

MIDDLETON, J., in a written opinion, said that the defendant's solicitors claimed a lien upon the money in Court for the excess of their costs over and above the amount recovered against the plaintiffs in the action; the right to assert a lien being reserved by the judgment as entered.

The plaintiffs, owning land, contracted to sell it to the defendant, who assigned his contract to the third parties; the third parties entered into an agreement with the plaintiffs, but it was stipulated that this should not exonerate the defendant from his liability. The plaintiffs sued the defendant upon his covenant for \$5,000, part of the purchase-money. He alleged that the sale was brought about by fraud, and counterclaimed for rescission of the contract. Fraud was found, but there could not be rescission unless there was restitution; and the defendant could not make restitution unless he could obtain reconveyances from those to whom he had sold. It was provided by the judgment that there should be rescission, the third parties reconveying, and that the money paid to the plaintiffs by the defendant, received by him from the third parties, should be paid into Court, to be paid out to the third parties; but, the lien being asserted, this direction was subject to the lien, if any, of the defendant's solicitors.

The learned Judge said that the so-called lien is not in strictness a lien at all; it is the right of the solicitor who is unable to obtain possession of the fund, and so unable to assert his lien, to call for the equitable interference of the Court where the fund has been created or preserved by his exertions, and to prevent its dissipation without his costs in that particular matter being paid: *Mercer v. Graves* (1872), L.R. 7 Q.B. 499, 503.

The costs incurred by the defendant were incurred in the resisting of a claim against him; the counterclaim was a subsidiary matter; no costs of appreciable magnitude were incurred which related solely to the counterclaim; and the payment into Court was not the direct result of the main litigation, but a sort of by-product.

Again, the fund was not created or preserved, within the meaning of the rule; it was in truth the price paid for the assistance of the third parties in enabling the defendant to make restitution, and so free himself from his contractual liability to the plaintiffs.

In general, the solicitor's right can be no greater than his client's; but a case in which a solicitor is entitled to assert a salvage lien is an exception; and, where the fund has been brought into existence by the exertions of the solicitor, he has, notwithstanding the position of his client—as, e.g., not being entitled to party and party costs under the judgment—a right to call for the equitable