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COSTS AS BETWEEN SOLICITOR AND CLIENT—JURISDICTION OF EQUITY TO ALLOW

P after having established a lien on the proceeds of certain trust bonds, filed a petition in a federal district court requesting that her counsel fees and disbursements over and above statutory costs be paid out of the fund. Receipts from sale of the group of bonds securing deposits on trust (like the one for which P had established a lien), made up the fund. It was alleged that P had established as a matter of law the right to recovery in relation to fourteen trusts in situations like her own, and that the fund was more than sufficient to discharge all trust obligations. The district court dismissed the petition on the ground that it had authority to do nothing except carry out the decree of the Supreme Court; the circuit court in affirming that ruling gave as an additional reason the fact that the time for amending of P's petition had expired. The Supreme Court held: the district court had jurisdiction to entertain the petition. The "claim for 'as between solicitor and client' costs was not directly in issue in the original proceedings," and therefore the lower court was not bound by the mandate of the Supreme Court as to this point since a claim for such costs is not impliedly included in the usual taxable costs. Such allowances "are contingent upon the exigencies of equitable litigation." The additional reason given by the circuit court falls because "the petition for reimbursement" was "an independent proceeding supplemental to the original proceeding." Sprague v. Ticonic National Bank, 59 Sup. Ct. 777, 83 L. Ed. 1184 (1939).

The awarding of counsel fees is a matter of equitable discretion; however, "parties holding particular characters" such as trustees, administrators, personal representatives, mortgagees, creditors of insolvent estates, and legatees under special circumstances, are generally allowed costs as between solicitor and client. Reimbursement for such

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1 On return of the case to the district court, costs "as between solicitor and client" incurred in establishing plaintiff's lien to the proceeds of the bonds, were allowed; but "an allowance of fees and expenses (which were sought in a subsequent petition) incurred in obtaining an allowance" was denied. Sprague v. Ticonic National Bank, 28 F. Supp. 229 (1939).

2 See generally 2 Daniell's Chancery Pleading and Practice (5th ed. 1879) Chapter XXXI, especially section 2.

In Kentucky this principle of equitable jurisdiction has been codified as follows: "... in actions between parceners, tenants in common, joint tenants, and for settling the distribution and division of deceased person's estates, and to settle partnerships, and to settle or enforce trusts, courts shall have a judicial discretion in regard to costs." Carroll's Kentucky Statutes (1936), section 889.

Delaware has a broader statute than Kentucky. "A Court of Equity ... shall make such order concerning costs in every case as shall be agreeable to equity." Revised Code of Delaware (1935), section 4907.

Perhaps the greater number of the states (Iowa is an example) which have statutes on the subject, treat various types of actions individually and set maximum attorney's fees for each but leave the determination of whether any attorney's fees at all shall be taxed in the
expenses has been denied parties guilty of misconduct. Thus a party who instigates proceedings which are not reasonably necessary, or introduces unnecessary witnesses may even be denied his costs as between party and party.  

The principal case extends the application of the doctrine that equity may under extraordinary circumstances in the exercise of its discretion grant reimbursement for costs as between solicitor and client. Equity has granted such allowances where the successful party sued as a representative of a class or has recovered a fund payable to a class; but the doctrine is now made applicable to situations in which others recover, by reason of plaintiff's efforts, as a consequence of stare decisis. The decree for P merely created a lien on the fund for the amount due her; however, the beneficiaries of similar trusts in the defendant bank would not have to undergo the expensive litigation borne by plaintiff before they could establish their priorities to the proceeds of the trust bonds.

The result obtained in this case is to be commended. Recovery

particular case, and if so how much, to the discretion of the court within the limits prescribed by the statute.

2 Danelli's Chancery Pleading and Practice (5th ed. 1879) 1394; Perry, Trusts and Trustees (7th ed. 1929), section 891.

The Court of Appeals of Kentucky has held that a trustee who is an attorney, may himself defend attacks made upon the trust, and recover for his services as an attorney; and that he is not guilty of conduct against public policy. Norris v. Bishop 207 Ky. 621, 269 S. W. 761 (1925). However, costs as between solicitor and client have been denied where the court is convinced that the party defending or prosecuting an action is primarily pressing his personal claims and is only incidentally seeking the interests of the class he purports to represent. Goddard's Exr. v. Goddard, Jr., 164 Ky. 41, 174 S. W. 743 (1915).

4 For example: Honderson v. Dodds, (1886) L. R. 2 Eq. 532, 14 L. T. 752, 14 W. R. 908 (Suit by creditors to administer realty. The realty proved deficient. Costs as between party and party were taxed for both plaintiffs and the defendant legatees, then plaintiffs' costs as between solicitor and client, and the balance was paid to the creditors in general); Jervis v. Wolferstan, (1874) L. R. 18 Eq. 18, 43 L. J. Ch. 809, 30 L. T. 452 (Suit by trustees for construction of trust settlements. Costs of all parties as between solicitor and client were allowed); Central Railroad and Baking Company of Georgia v. Pettus and Others, 113 U. S. 116, 5 S. Ct. 387, 28 L. Ed. 915 (1885) (Suit by attorney to obtain a lien on funds received by persons not parties to the suit but members of the class of creditors to which the solicitor's client belonged); Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157 (1881) (Holder of bonds in state improvement fund filed a bill alleging mismanagement and waste of the fund. During liquidation of the assets of the fund, resulting from this litigation, plaintiff petitioned that his costs as between solicitor and client be allowed out of the fund since other bond holders would equally benefit from his recovery of the fund. The petition was granted).

6 For example: Thomas v. Jones, 1 Dr. & Sm. 134, 62 Eng. Rep. 329 (1860) (Bill by a legatee for administration of the testator's estate. It was held that plaintiff was suing for a class—the legatees—even though no such assertion was made in the petition).
by reason of stare decisis under the instant facts would in all probability require no more than filing of claims before the proper officials in charge of the funds, since they would realize the futility of contesting an action should they force a proceeding on the part of the claimants. Surely equity is not bound by form to the extent that substance would be disregarded in a situation like this. The basic equitable factor here as well as in the ordinary class suit is that it is no more than fair that those who share the benefits of another's efforts should bear their portion of the expenditures. Moreover, since the allowance of costs in any given case is limited to reasonable expenses, if any be given, after a consideration of all the circumstances, the principle on which recovery may be had is reasonably free from inherent inducements encouraging the use of it in an abusive manner.

Clarence Cornelius

TRADE SECRETS: SOLICITATION OF CUSTOMERS BY FORMER EMPLOYEE

Defendant was employed by the plaintiff on oral contract to solicit and deliver laundry. He was given a list of customers' names and addresses in a particular territory, and was assigned that territory in which to work. There was no express contract not to disclose the list nor to solicit in competition with the plaintiff on the termination of his employment. Plaintiff, apprehensive that defendant intended to quit and go into the laundry business for himself, asked him to sign a contract not to solicit the plaintiff's customers upon termination of employment. Defendant refused to sign the contract, quit the employment of plaintiff, started a laundry of his own and began soliciting his former employer's customers. The corporation brought an action to restrain him from soliciting its customers. The court denied an injunction, stating that there was no confidential relation existing between the parties, and a contract could not be implied. Woolley's Laundry, Inc. v. Silva, 23 N. E. (2d) 899 (Mass. 1939).

If an employee makes an express contract not to disclose a list of customers' names, nor to use it in competition with the employer, after termination of the employment, equity will enforce it.¹ However, the

¹ Witkop-Holmes Co. v. Boyce, 61 Misc. 126, 112 N. Y. Supp. (1906) (The court said: "The names of the customers of a business concern whose trade and patronage have been secured by years of business efforts and advertisement and the expenditure of time and money constituting part of the good will of a business, which enterprise and foresight have built up, should be deemed just as sacred and entitled to the same protection as a secret compounding of some article of manufacture or commerce"); Mutual Milk and Cream Co. v. Prigg, 112 App. Div. 652, 98 N. Y. Supp. 458 (1906) (Contract not to use the list in competition with the employer at the termination of the employment enforced against a minor).