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THE ATTORNEY'S LIEN IN PENNSYLVANIA

Attorneys in Pennsylvania have long been concerned with the difficulty of collecting compensation for their services. These difficulties more or less arise from the fact that there has been no one decision in Pennsylvania clearly setting forth the various rights accruing for the collection of compensation.

An example of the difficulties that may confront an attorney in his collection of fees due, as well as expenses incurred, is illustrated in the *Purman* case. (*In re Purman*, 358 Pa. 187, 175 A.L.R. 1129, 56 A.2d 86, 1948). Here, a decedent devised his entire estate to his daughter and son, to the complete exclusion of his widow. The widow petitioned to take against the will. As a result of this petition, friction arose between the widow and her daughter. The daughter orally employed an attorney by the name of Montgomery to represent her in a suit arising out of an alleged mortgage indebtedness, and by written agreement also employed an attorney by the name of Harrison to represent her in other matters concerning the personal estate. Pending these proceedings the widow and daughter adjusted their differences, which permitted the fiduciary to file an account of its administration. At the audit of the account, both attorneys put in claims for compensation for their services, together with costs incurred. The fiduciary refused to pay these claims. It was the contention of the attorneys that these claims should be deducted from the daughter's distributive share of the estate and paid over to them by the fiduciary. The Court held that these attorneys' claims for compensation and costs did not constitute a lien against the daughter's distributable share, and hence were not payable by the fiduciary to the attorneys.

It will be sufficient to note at this point that a valuable security interest, by means of which an attorney may insure payment of fees due from, as well as expenses incurred in behalf of their clients, is the attorney's lien, and that in the instant case the attorneys failed to obtain an enforceable one.

This raises the question as to just when and under what circumstances an attorney's claim for payment of fees due from, as well as expenses incurred in behalf of, his client can constitute a lien upon the fund, documents or other property which he has been instrumental in creating or obtaining.

An examination of the cases seems to show that attorney's liens, in Pennsylvania fall into four categories.

Common Law Retaining Lien

The first of these categories is the Retaining Lien which has been defined as ". . . the right of an attorney-at-law to retain possession of such documents, money or other property of his client coming into his hands by virtue of the professional relationship, until he has been paid for his services or until he voluntarily surrenders possession of the property, with or without payment." 2 Thornton on *Attorneys-at-Law* §375, p. 970.

The chief characteristics of this lien are first, that the documents, money or other property comes into the hands of the attorney either in the course of the litigation or have been placed in his custody for safekeeping and second, can be retained, but with no right on the part of the attorney to defalcate or to sell them. This was not always the rule in Pennsylvania. In the case of *Walton v. Dickerson*, 7 Pa. 376 (1847), an attorney by the name of Dickerson retained \$100 as compensation and paid over the balance of a fund he had collected to his client, Walton. On a rule to show cause why he should not have turned over the fund intact, the Court ordered the amount paid without deduction. On a subsequent attempt by the attorney to collect his compensation, a defense was made that the previous Common Pleas Court action constituted *res judicata* as to the claim. The Court stated, "I am not aware of any decision of this Court that gives an attorney either a lien on the papers of the client, or on the money he collects for his fees," but permitted the attorney to pursue his action.

This case, however, has not been followed in Pennsylvania. In fact, it has only been quoted on one subsequent occasion, and that in a dissenting opinion [*Osterling v. Rose*, 286 Pa. 263, 272 (1926)].

Professor Brown, a leading text book writer on the subject, calls this case "a fugitive case to the contrary" and that "it is now well settled that an attorney has the right to retain possession of the securities, documents and other papers of his client . . . for the general balance due him for his professional services." Brown on *Personal Property*, (1936) § 115, p. 501, n. 14.

The leading case in Pennsylvania at present seems to be the case of *Smyth v. Fidelity & Deposit Co. of Maryland*, 125 Pa. Super. 603, subsequently affirmed on appeal by the Supreme Court, 326 Pa. 391, 111 A.L.R. 481, 192 A. 640, (1937), wherein it appears that an attorney by the name of Smyth obtained a judgment of \$1500 against his client for services rendered in his professional capacity. Smyth had in his possession a stock certificate registered in the name of his client. It became apparent that Smyth proposed to sell this certificate in order to satisfy his judgment for services. A judgment creditor of the client succeeded in obtaining an injunction restraining Smyth from transferring the certificate. Several months later the injunction was dissolved, but during the period of the injunction the stock steadily declined from its original value until it was worthless. Smyth sued on the injunction bond which was conditioned to indemnify him "for all damages which may be sustained by reason of said injunction." The case hinged first, on whether or not Smyth had a retaining lien upon the stock certificate and second, if so, whether he had the right to sell the same in satisfaction of his judgment. Judge Cunningham, who rendered the opinion for the Court, stated that:

"No Pennsylvania cases have been brought to our attention dealing directly with the technical 'retaining' lien. However, our cases, relating mostly to some phase of a charging lien or right of defalcation, as it is designated, show, by their broad language that an attorney has a common law retaining lien in this State."

[For the broad language alluded to, see *Dubois's Appeal*, 38 Pa. 231 (1861); *McKelvy's Appeal*, 108 Pa. 619 (1885); *Zinsser v. Zinsser*, 83 Pa. Super. 461 (1924)].

In granting judgment in favor of the defendant, the Court made the significant statement that

"The plaintiff failed to show he sustained damage as the direct and proximate result of the issuing of the injunction. . . . Granting that the plaintiff had a common law attorney's retaining lien, it was simply a right to hold onto the certificate and gave him no power of sale."

In 1940 the question was presented before the Supreme Court [*Greek Catholic Union v. Russin*, 340 Pa. 295, 17 A.2d 402 (1940)] as to whether the attorney's retaining lien was restricted to cover only costs and fees in the particular case in which the money or property was received. The lower court had so held. The Supreme Court reversed the lower court and even went so far as to say that the common law retaining lien was a general lien and therefore encompassed costs and fees of the particular case as well as those arising from other professional business. This is the furthest development of the Pennsylvania law relating to the common law retaining lien.

An additional problem relating to the common law attorney's retaining lien has currently received attention from the New York and Nevada Courts which has never been directly passed upon by a court in Pennsylvania. The problem is as follows: Under what circumstances and in what manner may a court, in ordering a substitution of attorneys, order that the documents in the displaced attorney's hands be delivered to the substituted attorney so that the main litigation may proceed but with due regard to the protection of the rights of the displaced attorney where his fees have not been paid or determined? The Supreme Court of Nevada held that it may require that documents and papers in the attorney's hands upon which they claim a retaining lien be delivered to the clients only upon the condition that they give security for payment of such fees as may be awarded the displaced attorneys. *Morse v. Eighth Jud. Dist. Ct.*, 195 P.2d 199, 3 A.L.R.2d 136; —Nev.— (1948).

The New York Court has followed the same doctrine but only in "particularly hard and meritorious" cases. *Robinson v. Rogers*, 237 N.Y. 467, 143 N.E. 647, 33 A.L.R. 1291 (1924); *Matter of MaKames*, 238 App. Div. 534, 265 N.Y. Supp. 515, 148 Misc. 759, 265 N.Y. Supp. 511 (1933).

Pennsylvania Charging Lien or Right of Defalcation

The second of these categories is what Pennsylvania has denominated as a charging lien or right of defalcation. It can be defined as the right of an attorney to apply against a fund in his possession belonging to his client, claims for payment of fees due from as well as expenses incurred in behalf of the client, but said fees and expenses are restricted to those incurred in the creation of the fund. The chief characteristics of this so called lien are first, that the fund must be in the

possession of the attorney; second, that there is the right of defalcation which, however, is restricted to the fees and costs incurred in the creation of the fund. Note that it is not a right of general defalcation for all fees and costs that may be due and owing by the client to the attorney.

In an early Pennsylvania case, *Balsbaugh v. Frazer*, 19 Pa. 95 (1852), an action was brought against an attorney to recover certain monies collected by the attorney on behalf of the plaintiff. It appeared that the attorney had deducted from the amount he had paid his client, a sum which he claimed as compensation for his services. The Supreme Court affirmed the judgment of the lower court, stating that an attorney who has money in his hands which he has recovered for his client may deduct his fees from the amount, and payment of the balance is all that can be lawfully demanded by the client. The Court set forth as their reason for so holding that the

“Law of Pennsylvania permits an attorney to recover from those who employ him in his professional capacity whatever his services are reasonably worth. . . . A claim for such services, like any other which arises out of a bargain or contract, express or implied, may be defalked against on adverse demand . . .” (19 Pa. 95, 98-99)

The above case was followed by *Martin v. Throckmorton*, 15 Pa. Super. 632 (1901), which more clearly emphasized the narrow field of application for Pennsylvania's charging lien or right of defalcation. The attorney in that case had collected a fund for his client in a partition proceedings and was then summoned as a garnishee in a suit against his client. The garnishee (attorney) made a claim for counsel fees in the partition and for services as counsel for the defendant in her capacity as a guardian, in a distinct and independent proceeding. The Court held the attorney could not claim out of the fund in his hands for services in other proceedings than that out of which the money came unless he can show that his client expressly so agreed.

National Slovak Society v. Gunther, 36 D. & C. 97 (1939), is an interesting lower court case which sets forth the distinction between the retaining lien and the charging lien in Pennsylvania. In this case the petitioner employed an attorney to collect a claim in his behalf. The attorney and the petitioner agreed that the former should have a \$350 fee. The attorney collected the claim and retained the monies, claiming that the petitioner owed him a sum in excess of that collected for legal services rendered on entirely different matters. A rule was granted to show cause why the attorney should not pay to the petitioner the monies collected by him less the \$350 agreed upon. On argument, the Court held that an attorney has no right under the law of Pennsylvania to retain money of his client for fees alleged to be due in cases other than the one in which the money was obtained.

In making a distinction between the two liens, the Court employed the following language:

"The petitioner (client) concedes that in many jurisdictions an attorney's retaining lien, as opposed to a charging lien, is good for any general balance due the attorney from the client, whether arising by virtue of the particular case, or by virtue of other cases in which fees are due. (97 A.L.R. 1134.) Petitioner maintains, however, that Pennsylvania has never recognized such a lien and that in Pennsylvania there is no distinction between the retaining lien and the charging lien. . . .

"A retaining lien is a lien depending upon possession by the attorney and binds only money, papers or other property in his hands which he was instrumental in collecting. . . . 'However, our cases, relating mostly to some phase of a charging lien or right of defalcation, as it is designated, show by their broad language that an attorney has a common law retaining lien in this State.'" *Smyth v. Fidelity & Deposit pany of Maryland, supra*.

Judge Keller states by way of clarification in *Zinsser v. Zinsser*, 83 Pa. Super. 461, 463:

"On the other hand it has been repeatedly held by our Appellate Courts that the lien which an attorney has for his services attaches only to a fund, or papers, actually in his possession, *McKelvey's Appeal*, 108 Pa. 615, and this so called lien upon funds in his possession is rather in the nature of a right to defalcate. *Dubois's Appeal*, 38 Pa. 231."

In spite of Judge Keller's opinion, it does not seem clear under the Pennsylvania decisions whether an attorney can exercise his right of retaining lien for his general balance (as it seems clear if he elects to exercise his right of defalcation he loses his right of lien for any charges other than those incurred in the litigation which resulted in the creating of the fund) if the fund consists only of money.

The Common Law Charging Lien

The third of these categories is the common law charging lien which has been defined as:

"A lien on the judgment secured by the attorney in behalf of his client for the costs, disbursements and services rendered by the attorney in securing the same." Brown on *Personal Property* § 115, p. 500-1.

The chief characteristics of this lien are first, that the attorney must be instrumental in obtaining the judgment for his client; second, that the lien can only be for costs, disbursements and services of the litigation which resulted in the obtaining of the judgment; and third, that the funds are in the hands of someone other than the attorney or the court. This lien has never been recognized in Pennsylvania.

This first becomes evident in the case of *Dubois's Appeal*, 38 Pa. 231 (1861), wherein an attorney by the name of Dubois, in behalf of a firm consisting of three partners, brought suit and recovered a judgment against their debtor. A writ of *fi. fa.* was issued and the interest of the debtor in a tract of land owned by his

wife was levied on and condemned. By various transfers of the title to the land, Dubois obtained an interest therein. When the land was sold, Dubois claimed a fee of \$50 as compensation for obtaining the judgment, in addition to his interest out of the proceeds for distribution. The Court held that:

"In a certain sense, an attorney has been said to have a lien for his fees, upon the money or papers of his client, while they are in his hands. He may deduct from money collected by him, a just compensation for collecting it, and need only pay over the balance. This, however, is a right to defalcate, rather than a lien. So he may retain papers entrusted to him until he has been paid for services rendered in regard to them. But possession is indispensable to his lien as much as it is to the lien of the ordinary factor or bailee. It has never been determined that he can maintain a claim upon a fund in court, against a mortgagee or a judgment creditor, even though such mortgagee or creditor be his own client."

In *Patrick v. Bingham*, 2 Pa. Super. 113 (1896), (although reversed on other issues in 165 Pa. 526) we find the following language:

"It is true that in equity a chancellor has the power to direct the payment of reasonable counsel fees out of monies for distribution, when the fund is the product of the attorney's labors and he has agreed to look to it solely for his compensation. *McKelvey's Appeal* . . . But there is no warrant for the proposition that at law an attorney's claim for services, for a sum not judicially ascertained nor assented to by other claimants, is a lien upon the fund attached as against such claimants. To hold that an attorney's fee is a lien on the money in court because it was recovered through his services would be to ignore the doctrine of *Dubois's Appeal*. . . . However desirable it may be to allow claims of counsel for services out of funds which those services secured, it cannot be done in the absence of legislation permitting it, to the prejudice of other creditors who have liens upon the monies."

Following the above suggestion of the Supreme Court, a statute was enacted (Act of May 6, 1915, P.L. 261) which attempted to give to attorneys the common law right of a charging lien which had not heretofore been extended to them. In said statute it was provided:

"That from the commencement of an action or proceeding, either at law, in equity, or otherwise howsoever, or the filing of any counterclaim or any pleading, the attorney who appears of record for a party therein shall have a lien for his compensation for his services upon his client's cause of action, claim or counterclaim, which shall attach to any award, order, report, decision, compromise, settlement, verdict or judgment in the client's favor, and the proceeds thereof in whosoever hands they may come; and the said lien shall not be affected or defeated by any compromise or settlement between the parties before or after judgment."

This act was declared unconstitutional in the case of *La Placca v. P.R.T. Co.*, 265 Pa. 304, 108 A. 612 (1919), the court declaring that it was special legislation in view of the fact that the Act gave attorneys of record in legal proceedings a right of lien not heretofore available to them, considering them merely as a part

of a professional class, so violating Art. III, section 7 of the Constitution of Pennsylvania forbidding the passage of any local or special law authorizing "the creation, extension or impairing of liens . . . or providing or changing methods for the collection of debts."

In the case of *Zinsser v. Zinsser*, 83 Pa. Super. 461 (1924), already mentioned while discussing the Pennsylvania right of defalcation, an attorney by the name of Thompson obtained a judgment against one H. Zinsser on behalf of his client, W. Zinsser, in the common law action of assumpsit. Thompson had orally agreed with his client that he was to receive a fifty per cent contingent fee. Upon obtaining the judgment, Thompson filed an order to mark fifty per cent thereof to his use. In the meanwhile, the two Zinssers compromised their differences and settled the case without Thompson's knowledge. The client secured a rule to have the order marking fifty per cent of the judgment to use of his attorney stricken from the record. In sustaining the rule the court held that:

"An attorney may claim his fees as a preference out of money raised by his services when it has come within the grasp of the court, applies only to a Court of Equity, or to a proceeding in the Orphans' Court. It does not apply to a common law action. . . ."

In a recent decision in a lower court, *Harrisburg Trust Company v. Snyder*, 60 D. & C. 503, 507 (1947), Reese, P.J. reiterated the doctrine set forth in the *Zinsser* case.

The Equitable Charging Lien

The fourth of these categories is the equitable charging lien or equitable allowance, which has been defined as the right of any attorney ". . . to compensation out of a fund which has been brought into a Court of Equity by his aid and to which it is agreed he will look for payment. . . ." 2 Thornton on *Attorneys-at-Law*, § 624. The chief characteristics of this lien are first, that the fund must have been raised as a result of litigation in a Court of Equity; second, that the fund must be within "the grasp of the court"; and third, that the lien can only be for the costs, fees and disbursements of the attorney incurred in the litigation by which the fund was raised.

The early cases do not call this instrumentality a lien but they recognize its close proximity to one. This is illustrated in *Aycinena v. Peries*, 6 W. & S. 243 (1843), 2 Pa. 286 (1845), which was an action for money had and received in the nature of a bill in chancery. The commissioners under the Spanish Treaty of 1815 awarded a large sum of money to be paid to one Yard for the loss sustained by two vessels under order of the Spanish authorities and the sale of their cargoes. The plaintiff, an attorney, was held to have had constructive possession of the fund and an equitable lien on it, from his having been the efficient person by whose means the money was ultimately recovered and having parted with the documents at the request and for the convenience of the parties interested. Rogers, J.:

"This case does not come, as may be safely admitted, within the general principle of lien; for a lien is defined to be a right in one man to retain that which is in his possession belonging to another until certain demands of him, the person in possession, are satisfied. Goods subject to a lien are in the nature of a pledge, which being personal, cannot be transferred; so if the goods are parted with, the lien, in general, is lost. But this rule is subject to qualification . . . There are equitable exceptions to the general rule. . . . The plaintiff had possession of all the documents on which the claim was founded, and, for the convenience of all the parties, he parted with them. It would therefore be unjust that by this act he should be deprived of the lien which he unquestionably would have had if the money had come into his hands. It may then be viewed as a qualification of the general rule applicable to liens. . . ."

"They all viewed the proceeds, the fruit of the services rendered by the plaintiff, as the primary fund for the liquidation of his claim.

"Although it may not strictly be a lien, may it not be viewed as a right or charge upon the thing itself? Thus there are liens recognized in equity whose existence is not known or admitted at law. *Gladstone v. Birley* (2 Meriv. 403). In regard to these liens, it is true, it may be generally stated that they arise from constructive trusts; they are, therefore, wholly independent of the possession of the thing to which they are attached as a charge or encumbrance; and they can be enforced only in a Court of Equity. . . ." (6 W. & S. 243, 251-2).

McKelvy's & Sterrett's Appeals, 108 Pa. 615 (1885), is an important case falling within this category. The controversy arises out of an award to one Sterrett and others under a Master's report. (The Master was appointed under a decree of a Court of Equity.) Sterrett, *et al.*, made efforts to take the fund out of court. One Neill, an attorney, retained by Sterrett in the proceedings, moved to have Sterrett's share impounded for his fees and submitted an application to have an auditor appointed to fix the amount of his fees. Auditor awarded Neill \$800. Auditor found, (1) appellee was to look to the fund (Sterrett's share) for his compensation. (2) Its existence is due in a great measure to his professional services. Held, in respect to the appellants' exception, that an attorney has no lien on a fund in court, where the attorney was to look to the fund in court and the existence of that fund was due in a great measure to his professional services. In a case in a Court of Equity, though his interest is not strictly in the nature of a lien, he is the equitable owner thereof to the extent of the value of his services.

In 1887 several cases arose which gave voice to the equitable charging lien. *Spencer's Appeal*, —Pa.—, 9 A. 523 (Pa.). In this case the Orphans' Court refused to grant an order on the Clerk of the Court to pay over certain money to appellant. One Olds, an attorney, had been employed by the appellant to attend to his interest in an estate, which he did. The appellant sought to evade payment of attorney's fee. Held, an attorney at law employed to attend to the business which produced a fund in court, who renders considerable and valuable services and brings the matter to a successful conclusion, is entitled to compensation for

his services out of the fund. In *Appeal of Atkinson*, —Pa.—, 11 A. 239, one attorney was employed to collect a judgment for its corporate client. After long and tedious litigation, he was successful. An auditor was appointed to distribute the money raised by execution and paid into court. The attorney not having been paid, requested an award out of the money in court.

Held by lower court and affirmed *per curiam* by the Supreme Court,

“Under this statement of facts the court, having control of the funds, could not, on any principles of equity, turn all the money over to the plaintiff and compel the attorneys to resort to a suit against an insolvent client for the collection of his fees. *McKelvy's Appeal*, *supra*, makes clear the duty of the court in such a case.”

The third case decided in 1887 on this issue was *Appeal of Price & Townsend*, 116 Pa. 410. Price & Townsend, attorneys, were employed by one Scott, guardian for his three sons to recover in ejectment, real estate in Philadelphia, and they were successful. The attorneys were paid in part for their services and now claim \$700 more from the estate of each minor. The eldest minor came of age and a final account in his estate was filed by the guardian. The attorneys presented a claim against it in the Orphans' Court at the time of the adjudication of the account. Lower court disallowed the claim, saying the Orphans' Court had no jurisdiction to determine the claim and the claimants must pursue their remedy at law. On appeal, decree was reversed. The court held,

“It seems to us that upon plain principles the jurisdiction to entertain claims for professional services rendered by attorneys to the estates of minors upon contracts with their guardians, ought to reside in the courts which have control of the accounts of guardians.”

The extent and scope of this lien in equity is defined in the case of *Aber's Petition*, 18 Pa. Super. 110 (1901). Aber obtained a judgment against Schnuth for \$188.42 and later Schnuth obtained judgment for \$327.28 against Aber. Schnuth, the day before the verdict was rendered in the latter case, assigned it to his attorneys, the appellees, in consideration of services rendered and money expended by them in his behalf and other cases. Aber petitioned and was granted a rule on Schnuth and his attorneys to show cause why Aber's judgment should not be set off against Schnuth's. Schnuth was insolvent. Court, after a hearing, discharged the rule. The appellee argued that a set off (here one judgment against the other) will not be permitted to the prejudice of an attorney's lien for services rendered in obtaining the judgment, and that upon this ground the rule was properly discharged. The court assumed, for the purposes of discussion, the attorney had an equitable claim upon the fund to be recovered. Held, in such a case the attorney had no lien or equitable claim thereon for services rendered in other cases.

The leading case in this class was decided in 1936 in *Harris's & Jacoby's Appeals*, 323 Pa. 124, 186 A. 92 (1936), condemnation proceedings. Maxey, J. states:

"We base our decision upon the facts that the primary right to institute and conduct the proceedings in behalf of the property, before the board of view, was in the property's owner; that the mortgagee who loaned money and took a first lien on this property as security therefor was chargeable with knowledge of the fact that if the property should be subjected to condemnation proceedings, (as it was), the right of action for damages was in the owner and this right of action carried with it the right to engage counsel to protect the interests of both the owner and the mortgagee, whose interests in such proceedings were not antagonistic but identical; that the mortgagee knew of the employment of Attorney Jacoby by the owner to protect the joint interests of the owner and the mortgagee in these condemnation proceedings and apparently approved of his employment and of what he did professionally in the matter; and that the professional efforts of this attorney produced, to a substantial extent, the fund for distribution, to which fund the attorney was required, under his agreement with his record client, to look for compensation, and against which the attorney had, under circumstances here present, an equitable claim which has often received judicial recognition under the name of a "charging lien."

Turtle Creek Bank & Trust Co. v. Murdock, 150 Pa. Super. 277, 28 A.2d 320 (1942), affirms the *McKelvy* and *Harris* cases, *supra*. In this case the court states

"Before a charging lien is recognized, it must appear (1) that the attorney's services contributed primarily to creating the fund; and (2) that there was an agreement with the client that the compensation was to be paid from that fund."

In *Anderson's Estate*, 51 D. & C. 212 (1944), Hunter, J. states:

"Ordinarily the Orphans' Court has no jurisdiction to determine fees between a distributee and his attorney. . . . An exception is made where the attorney holds an assignment of his client's interest, in which case the Orphans' Court had jurisdiction. . . ."

"In the case before us there was no assignment by the distributee to the attorney, and the Auditing Judge found expressly that there was no agreement between them that the attorney would look to the fund for compensation. For this reason the Auditing Judge rejected the attorney's claim to a lien on the fund and declined to take jurisdiction of the controversy."

Judge Hunter then quotes from the *Turtle Creek Bank* case, *supra*, and sets out in his opinion the two requirements for an attorney's equitable charging lien as quoted in that case. He then states that the lien fails among other things because there was no agreement that the attorney should look to the fund for his compensation. This case clarifies Orphans' Court practice on the subject of the attorney's equitable charging lien.

Summary

In view of the above analysis of attorney's liens in Pennsylvania, it would appear that in the *Purman* case, mentioned in the introduction, there is no right of, (1) a common law retaining lien because of the fact that the present distributive share was at no time in the possession of either of the attorneys; (2) that there is no charging lien or right of defalcation also because the fund was not in the possession of the two attorneys; (3) there was no common law charging lien as this type of lien is not recognized in Pennsylvania, and (4) there was no equitable charging lien, for although it had been agreed they would look to the fund for compensation, nevertheless, the attorneys did not aid in the procurement of the fund, nor did they successfully defend the estate from depletion because of unjust claims.

As the services of these attorneys were professional services for which their client is clearly indebted to them they must look solely to her for their compensation.

It is apparent that there are available to attorneys in Pennsylvania, three types of liens.

The common law retaining lien was given recognition for the first time in the *Smyth* case, *supra*. The lien, as outlined in this case, is upon documents which have come into custody of the attorney through his professional relationship with his client, and is exercisable for a general fund due the attorney from his client. This lien is quite valuable, but hinges on the important item of possession and, therefore, is unavailable for a fund produced by the attorney that is within the "grasp" of the court.

The Pennsylvania charging lien or right of defalcation is also dependent upon the attorney's possession of a fund of money. It permits an attorney to set off against this fund in his possession the expenses and compensation due him which were incurred in the creation of the fund. The difficulty with this lien is the restricted nature of the set off, *viz.*, to only those expenses in creating the fund.

This difficulty might be dispelled to an extent by using the retaining lien with respect to money. The common law definition of the retaining lien includes the money of the client in the attorney's possession. A hypothetical case will serve to illustrate a suggested method whereby a lien upon money in the attorney's possession, acquired by the attorney through his professional relationship with his client, may be used to aid recovery by said attorney of the general balance due him from his client.

A, an attorney, in 1947, earned a \$1,000 fee in the prosecution of a common law action. In 1948, A earned another \$1,000 fee from the same client in the prosecution of a different common law action. In that latter case, the attorney collected \$3,000 for his client. All the Pennsylvania cases on this subject have

allowed the attorney to withhold only \$1,000 and pay his client the balance of \$2,000. It is submitted that he should be able to hold the entire \$3,000, stating the money belonged to his client but that he is asserting a retaining lien upon it for the general balance of \$2,000 which was due him.

The common law charging lien concerns a fund which the attorney has been instrumental in securing for his client. The subject matter of the lien, however, must be within "the grasp of the court" because its exercise depends upon the fact that the court has control over the fund and also has control over its servants, namely, attorneys. The lien, available only for the compensation and expenses in raising the particular fund in court, has never been law in Pennsylvania. The historical reason in Pennsylvania for its non-availability has consistently been that an attorney should not be permitted to assert his lien out of funds his services secured to the prejudice of other creditors who have liens upon it. The legislature attempted to give the attorney what the Pennsylvania common law never allowed him. The *La Placca* case, *supra*, declared the statutory charging lien unconstitutional for the reason that attorneys are a part of a professional class and special legislation for such a group is repugnant to the Constitution.

The Pennsylvania equity decisions have permitted the equivalent of a charging lien to be exercised in equitable actions in their desire to adjust differences where, through technicalities, the law is deficient. The similarity of this device to the common law charging lien will not demand further discussion of its characteristics. It will suffice to say that Justice Maxey has sufficiently set them out in *Harris's Appeals, supra*.

Marcellus H. McLaughlin, Jr.