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**ATTORNEY AND CLIENT—ATTORNEY'S LIENS—
"MONEY" AND THE CHARGING LIEN**

Attorneys in Nebraska are aided in collecting compensation for their services by the attorney's lien statute.¹ The object of the lien statute is to protect the attorney against bad faith and ingratitude by clients, as well as collusion between a client and the adverse party which operates to deprive the attorney of his just compensation.² It is the purpose of this article to expose some of the difficulties inherent in the application of the statute, study the arguments which support the various interpretations thereof, and proffer recommendations for the correction and amplification of the statute.

The attorney's lien statute has not been changed since it first appeared in the statutes in 1866.³ According to the Nebraska Supreme Court it is declaratory of the common law.⁴ However, the statute apparently replaced the common law attorney's lien, and the attorney does not have a lien for his services unless he strictly complies with the provisions of the statute.⁵

¹ Neb. Rev. Stat. § 7-108 (Reissue 1954) provides: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party."

² *Myers v. Miller*, 134 Neb. 824, 279 N.W. 778 (1938); *Griggs v. Chicago R. I. & P. Ry.*, 104 Neb. 301, 177 N.W. 185 (1920); *Zentmire v. Brailey*, 89 Neb. 158, 130 N.W. 1047 (1911); *Jones v. Duff Grain Co.*, 69 Neb. 91, 95 N.W. 1 (1903).

³ The statute in its present form first appeared in Rev. Stat. Neb. Territory c. 3, § 8 (1866). See *Marshall v. Casteel*, 143 Neb. 68, 76, 11 N.W.2d 818, 820 (1943).

⁴ *Zentmire v. Brailey*, 89 Neb. 158, 130 N.W. 1047 (1911); *Cones v. Brooks*, 60 Neb. 698, 84 N.W. 85 (1900); *Sayre v. Thompson*, 18 Neb. 33, 24 N.W. 383 (1885).

⁵ *Young v. Card*, 145 Neb. 857, 18 N.W.2d 302 (1945); *Marshall v. Casteel*, 143 Neb. 68, 8 N.W.2d 690, rehearing denied, 11 N.W.2d 818 (1943); *Card v. George*, 140 Neb. 426, 299 N.W. 487 (1941); *Vanderlip*

The statute provides attorneys with the right to assert two types of liens: (a) Possessory liens and (b) Charging liens.

The possessory lien is a lien on papers which belong to the client but are in the hands of the attorney. The lien does not give the attorney the right to convert the papers, but it does give him the power to hold the papers until he has been reimbursed for his services.⁶ If the attorney retains anything of value, the lien is an effective device to secure payment because it strengthens his bargaining position with a client who might otherwise lose interest in securing an immediate settlement of his obligation to the attorney.

The statutory language from which the charging lien arises is not so definite as that of the possessory lien and thus raises many more problems. One of the major problems is determining the objects to which the lien attaches; more specifically, whether it can be interpreted to attach to real property.

I. STATUTORY INTERPRETATION BY THE NEBRASKA COURTS

The statute provides only that an attorney has a lien on "money in the hands of the adverse party" from the time the attorney gives notice of the lien. Thus, any item to be subject to the lien must fall within the confines of the word "money." On initial inspection of the statute, one would assume since the term "money" is used, that the attorney could obtain a lien only upon the property of a monetary nature. However, a study of three important Nebraska cases shows that the lien attaches to property other than legal currency and coins.

The first clear pronouncement by the Supreme Court of Nebraska that the lien did attach to something more than currency was in the case of *Zentmire v. Brailey*.⁷ In that case the attorney was employed by a real estate agent to collect the agent's fee for the sale of land. An action was filed for the fee, and later an attachment was made against some of the defendant's real property. The attorney filed notice of his lien. Fifteen days later the plaintiff and the defendant, without knowledge of the attorney, secured a dismissal of the action. The defendant im-

v. Barnes, 101 Neb. 573, 163 N.W. 856 (1917); *Rice & Gorum v. Day*, 33 Neb. 204, 49 N.W. 1128 (1891); *Elliott v. Atkins*, 26 Neb. 403, 42 N.W. 403 (1889); *Lavender v. Atkins*, 20 Neb. 206, 29 N.W. 467 (1886).

⁶ *State ex rel. Neb. State Bar Ass'n v. Bachelor*, 139 Neb. 253, 297 N.W. 138 (1941); *Van Etten v. State*, 24 Neb. 734, 40 N.W. 289 (1888).

⁷ 89 Neb. 158, 130 N.W. 1047 (1911).

mediately conveyed the attached property to his father-in-law. Three days later the attorney secured an order vacating the dismissal of the case and reinstating the attachment. The grantee of the property then brought an action to prevent the enforcement of the attorney's lien. The supreme court held that the lien was still in effect on the attached property. The court reasoned:

The legal effect of the attachment was to bring . . . [the defendant] into court and to charge the property with a lien in favor of . . . [the original plaintiff] for satisfaction of his claim. The attorney's lien was filed in the case and bound the *property* itself.⁸ (Italics ours)

The case illustrates that the lien may attach to real property as well as currency. The case does not answer satisfactorily the question of whether transfer to a bona fide purchaser extinguishes the lien.⁹

The case, however, seemed to lose some of its vitality by the decision of the supreme court in the case of *Marshall v. Casteel*.¹⁰ In that case the attorney for the plaintiff filed notice of his lien in a foreclosure action. The plaintiff bought the property at the sale. Years later, after the statute of limitations had run on the attorney's lien, a subsequent purchaser was successful in quieting title to the property. The defendant in the quiet title action was the attorney of the plaintiff in the foreclosure action. In its first opinion the supreme court held that the statute gave a lien upon "money" in the hands of the adverse party and did not give a lien on real property. On rehearing the court held that in the foreclosure action title to the property at the sale passed to the purchaser free of the attorney's lien even though the purchaser was the attorney's client. Judge Paine in a lengthy concurring opinion¹¹ discussed the validity of the attorney's lien in Nebraska. In justifying the opinion of the court he distinguished the *Zentmire* case by saying:

It is quite clear that Judge Rose in this opinion [in the *Zentmire* case] held that the attorney's lien was enforceable against the attached land, not because it was a lien on the land, but because it was a lien on the attachment, and only because of that fact,

⁸ Id. at 162, 130 N.W. at 1049.

⁹ It is noted here that the third person was the father-in-law of the defendant. He was not regarded as a bona fide purchaser. Cf. *Marshall v. Casteel*, discussed infra, in which the attorney was unsuccessful in asserting his lien against a subsequent purchaser from the purchaser at the foreclosure sale.

¹⁰ 143 Neb. 68, 8 N.W.2d 690, rehearing denied, 11 N.W.2d 818 (1943).

¹¹ Id. at 72, 11 N.W.2d at 818.

and in that particular case, it was in effect a lien on the land, for while the attached property was not a judgment, it was a lien obtained through court process.¹²

Judge Paine then said that the lien in the *Casteel* case was filed against the decree of foreclosure and did not attach to the land itself.

While the *Zentmire* case was distinguished from the *Casteel* case on the basis that the lien in the *Zentmire* case attached not to the property but to the judgment, such a distinction is not consistent with the language of the case,¹³ the wording of the statute, or the general conception of the nature of a lien.

In the recent case of *Tuttle v. Wyman*¹⁴ the supreme court defined "money" in its broadest terms when it held that the lien attached to the property rather than to a judgment or attachment. In that case the plaintiff-client entered into a contract with the attorney which provided that the attorney was to be paid out of the funds recovered in the action. The plaintiff was successful in the district court, and the defendant appealed. Before the appeal was taken, the plaintiff and defendant secured a dismissal of the action. The supreme court granted an attorney's lien on the funds and real property in the trust which was still in the hands of the defendant. The court set out the following definition of "money":

In a specific sense, the rents and profits here involved were money in the hands of the adverse party. On the other hand, the statute giving an attorney a lien on money in the hands of the adverse party must be liberally construed The word "money" is used not only in a specific but also in a comprehensive and general sense, and when so used, as we do here, and in similar cases where money or property or both are recovered by a judgment or its equivalent process of the court, then the word "means wealth representative of commodities of all kinds, of lands, and of everything that can be transferred in commerce" for satisfaction of a claim so established in litigation.¹⁵

Thus, this case suggests that the court might permit an attorney's lien to attach to real property, provided the property were the subject matter of the judgment and the case involved a suit by the attorney to enforce his lien upon the property while it was still held by the parties to the action. If an attorney's

¹² Id. at 78, 11 N.W.2d at 821.

¹³ See note 8 supra.

¹⁴ 149 Neb. 769, 32 N.W.2d 742 (1948).

¹⁵ Id. at 780, 32 N.W.2d at 749.

lien is allowed on the res of a trust¹⁶ which involves real property—the situation in the *Wyman* case—then it seems that a lien should be allowed on real property.

In summary, since the Nebraska court has never squarely held that an attorney cannot have a lien upon real property, and notwithstanding dicta that the attorney cannot have a lien on real property,¹⁷ it would appear that the Nebraska cases hold that real property is within the definition of the term “money” and thus subject to an attorney lien.

Additional factors which aid the solution of the question at hand are policy considerations and the law in other jurisdictions. The applicability and value of these factors will be considered next.

II. ADDITIONAL FACTORS FOR CONSIDERATION

There seems to be no point in distinguishing between the fruits of an attorney's labor involved in the recovery of real property, currency, or some other type of property.¹⁸ The argument that it is against public policy to burden real property with a lien because it lessens property values and causes hardships on subsequent purchasers¹⁹ dissipates when it is considered that as a practical matter there are many other charges attaching to property which place a purchaser on notice.

The distinction, as used in the *Casteel* case, that the lien attaches to judgments and not to property seems to be against the plain meaning of the statute. It is unrealistic to say a lien attaches to a judgment unless all that is meant is that the lien

¹⁶ Cf. *In re Lynch's Estate*, 139 Neb. 761, 98 N.W. 697 (1941) where the attorney was allowed a fee for preserving a trust res and was given a lien from the time he filed notice. However, it appeared that there was sufficient money to satisfy the lien.

¹⁷ Three Nebraska cases cite the proposition that an attorney's lien cannot attach to real property. These cases did not contain fact situations that warranted the making of that statement. See *Young v. Card*, 145 Neb. 857, 18 N.W.2d 302 (1945); *Marshall v. Casteel*, 143 Neb. 68, 8 N.W.2d 690, rehearing denied, 11 N.W.2d 818 (1943); *Card v. George*, 140 Neb. 426, 299 N.W. 487 (1941).

¹⁸ In *Taylor v. Stull*, 79 Neb. 295, 112 N.W. 577 (1907) a judgment awarded a prosecutrix in a bastardy proceeding was held to be subject to an attorney's lien, but such lien was held not to apply to potential money that would be due in a divorce action, though there was a statement to the effect that if temporary compensation had been awarded the lien might have applied. See *Yeiser v. Lowe*, 50 Neb. 310, 313, 69 N.W. 847, 848 (1897).

¹⁹ See *Marshall v. Casteel*, 143 Neb. 68, 80, 11 N.W.2d 818, 822 (1943).

attaches to the subject matter of the judgment.²⁰ An additional indication that the lien attaches to the property of the defendant and not the judgment is that the attorney can enforce his lien against the defendant even though the defendant, without notice to the attorney, has paid the plaintiff the complete obligation. In this situation the defendant has satisfied the judgment but is still liable for the amount of the lien.²¹

Though it seems that under Nebraska's statute the lien is intended to attach to the subject matter of the judgment and not to the judgment itself, it is not a commonly accepted conclusion that "money" as used in that particular sense means wealth or property as was stated in the *Wyman* case.²²

It is significant to note that the Minnesota legislature considered the term so ambiguous that it changed the statute governing the charging lien of attorneys to include property and money instead of money only.²³ In contrast, the Kansas statute

²⁰ *Burleigh v. Palmer*, 74 Neb. 122, 103 N.W. 1068 (1905), is typical of the Nebraska cases that speak in terms of the lien attaching to the judgment. By stating that the lien attaches to the judgment, the court seems to intend to limit the scope of the lien and not have it apply to all the money (and property) in the defendant's possession. It would seem that public policy demands this interpretation to be made, but it is not clear that the lien attaches to the judgment and not the subject matter of the judgment. See *Marshall v. Casteel*, 143 Neb. 68, 8 N.W.2d 690, rehearing denied, 11 N.W.2d 818 (1943).

²¹ *Heinisch v. Travelers Mutual Cas. Co.*, 135 Neb. 13, 280 N.W. 234 (1938); *Myers v. Miller*, 134 Neb. 824, 279 N.W. 778 (1938); *Griggs v. Chicago R. I. & P. Ry.* 104 Neb. 301, 177 N.W. 185 (1920); *Gordon v. Hennings*, 89 Neb. 252, 131 N.W. 228 (1911); *Sayre v. Thompson*, 18 Neb. 33, 24 N.W. 383 (1885).

²² The first definition of money in the dictionary is that it is a type of currency. *Funk-Wagnalls, New Standard Dictionary of the English Language* (1947 ed.). But this dictionary gives four definitions of money. The first definition is that money is a standard of value and medium of payment established by law and includes notes or other tokens that are currently accepted in exchange for commodities. The second definition is that it is "salable possessions; wealth; property; as, making money." The other two definitions are that money means cash payment or a system of coinage. It should be noted that within the second meaning of money the term wealth is qualified with an example such as "he has a lot of money,"—implying that the term means wealth only when used to signify riches, and by implication, one could argue that it doesn't mean wealth or property when used in a statute. In addition, *Black's Law Dictionary* states that usually "money" "does not embrace notes, bonds, evidences of debt, or other personal or real estate."

²³ The Minnesota legislature amended its attorney lien statute in 1939. See *Minn. Stat. Ann.* § 481.13 (1947); *Akers v. Akers*, 233 Minn. 133, 140, 46 N.W.2d 87, 92 (1951) (held money was not property).

which reads the same as Nebraska's has been interpreted to mean that the lien does not attach to real property.²⁴

The result is that the collateral factors split almost evenly on the question of whether real property should fall within the definition of the term "money" as used in the statute. However, in the light of the broad definition of "money" given by the court in the *Wyman* case, an attorney's lien can probably attach to real property which is the subject of the litigation if the attorney is diligent in enforcing his lien before innocent parties take the property. However, as long as the statute says "money," there is likely to be confusion concerning what is meant by the term.

III. COURSES OF FUTURE ACTION

Consequently, it seems that some legislative action should be taken. Two alternatives open to the legislature are to amend the lien statute to include both money and property, or to repeal the statute.

There is some basis for arguing that the lien statute should be abolished. Apparently attorneys do not often invoke the aid of the statute.²⁵ There might be some sentiment that filing a lien is resorting to a device beneath the dignity of the attorney. As a standard practice attorneys do not file notice of a lien with the cause of action.

When deciding whether or not to file a lien during the course of the action, the attorney is faced with a dilemma. The best means of securing just compensation for his services is for the attorney to maintain the good will of his client. The best means of dealing with the adverse party is to give him the impression that the attorney-client relationship is based on friendship and trust. The best means for the attorney to maintain a successful practice is to keep differences between himself and his clients at a minimum and not to give the impression to the court and the community that he must resort to outside forces to gain compensation. When the attorney serves notice that he intends to establish a lien, it might in the light of other circumstances in-

²⁴ Kan. Gen. Stat. § 7-108 (1949). See *Holmes v. Waymire*, 73 Kan. 104, 84 Pac. 558 (1906).

²⁵ No form is provided by Lightner, *Nebraska Forms Annotated* (2d ed. 1951), for an attorney to file a lien in the original petition. However, in Vol. I, §§ 1506, 1507 forms are set out for filing the attorney's lien after the action has commenced.

dicating that relations between the attorney and his client have become strained.

If the bar feels that the attorney's lien is an important aid to the attorney and its use should be encouraged, it could overcome the problem posed above by recommending that attorneys make it a standard practice to file notice of the attorney's lien with the cause of action.

CONCLUSION

It is submitted that the entire statute on attorney's liens should be revised and amplified.²⁶ The principal objective of the revision should be to define more carefully the property to which the attorney's charging lien attaches. Also, the statute should define more carefully the types of actions to which it applies, the proper method for giving notice of the lien to the adverse party and court, and a prescribed method for the attorney to enforce his lien.

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²⁶The Nebraska State Bar Association accepted one recommendation to amend the present attorney's lien statute, but the legislature did not act upon the recommendation. See Report of Committee on Legislation, 14 Neb. L.J. 65 (1933). The recommendation stated: "We recommend that § 7-108 . . . relating to attorney's liens, be amended by adding thereto the following . . . 'and upon any judgment against the adverse party, in an action in which the attorney was employed, and the proceeds of any such judgment from the date of entry of judgment in such action provided that such lien shall expire at the expiration of 90 days from the entry of final judgment unless within said time notice of such lien shall have been filed in the cause in which such judgment is entered.'" This amendment defines the lien in terms of proceeds of the judgment and provides a method for filing notice of the lien. It is submitted that a complete revision of the statute would be a more satisfactory solution to the problem.