E. R. C. CLARKSON (DEFENDANT).. .....APPELLANT; 1890

AND *Jan. 21.
*June 12.

WILLIAM RYAN (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Lien—Costs of execution creditor—Assignment for benefit of creditors—Construction of statute—48 *V. c.* 26 *s.* 9—49 *V. c.* 25 *s.* 2.

Under 48 V. c. 26 s. 9, as amended by 49 V. c. 25 s. 2, an assignment for the general benefit of creditors has precedence of executions not completely executed by payment subject to the lien of any execution creditor for his costs, where there is but one execution in the sheriff's hands, or of the creditor who has first placed his execution in the sheriff's hands when there are more than one.

Held, Gwynne and Patterson JJ. dissenting, that the lien created by this statute is not confined to the costs of issuing the execution but covers all the costs of the action.

The section of the Ontario Judicature Act, 1881, (s. 43) which provides that in cases where the amount in controversy is under $1,000 no appeal shall lie from the decision of the Court of Appeal to the Supreme Court of Canada, except by leave of a judge of the former court, is *ultra vires* of the legislature of Ontario and not binding on this court. Remarks on an order granting such leave on appellant undertaking to ask no costs of appeal.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Armour C. J. in favor of the plaintiff.

The appellant is assignee under an assignment for the general benefit of creditors, and the respondent an execution creditor, of one Kidd. The respondent's execution was placed in the sheriff's hands the day before the assignment was executed, and the sheriff seized the goods of Kidd but released them on being

*PRESENT.—Sir W. J. Ritchie C.J. and Fournier, Taschereau, Gwynne and Patterson JJ.

(1) 16 Ont. App. R. 311.

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notified of the assignment. These proceedings were subsequently brought to determine the extent of the respondent's lien for costs under 48 Vic. ch. 26 s. 9, as amended by 49 Vic. ch. 25 s. 2, the respondent contending that the lien attaches to the full costs of suit and the appellant that it is limited to the costs pertaining to the issue of, and proceedings on, the writ of execution.

48 Vic. ch. 26 s. 9 provides that "an assignment for the general benefit of creditors under this act shall take precedence of all judgments and of all executions not completely executed by payment."

49 Vic. ch. 25 sec. 2 enacts as follows: "Section 9 is amended by adding thereto the following words, 'subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs who has the first execution in the sheriff's hands;" and so amended the section is now sec. 9 of R.S.O. (1887) c. 124.

The case was argued before Armour C. J., who gave judgment for the plaintiff (respondent) thus deciding that the lien attached to the full costs of suit. His judgment was affirmed by the Court of Appeal, Mr. Justice Burton dissenting. The defendant then appealed to this court.

Foy Q.C. for the appellant. Prior to the amending act an execution creditor had no lien for either debt or costs; *Porteous* v. *Myers* (1). Then the amendment gave him the costs of execution so that his diligence would not place him in a worse position than other judgment creditors. This was all the legislature had in view and the act should be construed in the light of that intention. *Hawkins* v. *Gathercole* (2); *Caledonian*

(1) 12 Ont. App. R. 85.

(2) 6 DeG. M. & G. 1.

Railway Co. v. *The North British Railway Co.* (1); *Thomas* v. *The Great Western Railway Co.* (2).

Aylesworth for the respondent cited *Allan* v. *The Great Western Railway Co.* (3); *Scott* v. *The Great Western Railway Co.* (4)

(In the course of the argument the Chief Justice called attention to an order published in the record and purporting to be made by the Court of Appeal which gave defendant leave to appeal to the Supreme Court he undertaking to ask no costs of such appeal.

His Lordship said: "The Court of Appeal was not justified in making this order and had no right to insert any undertaking as to costs which is a matter entirely in the discretion of this court.

Mr. Foy referred to the Ontario statute requiring leave to appeal when the amount in controversy is under $1,000.

HIS LORDSHIP.—We have repeatedly stated in this court that we are not bound by that statute. The effect of this order is that the waiver of costs is a condition of the appeal. There was no necessity for an application for leave to appeal and if such leave were granted it should not be tramelled with conditions.

PATTERSON J.—The matter has been discussed in the Court of Appeal and there being no reported decision that the Ontario Act is *ultra vires* it has been acted upon.

HIS LORDSHIP.—The matter has been before this court more than once, appeals from Ontario being objected to on the ground that leave has not been granted under the Ontario Act, and it has been stated most unequivocally that this court is not bound by the act. If it is, then each province could legislate so as to take away the jurisdiction of this court altogether

(2) 6 App. Cas. 114.
(1) 24 U.C.Q.B. 326.
(3) 33 U.C.Q.B. 483.
(4) 23 U.C.C.P. 182.

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In one case where the Court of Appeal refused leave to appeal this court granted it on that ground alone (1). And in a subsequent case, where it was sought to raise the question again, we refused to hear it because it had been decided already. No person practising in Ontario, who has anything to do with this court, can be ignorant of our position in regard to that statute. I do not wish it to be imagined that we have the slightest doubt as to our jurisdiction without regard to that act, for to hold so would be to disturb numerous decisions of the court.)

Foy Q.C. in reply.

SIR W. J. RITCHIE C.J.—The facts of the case are thus stated in the judgment of Chief Justice Armour:

It was admitted by the pleadings that the plaintiff, on the 15th December, 1887, recovered judgment for debt and costs against one Kidd; that on the same day he placed writs against goods and lands in the hands of the proper sheriff, and that on the same day the said sheriff seized sufficient goods of the said Kidd to satisfy the said debt and costs. It was also admitted that on the 16th day of December, 1887, the said Kidd made an assignment to the defendant for the benefit of his creditors, under the provisions of the act R. S. O. cap. 124, of all his real and personal estate. It was also admitted by the defendant that the plaintiff was entitled to be paid in full the costs of the writ of execution against goods and the sheriff's proper expenses in connection therewith, but it was denied by him that the plaintiff was entitled to be paid in full any other part of his costs.

The act 48 Vic. cap. 26 sec. 9, gave an assignment for the general benefit of creditors under that act precedence of all judgments and of all executions not completely executed by payment.

This section was amended by section 2 of the act 49 Vic. cap. 25, by adding thereto the words: "Subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor who has the first execution in the sheriff's hands," and so amended this section stands as section 9, R. S. O. cap. 124.

I agree with the learned Chief Justice of the Queen's

(1) *Forestall* v. *McDonald* Cassels's Dig. 241, 406.

Bench Division and the majority of the Court of Appeal that the words used therein "for his costs" mean for his whole costs of recovering judgment, issuing execution, and of the sheriff's fees thereon, and are not to be limited, as was contended, to the costs of the writ of execution against goods and the sheriff's proper expenses in connection therewith.

I can see no ambiguity in the language used by the legislature which must be read in its plain, ordinary, grammatical meaning and so read it can, in my opinion, only mean all the costs recoverable by the creditor from the debtor under the execution. I can discover nothing in the act to limit the term costs to the costs of the execution to the exclusion of the costs in the cause.

I can discover nothing to induce me to suppose that the legislature used the language of the enactment in any other than its ordinary, natural sense. The fact of the legislators having shown that they well understood the difference between costs in the cause and costs on the execution so far from limiting the nature of the costs exempted, assuming we should go out of the statute to discover its construction the propriety of which I very much doubt, to my mind is strongly confirmative of the contention that where it used the word "costs" without any such limit it intended that word to be understood in its fair and full meaning, without limitation or application to one description of costs rather than the other, but intended it to apply alike and without distinction to all costs. I therefore think the appeal should be dismissed.

FOURNIER J.—I am of opinion that the appeal should be dismissed for the reasons given in the judgments in the Court of Appeal.

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TASCHEREAU J.—I am of opinion that the appeal should be dismissed with costs.

GWYNNE J.—In an action brought by the respondent against one Kidd, a question of account therein was referred to Daniel Home Lizars, Esquire, local master at Stratford, under the authority, it must, I think, be presumed for it is not so stated on the appeal book, of sec. 189 of ch. 50 of the Revised Statutes of Ontario of 1887 and the Judicature Act of 1881; before the 21st November 1885 the said local master made his report or certificate whereby he found that there was due from Kidd to the above respondent, the plaintiff in the said action, the sum of $522, and he directed that the defendant Kidd should pay to the said plaintiff his costs of the said action. These costs upon the 5th of September, 1887, were taxed at the sum of $795.55. No judgment was ever entered in the said action upon the said master's report or certificate, as required by the Ontario Judicature Act of 1881, order 37, p. 281 of McLellan's Judicature Act of 1881, but subsequently to the taxation of the said costs Kidd, the defendant in that action, paid to the plaintiff therein, the now respondent, upon the said sum of $522.00 and interest thereon and the said costs, the sum of $900.00 leaving the sum of $498.50 due in respect of the said action. Upon the 15th day of December, 1887, the local registrar at Stratford entered a judgment in favor of the now respondent against the said Kidd, not upon the said local master's report or certificate for the amount found due in the action the question of account wherein was referred to him and the taxed costs of the said action, but, upon what authority does not appear, for the said sum of $498.50, stating it in the judgment roll to be for balance of costs. In the absence of any authority suggested for the insertion of this statement in the judg-

ment, the question now is whether that statement so made in the judgment roll can make the said sum of $498.50 for which the judgment was entered to be *costs* within the meaning of the Ontario statute 49 Vic. ch. 25 sec. 9; for upon the 16th day of December, 1887, the day after the entering of the said judgment and the issue of execution thereon, the judgment debtor Kidd made to the above appellant, as assignee, a general assignment for the benefit of his creditors under the provisions of the Ontario statute 48 Vic. ch. 26 as amended by said 49 Vic. ch. 25, and the respondent now claims, against the assignee of that assignment, to be a privileged creditor of the assignor for the amount of the above judgment debt and the costs of two executions issued thereon against the goods and lands of the judgment debtor, sheriff's percentage and other fees.

At the time of the passing of 48 Vic. ch. 26, upon writs of execution being placed in a sheriff's hands, the judgment debtor's goods and land became liable to the satisfaction of the judgment debt, and the judgment debtor could make no valid disposition thereof to the prejudice of the judgment creditor, but the latter acquired no "*lien*" upon his judgment debtor's goods or lands. He acquired simply the right of having his judgment paid out of the judgment debtor's property, and of preventing the judgment debtor making a valid disposition of any part unless he should leave sufficient to satisfy the judgment debt. Now the statute in its 9th section enacted that an assignment for the general benefit of creditors under that act should take precedence of all judgments and of all executions not completely executed by payment; the effect of this section was to deprive a judgment creditor of all right of precedence in payment of his judgment debt as to so much of the debt as remained unpaid or unrealised

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by execution executed; and to give precedence to the assignment for the general benefit of creditors over all judgments, even though executions issued thereon should be in the sheriff's hands to be executed.

This 9th section of 48 Vic. ch. 26, was amended by 49 Vic. ch. 25 sec. 2, and so amended thereafter read and reads:—

> An assignment for the general benefit of creditors under this act shall take precedence of all judgments and of all executions not completely executed by payment subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs who has the first execution in the sheriff's hands.

This language, which has been introduced by way of amendment of what was clear and just, has made an alteration in the act which has occasioned some perplexity. In the provision of 48 Vic. ch. 26, there was apparent both sound reason and justice in putting all creditors of a person unable to pay his debts in full upon an equal footing as to participation in his estate assigned for the equal benefit of all. It is difficult to see why a judgment creditor, by putting an execution in the sheriff's hands a day or an hour before the execution of an assignment by the judgment debtor for the general benefit of all his creditors, and it may be for the express purpose of obtaining precedence over the assignment which the judgment creditor may have known was being prepared for execution, should obtain precedence for that portion of his judgment debt which consisted of costs; for this is the extent to which the respondent's contention must go if it prevails. So, likewise, is it difficult to perceive why, where there are several executions in the sheriff's hands against the same debtor, that privilege of precedence for costs over an assignment for the general benefit of all the judgment debtor's creditors should be granted to him who had his execution first in the sheriff's hands. No

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rational explanation for this preference being made in favor of the first of several execution creditors, has been or, as it seems to me, can be suggested. Then what can be the meaning of the words twice used in this amended section "subject to the *lien* if any," of an execution creditor, or of the first of several, for his costs?

It is only with execution creditors whose executions are in the sheriff's hands that the section deals at all. To an execution creditor who has not yet placed his writ of execution in the sheriff's hands when the assignment for the general benefit of creditors was executed the section gives no preference. The placing of a writ of execution in the sheriff's hands did not, as already observed, give to the judgment creditor a *lien* upon any goods or lands of the judgment debtor. The section does not purport to create a *lien* which before did not exist; it simply enacts that the assignment for the general benefit of creditors immediately upon its execution shall have precedence over all judgments and all executions save only as regards any *lien*, if an execution creditor having an execution in the sheriff's hands has any lien, for his costs. If independently of the section the execution creditor had no such lien the section does not give him one. There is a difficulty in construing the section as treating the right, which a judgment creditor acquired by placing a writ of execution in the sheriff's hands, of preventing the judgment debtor making any valid disposition of his property unless he should leave sufficient to satisfy the judgment debt as constituting a lien upon such judgment debtor's goods or lands, for in that case as *ex-præmissis* the placing the writ of execution in the sheriff's hands would effectually perfect the lien, the qualification involved in the words, "if any" twice deliberately used in the section would be quite insen-

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sible. There is, as it appears to me, much force in the view taken by Mr. Justice Burton in the Court of Appeal for Ontario, namely, that the costs referred to are costs of an execution creditor in relation to his writ of execution, that is to say, costs incurred subsequently to the writ of execution being placed in the sheriff's hands, for which costs a lien may have been obtained by a levy made under the execution, as, for example, for the sheriff's possession money—the taking care of and feeding cattle—mileage—and all other the sheriff's fees and expenses of execution, and such poundage as the sheriff might be entitled to under the 45th section of ch. 66 of the R.S.O., 1877; for such costs, if any have been incurred by actual seizure, it may with propriety be said that a "lien" would be acquired upon the property levied upon, and a sensible construction to the section would be given by construing it as giving precedence to the assignment for the general benefit of creditors over all judgments and over all executions, subject only to the lien, if any has been acquired, for such costs by reason of an actual seizure having taken place; such costs would be actually costs of the "execution creditor," which is the term used in the section; and this construction would seem also to afford some explanation of the provision that the precedence of the assignment should be subject only to the costs of the creditor whose execution is first placed in the sheriff's hands, when there are more than one in his hands against the same judgment debtor, for it would be under the first writ placed in the sheriff's hands that most of the above costs would be incurred. But the section cannot, in my opinion, apply to the amount recovered by the judgment in the suit of *Ryan* v. *Kidd* even though we must construe the word "costs" as used in the section as applying to the judgment cre-

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ditor's "costs" included in his judgment. The term "costs" as used in the section in such case must needs, in my opinion, be held to apply to the costs recovered by the plaintiff as *incident* to the debt or damages recovered by the judgment—those costs which under the old form of entering judgment for a plaintiff it was adjudged that the plaintiff should recover "for his costs of suit by the court here adjudged of increase to the plaintiff which said *monies*, or *debt*, or *damages and costs* in the whole amount to ." The form of entry of judgment is changed by the Judicature Act of 1881 but the substance still remains, and at No. 159 on p. 144 of McLellan's Judicature Act of 1881 the form of entry of judgment in a case similar to that of *Ryan* v. *Kidd* is given as follows:

> The questions of account in this action having been referred to and he having found that there is due from the defendant to the plaintiff the sum of $ and directed that the defendant do pay the costs of this action. It is this day adjudged that the plaintiff recover against the said defendant $ and costs to be taxed.
>
> The above costs have been taxed and allowed at $ as appears by a taxing officer's certificate dated the day of .

Now assuming the term "costs" in the 2nd section of 49 Vic. ch. 25 to apply to a plaintiff's costs recovered by a judgment entered in the above form, and not merely to his costs as execution creditor incurred subsequently to his writ of execution being placed in the sheriff's hands, it is to costs which, as in the above form, are recovered by a plaintiff as his taxed costs *incidental* to the recovery of a judgment by him for a debt or damages that the term must in my opinion be construed as applying. There are no such costs recovered by the judgment in *Ryan* v. *Kidd* now under consideration. The only sum recovered by that judgment as a judgment debt is the sum of $498.50; no costs are recovered as *incidental* to the recovery of that judg-

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ment debt. What appears by the judgment is that on the 5th September 1887 there was due from the defendant to the plaintiff the sum of $1,317.55 with interest upon the sum of $522 from the 28th November, 1885, and that on the 15th December, 1887, there remained due in respect of such debt the sum of $498.50 for which sum as his only judgment debt the plaintiff entered judgment, adding without any apparent authority for so doing, "for balance of costs herein." There does not appear to have been any warrant for the insertion of these words, the sole object of doing which would seem to have been to lay a foundation for the contention in the present case; neither does their insertion alter, in my opinion, the fact apparent from what is previously stated in the judgment showing that the amount for which the judgment was entered was in truth a balance of a larger sum alleged to have been previously due from the defendant to the plaintiff for debt, interest and costs, for which as a debt due to the plaintiff the judgment is entered. The insertion of these words in a judgment so entered cannot, in my opinion, make the judgment for such debt to be a judgment for "costs" within the meaning of that term as used in 49 Vic. ch. 25 sec. 2, nor anything else than an ordinary judgment for a debt antecedently due as distinct from a judgment for taxed costs recovered by a judgment as incidental to the recovery of a debt or damages recovered by the same judgment, which I take to be the true construction of the term "costs" as used in 49 Vic. ch. 25 sec. 2.

I am of opinion, therefore, that the appeal should be allowed with costs because, first, I think that the term as used in the above section refers to an execution creditor's costs of his writ after it is placed in the sheriff's hands and in respect of which something had been done giving rise to a lien for the costs "if any"

so incurred ; secondly, because assuming the term to be applicable to "taxed costs" of suit recovered in a judgment whereby a debt or damages is or are recovered, and not to be limited to an execution creditor's costs incurred in virtue of same action taken by a sheriff under a writ of execution placed in his hands, the judgment debt recovered in *Ryan* vs. *Kidd* cannot, in my opinion, be said to be for "costs" within the meaning of that word as used in 49 Vic. ch. 25 sec. 2; and thirdly, because to whatever the term "costs" as used in the section may be applicable, I am of opinion that no "lien" attaches in favor of an execution creditor upon any property of his judgment debtor until a levy or seizure should be made by the sheriff, under an execution placed in his hands to be executed, of some property of the judgment debtor to which the "lien" can attach, and as there has been no such seizure made under the execution placed in the sheriff's hands at the suit of *Ryan* vs. *Kidd*, there has been no "lien" acquired by Ryan for any costs to which the precedence of the assignment for the general benefit of Kidd's creditors is by the statute made "subject."

PATTERSON J.—The judgment of *Ryan* v. *Kidd* for $498.50 must, I think, be considered to be a judgment for costs taxed in that action. It sets out the reference of the question of account in the action, and the award that there was due from the defendant to the plaintiff $522, and that the defendant was to pay the costs of the action ; that the costs were taxed at $795.55 ; that $900 had been paid upon the judgment debt and interest and in reduction of costs, leaving $498.50 due in respect of the action : and adjudges to the plaintiff the sum of $498.50, being for balance of costs therein. The form of this entry may be open to criticism, but I take

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it that we must accept and act on the judgment as we find it.

The question that presents more difficulty to my mind is the proper effect to be given to the enactment R. S. O. (1887) ch. 124 section 9.

Upon the best consideration I have been able to give to the matter, I have come to the conclusion that the view taken by Mr. Justice Burton, who dissented in the court below, and by my brother Gwynne in the judgment just delivered by him, is the correct understanding of the section.

The language of the enactment is satisfied, as I construe it, by giving to the execution creditor the costs incident to his execution when by seizure under it he may have obtained what is called a *lien* for those costs. That construction is, in my judgment, better fitted to the language employed than the construction which would give him also the taxed costs included in his judgment, which are expressly given in other circumstances by the Creditors' Relief Act to the creditor under whose writ the sale takes place for the benefit of all the creditors, while there is no reason, upon any ground of principle apparent to my apprehension, why a preference in respect of the taxed costs should be given to the creditor who happens to have put his *fi. fa.* in the sheriff's hands before the assignment for the general benefit of creditors. For these reasons, as more fully detailed by my brother Gwynne, and in the court below by Mr. Justice Burton, I am of opinion that we should allow the appeal.

Appeal dismissed with costs.

Solicitors for appellant: *Foy & Kelly.*

Solicitors for respondent: *Idington & Palmer.*