GRAY, ... APPELLANT.
GRAHAM ET AL., ... RESPONDENTS.

1855.
March 30*th*,
April 2*d*, 3*d*,
August 14*th*.

Solicitor and Client.—Lien for Costs.—Semble : A solicitor or law agent having a lien or right of retention over the title deeds of several estates belonging to his client is not in a situation corresponding with that of a catholic creditor. The Court will not marshall his securities so as to make him take rateably according to the value of the respective estates.

Clark v. *Morrison*, 29, November 1837, questioned.

The parting with one set of title deeds will not affect the lien over another set.

Semble : Although contrary to the Scotch judicial opinion, that the lien allowed to a solicitor or law agent upon title deeds and papers of client extends to a proceeding brought against such client to recover payment of the bill of costs, although such proceeding is one not *for* but *against* him, and is posterior to the subsistence of the relation of solicitor and client.

A solicitor or law agent acting for both lender and borrower is bound to reveal any claim of lien or retention competent to him over the borrower's title deeds, otherwise he is barred from afterwards setting up such claim against the lender.

Taxation.—A bill of costs may be liable to taxation at the suit of creditors in a Ranking, although the debtor may have long, and, as regards himself, conclusively, acquiesced in the propriety of all the charges.

The *Solicitor General* (*a*) and Mr. *Anderson* were heard for the Appellant.

Mr. *Rolt* and Mr. *R. Palmer* for the Respondents.

The circumstances of the case are fully stated in the following opinion, delivered by

(*a*) Sir R. Bethell.

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The LORD CHANCELLOR (*a*):

My Lords, the Appellant was the law agent of the late Mr. Cuningham of Cairncarran in the county of Renfrew; and his bill of costs, from the 23d of November 1826 to the 23d of December 1834, amounted to 609*l.* 12*s.* 7*d.*

In order to recover payment of that sum, the Appellant brought an action before the Sheriff of Lanarkshire. Mr. Cuningham was personally served with the summons, but did not appear. On the 1st of July 1835, the Sheriff made a decree in absence for the whole demand and interest. On the 3d of June 1836, the Appellant raised a summons of adjudication on this decree, seeking to affect Mr. Cuningham's estates of Stonelaw and Kinninghouse, and some property of his in Regent Street Glasgow.

Mr. Cuningham had paid for the Kinninghouse property, 1,350*l.*, and for the Regent Street property 2,140*l.* He had been owner of both before the Appellant had become his agent.

In January 1830, Mr. Cuningham purchased the Stonelaw property for 18,500*l.*, subject to a heritable bond dated in 1824, in favour of the Bank of Scotland for 15,000*l.*, and subject also to some other real burthens. The title deeds of Stonelaw were in the hands of the bank, having been assigned to them by their heritable bond; but upon the completion of that purchase by Mr. Cuningham they were delivered up to him.

The Appellant, as the law agent of Mr. Cuningham, had in his hands the title deeds of all the three estates.

The Bank of Scotland being desirous of getting the Stonelaw estate sold, in order that they might obtain their money, applied to the Appellant for the deeds, alleging that as against them he had no lien or right

(*a*) Lord Cranworth.

of retention. A great deal of correspondence took place upon this subject in the years 1832, 1833, and 1834, and eventually in December 1836, after the Appellant had raised his summons of adjudication, and before he had obtained a decree upon it, an agreement was come to between the bank and the Appellant, that they should pay him 425*l.* towards the discharge of the demand of 612*l.* 12*s.* 7*d.*, which he had against his employer Mr. Cuningham, and then that he should abandon his claim of lien or retention on Stonelaw, so as that it might be sold to satisfy the claim of the bank.

This agreement was carried into effect with the approbation of Mr. Cuningham. The bank having paid 425*l.* to the Appellant, his demand was thereby reduced to a sum of about 380*l.*,including interest.

On the 14th of February 1837 the Appellant obtained a decree on his summons of adjudication, whereby the *Lord Ordinary* assoilzied the estate of Stonelaw, and adjudged the other lands, *i.e.* Kinninghouse and the property in Regent Street, Glasgow, to the Appellant in satisfaction of the balance of 380*l.*, and he was thereupon duly infeft in those lands. Mr. Cuningham approved of all these proceedings. He died early in 1840.

Afterwards the Appellant raised a process of ranking and sale, in which he claimed to be ranked *primo loco* for the 380*l.* and interest, and also for a further sum of 155*l.* for subsequent expenses, consisting chiefly, I might almost say entirely, of the expenses incurred by him in the proceedings relative to his claim against Mr. Cunningham.

This claim was opposed by the Respondents, relying on an heritable bond for 2,500*l.* over the two properties of Kinninghouse and Regent Street, granted in 1828 by Mr. Cuningham, being the first securities affecting those estates. The opposition to the Appellant's claim

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was on the following grounds; *first*, the bill of costs ought to be taxed; *secondly*, the interest ought to be calculated on a principle different from that adopted by the Sheriff; *thirdly*, if the Appellant is entitled to any lien by way of hypothec against the Respondents it can only be for such a portion of his demand as the value of the two estates of Kinninghouse and Regent Street bears to that of Stonelaw; *fourthly*, as to the 155*l.*, a law agent has no lien for costs incurred against his employer for enforcing a demand against him.

Miss Cuningham, the other Respondent, objected to any claim against her by the Appellant on the ground of a personal exception. She claimed, in virtue of an heritable bond granted to her by Mr. Cuningham in 1830, in the procuring and preparing of which bond she alleged that the Appellant had acted as her agent, and also as agent of Mr. Cuningham, the grantor; and she alleged that during the negociations for and preparation of this bond, the Appellant never set up or alluded to any claim of hypothec, but on the contrary represented the estates as subject to no burthens except the prior bond to Wardrop.

On all these points, the decision, first of the *Lord Ordinary* and then of the Court of Session, was adverse to the Appellant; the learned Judges in Scotland holding, *first*, that the right of the Appellant's hypothec or retention did not extend to the 155*l.*; *secondly*, that notwithstanding the decree by the Sheriff and the subsequent decree of adjudication, the Appellant's bills were still liable to taxation; *thirdly*, that the Appellant could only claim a lien upon the estates in question, Kinninghouse and Regent Street, for such proportion of his demand as would effeir (*a*) thereto after attributing a rateable proportion of the claim to the estate of Stonelaw; and *fourthly*, that as against Miss Cuningham he could not set up any right of hypothec at all.

(*a*) *i. e.* attach.

The Appellant has brought these adverse interlocutors by way of appeal before your Lordships' House, and the case was argued at the bar in the month of April last.

My Lords, as to the point with reference to the 155*l.*, the *Lord Ordinary* decided, and his decision was adopted by the Court of Session, in these terms: "Finds, That the objection to Gray's claim of hypothec in so far as founded on the accounts, amounting to 155*l.* 14*s.* 3*d.*, *incurred subsequent to the* 17*th April* 1835, *before which date the relation of agent and client between these parties had been dissolved*, cannot be maintained in competition with the claims of the Respondents heritable creditors, so as to enable Gray to draw preferably and to the prejudice of the said Respondents."

I confess that on this part of the case I have very considerable doubts; because if a solicitor has a lien upon his client's deeds for costs incurred by him, and the client upon application refuses to pay those costs, and the solicitor is consequently driven to bring an action, undoubtedly by the law of England, according to all principle, though there is no direct authority upon the subject, except a case very shortly reported in Barnewall and Cresswell (*a*), the lien must extend as well to the costs of enforcing the bill of costs as to costs incurred by the client himself.

The Court of Session have held that as to this 155*l.* incurred in the process of adjudication, the principle to

(*a*) 2 Barn. & Cress. 116. In this case it was held that an attorney has a lien upon papers belonging to a bankrupt, not only for his bill for business done, but for the costs of an action brought against the bankrupt subsequently to the issuing of the commission to recover payment of his bill. Lord Chief Justice Abbott, in *Banco Regis*, observing,—"I think the solicitor had the same right of lien against the assignees that he had against the bankrupt. Now, it is quite clear, that as against them his lien would have extended to the costs of the two actions," &c.

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which I have adverted does not apply. And though I had some doubt about it, yet having regard to the special circumstances of the case, upon full consideration I think the Court of Session is right, and for this reason. The right of retention is primarily a right against the client, and the client only, the owner of the estate. But by the law as administered in Scotland, which certainly gives rise, as text writers have suggested, to very great anomalies, it is a right which prevails against the holder of the heritable security also. Now this is a very anomalous state of the law, because it enables the debtor to prejudice the rights of his creditors. And then the question is, How are those rights affected by the law agent obtaining adjudication? When the law agent who had this demand, having first constituted his debt, proceeded next to the process of adjudication, there is no doubt that by virtue of that adjudication and what subsequently follows upon it, viz., the infeftment and other proceedings, he becomes a real creditor upon the lands,—but he becomes a real creditor upon the lands not in virtue of his lien, but in virtue of the proceedings which he has instituted. And what the Court of Session has decided is this, that the costs which he incurred in making himself a creditor with a real security, though they may constitute a very good ground of lien or retention against the client who employs him, cannot prejudice the rights of heritable creditors who had claims upon the estate prior to his lien. The Court of Session held that there was no authority to warrant any such extension of the law—that the law itself is subject to very considerable anomalies, and there being no precedent for it they thought that it ought not to be extended. And in that view of the case I entirely concur. That therefore disposes of the first question as to the 155*l.*

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My Lords, the next question was as to whether or not these bills were still liable to taxation. The argument was that there must be an end to the time when a solicitor's bills are liable to taxation—that here the debt was constituted a liquid debt in the year 1835, and that from repeated acts, the particulars of which it is not necessary for me to enumerate, from that time onwards to the time of his death, it may be taken to be clear that Mr. Cuningham had repeatedly recognized this as being a valid claim, and it is said that it cannot now be questioned, but that it must be taken to be good, and that it is not liable to taxation. The Court of Session, however, thought otherwise, and I think correctly, because this, as in the former case, is not substantially a question between the client and the law agent, but between the heritable creditors of the estate of the client and the law agent. Mr. Cuningham did all that he could do to confirm the amount of the debt due from him to his law agent, to ratify the finding of the Sheriff as to the amount—in short everything he could to confirm that as a debt due from him; but his acts cannot prejudice the rights of those who had claims prior to any claims that his acts could affect. The Court of Session held, and I think rightly held, that in a process of ranking and sale of this nature, which is substantially a question between the other creditors holding a prior heritable security and the law agent, the circumstance that the client has chosen to dispense with taxation does not prejudice those who may insist upon it, even after the lapse of a considerable time.

Then, my Lords, the third question was one of this nature. I have already stated to your Lordships that Mr. Cuningham, the client, had three estates: Stonelaw, subject to large demands nearly exhausting the

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whole value, the estate being sold for 18,500*l.*, and the charge upon it being 15,000*l.*; and he had two other estates which are the subject of adjudication. And the point which has been decided by the *Lord Ordinary* first, and approved of by the Court of Session, is this: That the law agent could not part with his lien upon the one estate so as to leave the lien affecting the others; that having a lien upon Stonelaw and Kinninghouse, and Regent Street, he had no right to part with his lien upon Stonelaw, so as to leave it wholly to affect the two other estates.

Now, my Lords, with very great deference, I must say, after having considered the case very fully, I cannot do here otherwise than concur with the Appellants. I think that the Court of Session have fallen into a mistake as to what is called the doctrine of catholic securities, which, though assuming a different name, is a doctrine as perfectly familiar in this country as it is in Scotland (*a*). It is very reasonable that, where a creditor has a claim upon two funds, he should take his payment rateably out of those funds, or if he takes it, as he certainly may, only out of one of them, then that he should assign to the persons who are prejudiced by that a portion of the securities, so as to set the matter right. That is the doctrine of the law of Scotland, as well as of the law of England.

But how does that apply to the case of a law agent insisting upon his lien; that is to say, the right to retain his client's deeds? That is something totally different, and the Judges of the Court below, in deciding this case, admitted that no such doctrine

(*a*) "It is the constant equity of this Court, that if a creditor has two funds, he shall take his satisfaction out of that fund out of which another creditor has no lien," *per* Lord Hardwicke, 2 Atk. 446. The marshalling of securities for the purposes of justice is but an English phrase to express a familiar Scottish operation.

had ever been propounded or acted upon, until the case of *Clark* v. *Morrison*. And they all, in giving their judgment, expressly said, that it was exceedingly difficult to apply the doctrine to such a case as this, and though they did arrive at this conclusion, they arrived at it evidently with very, very great doubt. And the Judges in the present case, I think, acted solely, so far as authority went, upon that decision of *Clark* v. *Morrison*.

I do not feel myself called upon to state it as my decided opinion that that case of *Clark* v. *Morrison* is wrong. But I have no objection to say, that I think it requires very great consideration before it can be held to be right. What does it amount to? It amounts to this, that where the client has several estates, a solicitor can never safely allow him to sell any, without ascertaining what is the proportionate value of that estate to the others, and saying to him, "You must discharge a portion of your debt to me now, in order that those who hereafter may question my right to the other estates may have nothing to complain of." That seems to me a doctrine so exceedingly inconvenient, that unless it be concluded by the most positive authority, I should be very unwilling to recommend your Lordships to act upon it.

But I think that this case is distinguishable from the case of *Clark* v. *Morrison* upon two grounds, and therefore even supposing the case of *Clark* v. *Morrison* to be rightly decided, still it would not govern the case now awaiting your Lordships' decision. The distinctions are these: in *Clark* v. *Morrison* the whole estate was actually under diligence; the estate was conveyed to a trustee, who was to sell the whole and to apportion the proceeds among the creditors rateably. One of the estates was subject to heavy burdens, and the trustee agreed, with the assent of all parties, that the second creditor upon the estate

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should take the property to himself, subject to the prior burden, and in consideration of that should release all his claim upon the personal estate; that is to say, that he should become the purchaser of the estate upon which he held a second security, taking the money due to him as the purchase money. Then when Mr. Grieve proceeded to sell the other estates, undoubtedly the Court held that the solicitor, the law agent, had lost his lien upon the other estates to the extent of the proportion which the estate which had been taken by the other creditor bore to those which then remained to be sold. It was a very strong decision, but it was a decision applicable to the case only of estates that were actually under adjudication, and under process of ranking and sale.

In this case, the ultimate completion of the sale of Stonelaw by the bank, and of the sale of Kinninghouse, did not take place until after the Appellant had raised his summons of adjudication; yet it took place, and was substantially entirely completed before there was any decree of adjudication. It had been commenced long before there was any dispute about the payment of the bills at all. Therefore it is the simple case of a client solvent, at least apparently solvent (it was suggested that he really was insolvent for many years, but *non constat* that he was), selling one of the estates of which he was the owner, and the solicitor parting with the deeds upon the completion of that sale. That makes a most material distinction between this case and the case of *Clark* v. *Morrison*.

But there is another distinction which puts this case upon a footing different from that of *Clark* v. *Morrison*, which is this; when the Bank of Scotland proceeded to get this estate of Stonelaw sold, in order to pay themselves out of the proceeds the heritable debt due to them of 15,000*l*., they disputed the right

of the Appellant to hold these deeds against them at all; for when they took the security, they took it with an assignation of all the rights and deeds, and they had the rights and deeds in their actual custody and possession. That was prior to the purchase of the property by Mr. Cuningham, and when Mr. Cuningham purchased, the vendors borrowed the deeds from the bank and gave a receipt, saying that they had borrowed them, and that they promised to return them on demand. Now the Appellant contended that he was not a party to that, and that consequently when the deeds came into the hands of his client Mr. Cuningham, the purchaser, he was entitled to hold them against the bank. The bank said that he was cognizant of it, and a great deal of discussion took place, which was protracted through several years, as to whether the Appellant had any lien at all upon those deeds, or whether they had not been fraudulently or surreptitiously obtained from the bank, so as to get from them deeds which they were entitled to hold, and which they parted with only for a limited purpose. Before the matter was completed, however, the bank said that they were not willing to protract the litigation any further, and that they would give the sum of 425*l.* towards the discharge of the lien, which altogether amounted to 612*l.* 12*s.* 7*d.* With that offer the Appellant was perfectly ready to close, and the 425*l.* was actually paid.

Now to say that where a solicitor has a lien for 612*l.* 12*s.* 7*d.* in respect of his costs upon all the deeds of his client, upon the client wishing to sell one of his estates, the solicitor must not part with the deeds without being paid in the exact proportion of the value of the estate sold to the other estates, would be carrying the doctrine to a length which unquestionably the case of *Clark* v. *Morrison* does not justify.

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In my opinion, therefore, the *Lord Ordinary* first, and the Court of Session afterwards, came to an erroneous conclusion in respect to the third finding. I think that there was nothing in what passed between the Appellant and the bank, upon the sale of the Stonelaw estate, which prevented him (after giving credit for the 425*l.*) from asserting to the full extent his security, his claim against the proceeds of the other two estates.

The only remaining point in this case lies in a very narrow compass—that is, the proposition of Miss Cuningham, who disputes the claim of the Appellant to any lien against her, upon a ground which I think the Court of Session was perfectly right in sustaining in point of law, if the facts had warranted the application of it. What the Court decided was this, that where there is a borrower and a lender, and the solicitor for the borrower acts as solicitor for both parties, he, preparing the security for the lender at the expense, as will ordinarily be the case, of the borrower, if he has any demand upon the title deeds which belong to the borrower and affect his security, he is bound to disclose that fact to him, because otherwise he is deceiving his own client by leading the lender, who is as much his client as the borrower, to suppose that he is giving him the security of the estate free from any lien on his part, whereas in truth he afterwards sets up a right of retention against him. The Court of Session held that nothing was more dangerous than to allow transactions of this sort; and that where the same law agent acts for parties who have conflicting interests, the law must always be taken most strongly against him; and consequently they held in this case that there was a personal exception against the Appellant setting up this lien against Miss Cuningham.

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My Lords, as regards the law there laid down, I entirely concur in the judgment of the *Lord Ordinary* and of the Court of Session afterwards. But, upon looking attentively to the case, I cannot discover the least trace that Mr. Gray acted in any respect whatever as the law agent of Miss Cuningham. The proceedings here are in the nature of what we should call in this country a demurrer. There is no evidence gone into, except some letters which I shall allude to presently. Miss Cuningham says that Mr. Gray acted as her agent; he denies that; he states that he never saw Miss Cuningham in his life; Miss Cuningham says that he acted as her agent, communicating with her through a nephew, a son of Mr. Cuningham's; that is entirely denied; the transaction looks to me very much more like that which the Appellant represents it than that which Miss Cuningham's advisers represent it. Because this was no loan of money; Miss Cuningham was the creditor of her brother upon a bill or a note, or some transaction of that sort (I suppose some family arrangement); and Mr. Cuningham had, whether at her instance or not is immaterial, agreed that he would give her a real security for the amount he owed, 500*l.* due to herself, and 200*l.* to some person for whom she was trustee, making in all 700*l.*

The printed case now before your Lordships does not disclose the fact, but we have had handed to us the print as it was before the Court of Session in Scotland, and by that print it appears that a correspondence took place, in which Mr. Cuningham always treated this as a transaction in which he, and he alone, was concerned; I say he alone, because there is no allusion to anybody else; the bill of costs was brought in to him; he complained of delay and neglect on the part of the agent, Mr. Gray, who managed this

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business. Mr. Gray takes offence atthat, and writes to say that Mr. Cuningham is charging him very unfairly, that he has done exactly what Mr. Cuningham has told him to do, and he points out how he had strictly complied with his commands.

That being so, the facts upon which the law applied by the Court of Session rested, entirely failed in this case. There is no evidence that Mr. Gray ever undertook to act as agent for Miss Cuningham, and consequently the application of the law is not warranted by the facts of this case.

The result, therefore, my Lords, is that I shall move your, Lordships as to the two first findings, to dismiss the appeal, and as to the rest of the case, to declare that the Appellant's right of retention of the title deeds of Kinninghouse and Regent Street Glasgow, was not affected by reason of his having parted with the title deeds of Stonelaw; and to declare further, that the Appellant was not barred by any personal exception from insisting on his right of retention against Miss Cuningham's claim on her bond for 700*l.*; and with this declaration, I recommend that we remit the case to the Court of Session.

Ordered and adjudged accordingly.