamp Duties.

According to father and son, the certificate of title was obtained from the bank between 16th and 25th October 1929 for the purpose of preparing the transfer and effecting registration. The father now claims to retain the certificate of title in the exercise of his solicitor's general lien, and it is this claim which is the subject of the present appeal.

Father and son say that on an occasion when the local manager was discussing the sale with the father in his office at Warwick, the son happened to come in, that the father then asked him to go down to the bank with the manager and obtain the certificate of title and that this was done. But the liquidators produced a receipt for the document signed by the son which bore the date 8th November 1929. The receipt was on the bank's printed form and ran as follows: "Received from, or held on account of, the Primary Producers' Bank of Australia Ltd., the undermentioned deeds and/or documents for the sole purpose of registering transfer to bank upon completion of which I/we undertake to deliver such deeds and/or documents to the said bank."

Now, if the terms of this receipt express a condition binding on the father upon which the certificate of title was held by him, his lien is displaced. A solicitor's general lien extends to documents which have come into his possession in his professional capacity even for a particular purpose, at any rate after that purpose has

been served. But the undertaking to redeliver the instrument to the bank after completion of the registration of the transfer, and the limitation imposed by the word "sole" upon the purposes of the bailment are together inconsistent with the retention of the certificate under a general lien. Accordingly, if, as the father says, he, and not the son, was the solicitor to whom the bank entrusted the certificate of title, the appeal depends upon the question whether the terms of the receipt express a condition by which the father is bound. The son gave evidence that he signed the receipt some weeks after he had obtained the document on behalf of his father from the branch manager at Warwick. He said that one day he met the manager who asked him for a receipt, telling him that he had been transferred elsewhere and was cleaning matters up prior to handing over the branch to his successor and that he found that he had no receipt for the certificate of title he had given him some time before. In his evidence, the son said that before signing the receipt, which was filled in but undated, he asked the manager when the document had been handed over, but neither of them was able to remember, and he put down 8th November 1929 as in effect his estimate of the approximate date. No oral testimony was adduced by the liquidators, and the evidence of the father and son went uncontradicted. The trial Judge accepted their account of the matter and found that the father was the solicitor entrusted with the certificate of title, and that he was not bound by the receipt.

The Full Court reversed his decision on the ground that the evidence of the father and son was in some respects inconsistent with the documents, and for that reason, and also because they had not adhered steadily to one statement of the occasion and date when the certificate had been handed over, it ought not to be acted upon. At first the father had deposed that the certificate was handed over before he went into hospital and on the occasion when he told the bank manager that his son would look after the matter while he was away. The son, in answer to an interrogatory, had said that he received the certificate for his father, but had put the occasion in November 1929. It appeared also that, from 29th August 1929 onwards, the bank dealt directly with the son who did a great deal of further work in connection with the matter, and

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that ultimately, with the father's concurrence, the bill of costs was rendered by the son in his own name, and that he fixed with the liquidators the amount of the costs at a lump sum to avoid a taxation. Indeed, the delivery of the bill by the son and the fixing of the costs by him appear to be the source of all the trouble. When this was done, the solicitor acting for the liquidators recollected an old judgment debt owing by the son to one of his clients, and took garnishee proceedings to recover it. How it happened that a debt provable in a liquidation came to be garnisheed has not been explained. (Cf. *Boyse* v. *Simpson* (1); *Dawson* v. *Malley* (2); *Mack* v. *Ward* (3); *Prout* v. *Gregory* (4), and *Spence* v. *Coleman* (5), explaining *Klauber* v. *Weill* (6); cp. *Evans* v. *Stephen* (7).) But, whatever be the explanation, the sum fixed for costs owing by the liquidating bank upon the bill so rendered was in fact garnisheed under the old judgment against the son. It now appears that there were other costs owing to the father, so even if he were precluded by his concurrence in the delivery of the bill in his son's name from disputing that the costs it covered were owing to his son and not to him, and even if the efficacy of the garnishee proceedings to extinguish the debt cannot be challenged, his claim to a general lien would not be thereby affected. But the Full Court considered that the matters referred to together so far shook the probability of the case made by the father as to render it unsafe to act upon it.

An examination of the evidence and the documents suggests that father and son were attempting to reconstruct events of five years before which at the time they occurred were of little significance, and that in some respects their reconstruction was erroneous.

The learned Judge was impressed by the honesty of father and son, and there does not appear to be any sufficient ground for questioning the correctness of his estimate of their truthfulness as distinguished from their accuracy. The basis of their ultimate reconstruction of the order of events seems to have been their belief that the certificate of title was needed for the preparation as well as

(1) (1859) 8 I.C.L.R. 523.
(2) (1867) I. R. 1 C.L. 207; 15 W.R. 791.
(3) (1884) 28 Sol. Jo. 234; (1884) W.N. 16.
(4) (1889) 24 Q.B.D. 281.
(5) (1901) 2 K.B. 199.
(6) (1901) 17 T.L.R. 344.
(7) (1882) 3 L.R. (N.S.W.) (L.) 154.

the registration of the transfer and their recollection of some conversation as a result of which the son went with the manager to fetch the certificate from the bank. The son too must be taken to have some recollection that, when he gave the receipt dated 8th November 1929, the certificate of title had been already handed over by the bank and that he antedated the receipt. No doubt there is a probability that the certificate was obtained before the transfer was executed and before it was presented to the Stamps Commissioner, which was done actually on 8th November. But the information in the possession of the solicitors was sufficient for the preparation of the transfer and the certificate was not, at that stage, absolutely necessary for that purpose. It is impossible upon the whole of the evidence not to feel some doubt whether father and son have correctly reconstructed the events concerning the handing over of the certificate of title. But, even if it be the case that the document was delivered to the son for and on behalf of the father between 16th and 25th October and the receipt was not signed by the son until some time after 8th November 1929, it does not follow that the father is not bound by the condition expressed by the receipt. That receipt was in the ordinary form of the bank. If the son had signed it when the certificate was given to him, undoubtedly it would have bound the father. It was for the bank to state upon what conditions it would entrust documents to its solicitor. The solicitor could not complain if it refused to expose a document to his potential lien. The son as his agent, even if his agency were limited to obtaining the certificate, would, on the occasion of receiving it, have possessed authority from his father to sign such a receipt. But his agency was not limited to obtaining the instrument. His father had already put him in his place to carry through the transaction. The father had resumed the supervision of his business, and, no doubt, although he was compelled to return to hospital three or four months later, his physical condition did not at that time disable him from carrying out the transaction himself. But the bank manager evidently looked to the son to complete it, and the father acquiesced in that position even to the extent of subsequently concurring in his son's rendering the bill of costs in his own name. In a regular course of business strictly conducted, when the bank manager gave

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the certificate of title to the son, he should have obtained the receipt from him. In all these circumstances, the son's authority to act in the transaction on behalf of his father appears to have been wide enough afterwards to give the receipt when the bank manager requested him to do so. When given it operated as an acknowledgment defining the nature and conditions of the bailment.

For these reasons the father should be considered to hold the certificate upon the conditions expressed in the receipt dated 8th November 1929 which are inconsistent with a general retaining lien.

The appeal should be dismissed with costs.

STARKE J. The bank—the respondent—brought an action against the appellants for the return of a certificate of title to certain land, and damages for its detention. *Hart* A.J. gave judgment in favour of R. J. Leeper senior, one of the appellants here and the father of the other appellant, but on appeal to the Full Court of the Supreme Court of Queensland, his judgment was set aside and judgment entered for the bank for the return of the certificate of title. An appeal is now brought to this Court.

The appellants are father and son, who, separately, practise as solicitors in Queensland. The father acted as solicitor for the bank in various matters. In May 1929 the bank instructed the father to take action against one Johnston for the payment of moneys due to it. A writ was accordingly issued against Johnston, out of the Stanthorpe District Registry of the Supreme Court. The father, who practised as a solicitor in Warwick, procured his son, who practised as a solicitor in Stanthorpe, to issue the necessary process, and in due course to sign judgment in favour of the bank, and thereafter to proceed to execution. In September 1929 a writ of fi. fa. was issued, which was executed against certain land in the name of Johnston mortgaged to the bank. The certificate of title to these lands was in the possession of the bank. The father was not in good health, and became a patient in the Mater Misericordiae Private Hospital in Brisbane for about two weeks in August and September 1929, and for about six weeks in February and March 1930. The proceedings against Johnston were conducted in great part by the son, but the business was that of the father, and there

is no doubt, in my opinion, that the father was always the solicitor retained and employed by the bank in connection with these proceedings. The son was his father's agent, but he had full authority to represent and act for his father in the Johnston matter, and also to attend to his practice during his illness.

It is not disputed that the bank bought in the equity of the land in the name of Johnston, and that the certificate of title was required for the purpose of registering a transfer from the sheriff to the bank. Nor is it disputed that the bank in 1929 handed over the certificate for that purpose, that it reached the hands of the son and that in 1929 the son signed an undertaking relating to it in the following form: "Received from or held on account of the Primary Producers' Bank of Australia Limited the" (certificate of title) "for the sole purpose of registering transfer to bank upon completion of which I undertake to deliver such" (certificate of title) "to the said bank." This undertaking bears date the 8th November 1929, but the father and son both deposed that the certificate of title was handed over at an earlier date. The trial Judge accepted this view, though the son had sworn, in an answer to interrogatories, that he did "in the month of November 1929 obtain *de facto* possession from the plaintiff of the certificate of title but such *de facto* possession was not possession on my own part but on the part of" his father. There were other discrepancies in their evidence which led the Full Court on appeal to regard their evidence as "so untrustworthy and so inconsistent that it should not be accepted." There is a good deal to be said for this latter conclusion. But it appears to me that the undertaking is, and, according to ordinary notions of justice, should be, decisive of the rights of the parties. A solicitor has, no doubt, a right to hold papers of his client, which come to him in the course of business in his professional capacity, until his bill is paid. The lien, unless limited, is general, and is not confined to the particular occasion on which the papers are delivered. But a lien may be excluded by contract, or the exclusion may be inferred from the conduct and course of dealing between the parties. If in the present case the certificate of title was handed over and the undertaking executed at one and the same time, then the case for the appellants is unarguable: the undertaking to redeliver the

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certificate of title to the bank upon registration of the transfer is inconsistent with the right to retain the document, and therefore with any lien over it. But even if the undertaking were executed some time after the delivery of the certificate of title, still it is cogent and really conclusive evidence of the terms upon which the certificate of title was received and accepted, and is equally inconsistent with the existence of any lien. It was no doubt executed by the son, but the son had full authority, as I have said, to represent the father and transact his business.

The conduct of the father and son was criticized upon this appeal. It was pointed out that the son held the certificate of title until June 1933, when, being apparently in pecuniary difficulties, he returned it to the father. It was also suggested that the father allowed the son to render and settle a bill of costs at £67 10s. in the Johnston matter as if he were the principal, but disowned that position when these costs were the subject of garnishee proceedings against the bank. But I do not find it necessary to discuss or to form any opinion upon these matters.

In my opinion, the father has no lien over the certificate of title claimed by the bank, and the judgment of the Supreme Court of Queensland in Full Court should be affirmed and this appeal dismissed.

Appeal dismissed with costs.

Solicitor for the appellants, *J. B. Moffatt* for *McSweeny & Leeper*, Brisbane.

Solicitors for the respondent, *John Hickey & Quinn*, for *Neil O'Sullivan*, Brisbane.

J. B.