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Before Mr. Justice Scott.

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IN RE THE BOMBAY SAW MILLS COMPANY, LIMITED.
EWART, LATHAM & CO.'S CLAIM. [11th February, 1889.]

Principal and agent—Joint stock company—" Secretaries and treasurers "—Advances and disbursements to, and on behalf of, the company—Lien on company's property—Contract Act IX of 1872, *ss.* 171, 217, 222.

Messrs. E. L. & Co. were the secretaries and treasurers of the above company which went into liquidation. Messrs. E. L. & Co. claimed to be creditors of the company for Rs. 1,12,000 in respect of advances made to, and expenses incurred and disbursements made on behalf of, the company from time to time and in the conduct of its business. Rupees one lac of this amount was in respect of sums lent to the company and guaranteed by the claimants. The remainder consisted of money expended in the working of the company's business. Messrs. E. L. & Co. claimed to be in possession generally of all the property of the company, and to be entitled to a lien on such property in respect of the above claim of Rs. 1,12,000. Other creditors disputed the possession and the right to the lien claimed.

Held, that, even assuming Messrs. E.L. & Co. to be in possession of the property of the company as alleged, they had not the lien that they claimed.

A lien is either general or particular. The claimants had not a general lien, because they were neither " bankers, factors, wharfingers, attorneys, or policy-brokers," to whom a general lien is limited by s. 171 of the Contract Act. Nor had they any particular lien: not under s. 217 of the Contract Act, because that section was inapplicable, having to do only with a lien on a sum of money of the principal in the hands of the agent: nor under s. 221 of the Contract Act, because the sums advanced and expended were not, as required by that section, "disbursements and services in respect of" the property on which the lien was claimed, but were loans made on behalf of the company generally and for the purpose of the whole concern.

THE above company went into liquidation in May, 1888. In 1882, Messrs. Ewart, Latham & Co. had been appointed "secretaries and treasurers" of the company.

[315] Previously to their appointment, that office had been held by the firm of Messrs. W. M. Macaulay & Co.. The following were the articles of association relating to the office :—

" 124 A. The general management of the business of the company, subject to the control and supervision of the directors, shall be in persons to be called the secretaries and treasurers.

"125A. The persons for the time being forming the firm of Messrs. W. M. Macaulay & Co. shall be the secretaries and treasurers of the company, and their remuneration shall be as from the first day of August 1880 (in lieu of the remuneration fixed by the special resolution which was passed and confirmed at the extraordinary general meeting of the company held on the 2nd and 19th days of November, 1878, respectively) a fixed allowance for office expenses of Rs. 500 *per* month, and in addition to such allowance a commission at the rate of five *per cent.* to be calculated and paid at the end of each financial year, on the balance at the end of such financial year at the credit of the profit and loss account of the company in the annual balance-sheet of the company."

At an extraordinary general meeting of the Saw Mills Company, held on the 8th November, 1882, the following special resolution was passed and confirmed :—

" That the articles of association of the company be amended by the substitution, in art. 125A, of the words Messrs. Ewart, Latham & Co. (as

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the names of the secretaries and treasurers of the company) for the words Messrs. W. M. Macaulay & Co."

Since their appointment under the said resolution in November, 1882, Messrs. Ewart, Latham & Co. had, as secretaries and treasurers, carried on the business of the company. They now claimed to have a lien upon all the property of the company in their hands for advances made by them to the company and for expenses incurred by them in their working of its business.

In an affidavit made by W. Greaves, a partner in the firm of Messrs. Ewart. Latham & Co., dated 17th January, 1889, he set [316] forth the claim made by his firm. The material part of the affidavit was as follows :—

"1. That my said firm of Ewart, Latham & Co. were at the time when the above-mentioned company went into liquidation and for several years prior to that period had been the duly appointed agents of the said company, and as such agents were and are now in possession of goods, papers, and other property of the company both moveable and immoveable.

"2. That Ewart, Latham & Co. as such agents as aforesaid from time to time made advances to, and incurred expenses on behalf of, the said company in conducting the business or for the purposes of the business of the company, and also for the like purposes made disbursements on behalf of the said company.

"3. That such advances, expenses, and disbursements were so made, incurred and applied exclusively for the purposes of the company and for the conduct of their business.

"4. That Ewart, Latham & Co. claim to be entitled to retain all monies, goods, papers, and other property, whether moveable or immoveable, of the company received by Ewart, Latham & Co. until the amount due to them as aforesaid has been paid or accounted for to them.

"5. That the company obtained loans for the purposes of carrying on their business from the Chartered Bank of India, Australia and China and also from one Chutoorbhooj Moorarjee, and the said Bank and Chutoorbhooj Moorarjee respectively having stipulated as one of the conditions for making such loans that Ewart, Latham & Co. should personally guarantee the repayment thereof, Ewart, Latham & Co. did accordingly give their personal guarantee for repayment of the said loans respectively.

"6. That Ewart, Latham & Co. claim to have a like lien as in paragraph 4 hereinbefore mentioned in respect as well of all monies heretofore disbursed by them in pursuance of such guarantees as aforesaid as of all other monies which they may hereafter be required to disburse on behalf of the company in respect of the said guarantees."

The sum in respect of which the said lien was claimed, amounted to Rs. 1,12,000, or thereabouts. This amount included two sums of Rs. 50,000 lent to the company and guaranteed by Messrs. Ewart, Latham & Co. The remainder consisted of money expended in the working of the company's business.

Lang, in support of the claim :—He relied on the affidavits, and argued that ss. 217 and 221 of the Indian Contract Act gave Messrs. Ewart, Latham & Co. a lien for their disbursements. He cited *Foxcraft* v. *Wood* (1).

(1) 4 Russ. 487.

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[317] *Kirkpatrick*, for creditors opposing the claim:—From the affidavit of claim, it would appear that the agents claim to have a general lien, although their case is now rested on ss. 217 and 221 of the Contract Act, which deal with special liens. It is clear they have not a general lien—Story on Agency, paras. 354 and 355; Indian Contract Act, s. 171; and Story on Agency, para. 375 *et seq.*

Even if in any case the law gave such agents a general lien, such lien does not exist here. Lien depends on possession. But the claimants have never had possession. The company has always had possession of its own property, and the claimants have merely been the servants of the company. The legal possession was in the company up to the date of its going into liquidation—*Hoggard* v. *Mackenzie*(1); *The King* v. *Sankey*(2); *Wordall* v. *Smith*(3).

Further, we say that, if the claimants ever had such possession as could give them a lien, they lost it when the company went into liquidation, and their lien is therefore gone. The liquidators have been in possession and have dealt with the property—*Jacobs* v. *Latour* (4). It will be necessary to take oral evidence on the point of possession.

The lien claimed is not a special lien, and does not fall within s. 221 of the Contract Act. That section gives a lien on specific property upon which work is done. The section is taken from Story on Agency, para. 373, which deals with particular liens, and for a definition of particular lien see *ibid.*, para. 354; see also 2 Selwyn's Nisi Prius (13th ed.) p. 1313; *Sanderson* v. *Bell* (5).

Inverarity, for other creditors opposing the claim:—This claim cannot be decided on affidavit. It will be necessary to cross-examine Messrs. Ewart, Latham & Co. as to their alleged possession. We contend they never had possession. The company has had possession. The owner of a shop may employ a manager to carry on his business. He may never [318] come to the shop himself. Nevertheless he is in possession of the shop, and of the goods in it. The manager is not said to be in possession, and a claim by him to a lien on the goods would be absurd. The articles of association provide that the Directors shall have the entire management superintendence and control of the affairs of the company. Article 124 provides that, subject to the Directors, the general management shall be in the secretaries and treasurers, who are to receive certain remuneration. Messrs. Ewart, Latham & Co. therefore are merely servants and not agents within the meaning of ss. 217 and 221 of the Contract Act. He cited Fisher on Mortgages (4th ed.), p. 175; Palmer's Precedents, p. 840.

Latham (Advocate General), for the liquidators.

JUDGMENT.

SCOTT, J.—The claim of Messrs. Ewart, Latham & Co. is set out in the affidavit of Mr. Greaves, partner in the firm, dated the 17th January last, and raises a question of considerable commercial importance. He says that his firm was, at the time of the liquidation of the company and for several years previously, agents of the company, and in possession, as agents, of goods, papers, and other property of the company, both moveable and immoveable; that as agents they have made advances and disbursements and incurred expenses on behalf of the company in conducting the business, or for the purposes of the business. In a previous affidavit

(1) 25 Bea. 493. (2) 5 Ad. & El. 423. (3) 1 Camp. 332.
(4) 5 Bingh. 130. (5) 2 Cr. & M. 304.

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(August 27) he states that in excess of the money they have advanced, they (the agents) gave their personal guarantee, as such, in order to enable the concern to borrow money which was urgently required for the purpose of the company. All the advances made by the firm and all the guarantees given by the firm, he says, were made with the sanction of the directors of the company. The firm now says it is in possession of the whole of the property of the company, and claims, under ss. 217 and 221 of the Contract Act, to be entitled to retain all monies, goods, papers, and other property, whether moveable or immoveable, received by his firm until the amount due to them has been satisfied.

The question for my consideration may be put in the words of Lord Hardwicke in the leading case of *Kruger* v. *Wilcox* (1): **[319]** "This is a case of bankruptcy, in which this Court always inclines to equality: yet if any person has a specific lien, or a special property in goods, which is clear and plain, it shall be reserved to him notwithstanding the bankruptcy." The question is twofold: (*a*) Have Messrs. Ewart, Latham & Co. the requisite possession of the property? and (*b*) have they the right to retain it?

Before I deal with the question of the alleged possession, I will consider their right to a lien on the assumption that they are in possession as they allege. For the sake of clearness, I must state the ordinary rules as regards this right of retainer or lien. A lien can only arise in one of three ways: (1) by common law; (2) by express or implied contract; and (3) by the general course of dealing in the trade in which the lien is claimed. Liens are of two kinds: *general* and *particular*. A *general* lien is the right to retain the property for a general balance of accounts. A *particular* lien is a right to retain property for a charge on account of labour employed or expenses bestowed upon the identical property detained. (Smith's Mercantile Law, Chapter on Lien.) Whilst particular liens are favoured, general liens are regarded with jealousy by the law, because they encroach upon the common law, and destroy the equal distribution of the debtor's estate among his creditors—*Rushforth* v. *Hadfield* (2).

In the first place the lien claimed in this case is a general, not a particular, lien. It does not arise out of the identical property retained. The advances were made, not to the specific use of the mill, or the machinery, or the books or the papers detained, but they were made, as Mr. Greaves says, "on behalf of the company for the general purposes of the business." The firm, as agents of this company, did what is often done by agents of companies in Bombay. They furnished the current capital. They financed business. Without their aid the company would have probably closed its doors for want of funds. Messrs. Ewart, Latham & Co. claim, then, a general lien for the amount of their debt. Is such a lien created by implication of law in the relations of principal and agent? According to English law, the answer must be in the negative. The right of general lien does not exist **[320]** by the common law. It must arise out of general usage, or by agreement. The *onus* of proving it lies upon him who claims it—*Rushforth* v. *Hadfield* (2); *Holderness* v. *Collinson* (3). Lord Chancellor Campbell in *Bock* v. *Garrison* (4) says: "I do not think that a general lien can be claimed according to any general law of principal and agent. The law of England does not favour general liens, and I apprehend that a general lien can only be claimed as arising from

(1) Amb. 252 (253).
(2) 7 East. 224.
(3) 7 B. & C. 212.
(4) 2 DeG. F. & J. 443.

dealings in a particular trade or line of business, such as wharfingers, factors and bankers, in which the custom of a general lien has been judicially proved and acknowledged, or upon express evidence being given that, according to the established custom in some other trade or line of business, a general lien is claimed and allowed." There are exceptions as in the case of factors and bankers, and I might instance the usage which obtained as regards consignees or managers of West Indian estates, who were given a general lien on the estate, in respect of the balance due to them for the costs of management, because the estate would become valueless if it was not maintained in cultivation. But Lord Westbury in the last of the cases on the point expressly says in his judgment (*In re Leith's Estate* (1)): "The right of the consignee, as it is supposed to be established by decisions, giving him a lien on the plantation in respect of the balance due to him, is an exception to the general rule which applies to principal and agent."

Foxcraft v. *Wood* (2) was relied upon. But that case was expressly decided on the principle "that a factor, who became surety for his principal, had a lien on the prices of the goods sold by him as such factor, to the amount of the sum for which he was surety." In the present case the claimants are not factors. A factor is an agent employed to sell goods or merchandise consigned or delivered to him by his principal; he is entrusted with the possession, management, control, and disposal of the goods, and may buy and sell in his own name (Wharton's Law Lexicon). The claimants do not come within this definition of law. No [321] general lien then exists by implication. In the present case no usage was set up, still less proved. It is also admitted that no special agreement was made as regards the advances. In fact, Messrs. Ewart, Latham & Co. wholly rely on ss. 217 and 221 of the Contract Act, which, if they give a lien in this case, differ from the general English law.

The first of these sections runs as follows:—Section 217.—"An agent may retain, out of any sums received on account of the principal in the business of the agency, all monies due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent." This section merely declares the English law. Adding the words concerning remuneration to the following passage from Story on Agency (pl. 350) the two statements of the rights of an agent would be almost identical:—"An agent may insist upon deducting all his advances, expenses, disbursements, and losses, arising in the course of his agency from the pecuniary funds in his hands belonging to his principal." But in the present case it does not appear that at the time of the liquidation there were any monies of the company in the hands of the agent: monies received subsequent to the liquidation belong to the liquidation. So that the s. 217 does not apply to the circumstances of the case.

Section 221 runs as follows:—"In the absence of any contract to the contrary, an agent is entitled to retain goods, papers, and other property, whether moveable or immoveable, of the principal received by him (the agent), until the amount due to himself for commission, disbursements and services *in respect of the same*, has been paid or accounted for to him." This section also has its parallel in the English law. Story on Agency (pl. 373) says: "In cases of agency there generally exists a particular

(1) L. R. 1 P. C. 305. (2) 4 Russ. 487 (488).

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right of lien in the agent for all his commissions, expenditures, advances, and services in and about the property or thing entrusted to his agency." With s. 221 must be read s. 171 of the Contract Act, which limits the right to a general lien,—that is to say, the right of parties to retain all goods [322] in their possession as a security for a general balance of account, to "bankers, factors, wharfingers, attorneys, and policy-brokers," and the section further declares that "no other person has such a right unless there is a special contract."

Both English and Indian law, therefore, confine the lien claimable in this case to commission, disbursements, and services in respect of certain specific property or things. I have already said the advances now claimed cannot be held to be disbursements or the services in respect of either the goods or the papers or the mill of the company. They were "loans made on behalf of this company," and for the purposes of the whole concern, not specially assigned to the mill or other property. There is, therefore, no lien. In the absence of any special agreement the claimants can only rank as ordinary creditors for these advances, and *a fortiori* for money paid on the guarantees given.

In this view of the case I need not consider the question of possession, which would be difficult to decide without oral evidence, as the affidavits (*e. g.* the last of Mr. Ryrie) throw a doubt on its continuous character. The claim of lien must be dismissed.

As regards the costs, I think Messrs. Ewart, Latham & Co., who are the unsuccessful litigants, should pay costs, but only one set of costs. If the liquidators had attended the hearing, and actively resisted the claim, I would have thrown their costs on the claimants, and would have left the creditors to have borne the expense of all unnecessary appearance. But the creditors really were the resisting party and most essential to the matter, and they must have their costs, one set, against the unsuccessful claimants. The liquidators' costs arising out of this motion must come out of the estate.

Attorneys for the liquidators:—Messrs. *Macfarlane, Edgelow, and Hemming.*

Attorneys for creditors:—Messrs. *Chalk, Walker, and Smetham.*

Attorneys for Messrs. Ewart, Latham & Co.:—Messrs. *Craigie, Lynch, and Owen.*

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[323] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

JAMSEDJI SORABJI (*Original Defendant*), *Appellant v.* LAKSHMIRAM RAJARAM (*Original Plaintiff*), *Respondent.** [19th June, 1888.]

Landlord and tenant—Non-payment of rent—Forfeiture, relief against—Co-sharer—Lease from one of several co-sharers—Denial of lessor's title—Estoppel.

A person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive the rent or sue in ejectment.

The plaintiff sued to eject the defendant, his tenant, for failure to pay rent on the ground that such failure operated as a forfeiture under the terms of the

* Second Appeal, No. 219 of 1886.