

MENZI & COMPANY, INC., PLAINTIFF AND APPELLEE, VS. FRANCISCO BASTIDA ET AL., DEFENDANTS. THE BANK OF THE PHILIPPINE ISLANDS, THE PHILIPPINE GUARANTY CO., INC., AND MACONDRAY & C...

G. R. No. 42278. March 25, 1936

Ponente: IMPERIAL, J.

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IMPERIAL, J.:

In civil case No. 31956 of the Court of First Instance of Manila, G. R. No. 35840[1] of this court, entitled Francisco Bastida, plaintiff, vs. Menzi & Co., Inc., et al., defendants, final judgment was rendered on appeal ordering Menzi & Co., Inc., to pay to Francisco Bastida the sum of P21,633.20 with legal interest thereon from June 17, 1927, without costs. Said sum with interest thereon amounted to P29,774.49 on September 25, 1933.

Prior to the issuance of a writ of execution of the final judgment so rendered, Menzi & Co., Inc., received written notices from Levy Hermanos, Inc., the Bank of the Philippine Islands, Manuel Bustamante, Filipinas Lumber Co., Inc., the Philippine Guaranty Co., Inc., Claro M. Recto, Jose M. Casal, Alberto Barretto and Manuel Nieto alleging that they were Francisco Bastida's creditors in the amounts specified by each of them and that, their respective claims being preferred claims, they asked to be paid with preference. In order that the courts might finally determine the alleged preferences and the order in which they should be paid, and to avoid subsequent responsibilities, Menzi & Co., Inc., brought an action of inter-pleading against all the said creditors and on said date, September 25, 1933, it deposited the sum of P29,774.49 with the clerk of the Court of First Instance of Manila. The action so brought was docketed as No. 45209.

On April 18, 1934, judgment was rendered in said case ordering that the credits be paid in the order and preference as follows: the sum of P23,041.69 to Levy Hermanos, Inc.; the sum of P1,300 to Claro M. Recto; the sum of P4,000 to Jose M. Casal, or to his assignee Macondray & Co.; the sum of P1,000 to Alberto Barretto; the sum of P100 as attorney's fees and P76.04 as judicial expenses to Harvey and O'Brien, and the balance to the Bank of the Philippine Islands.

The Bank of the Philippine Islands, Filipinas Lumber Co., Inc., Macondray & Co., Inc., and the Philippine Guaranty Co., Inc., filed motions for a new trial which were denied; but only the Bank of the Philippine Islands, Macondray & Co., Inc., and the Philippine Guaranty Co., Inc., filed a joint bill of exceptions thus making them the only appellants.

Pending the appeal and before it was considered, the creditor and appellee Claro M. Recto filed a motion withdrawing his claim on the ground that being now a member of this court he does not desire to intervene as litigant in any case pending before it, preferring to collect his credit for professional services directly from the then plaintiff Francisco Bastida. The motion was favorably acted upon and therefore said creditor has ceased to be an appellee in this case.

Francisco Bastida owed Levy Hermanos, Inc., the sum of P18,531.42 representing the value of autotrucks and an automobile bought by him on the installment plan, having constituted mortgages on six (6) Dodge Brothers autotrucks and a seven-passenger Hudson Sedan, which mortgages were duly registered. On May 11, 1931, after Bastida had obtained judgment in his favor in civil case No. 31956, Levy Hermanos, Inc., was informed that the securities given to it by Bastida had greatly depreciated in value due to the constant use thereof, for which reason it required Bastida to transfer to it part of the judgment obtained by him sufficient to cover the balance in question plus interest thereon on the date of the execution of the judgment. Bastida agreed and on said date he executed Exhibit F-Levy Hnos., Inc. whereby he sold, ceded and conveyed to said creditor an aliquot part of the judgment obtained by him sufficient to pay the said balance with the stipulated interest thereon until the date of the execution of the judgment. The document so executed was legalized by a notary on the 26th of said month and year and on the following day, the 27th, it served Menzi & Co., Inc., with a copy thereof, notifying the latter of the existence of said assignment. On said date it attached a certified copy of said deed to the record of civil case No. 31956. On October 25, 1933, the date on which Levy Hermanos, Inc., filed its answer, its credit amounted to P23,041.69 including the stipulated interest thereon up to said date.

On March 30, 1932, Francisco Bastida and Jose M. Casal executed a promissory note for P10,000 in favor of the Bank of the Philippine Islands, binding themselves to pay said amount jointly and severally after ninety (90) days with interest thereon at 9 per cent per annum plus the penal sum of P1,000 as judicial expenses and attorney's fees, in case the creditor should be compelled to resort to the courts. To secure the promissory note which became due on June 28, 1932, Francisco Bastida, on the 9th of November of said year, executed Exhibit A-B. I. F. whereby he mortgaged the judgment obtained by him in civil case No. 31956 to the Bank of the Philippine Islands. This mortgage deed was registered in the registry of deeds of the City of Manila on December 3, 1932, and on April 3, 1933, the Bank of the Philippine Islands notified Menzi & Co., Inc., of the existence thereof and that its credit then amounted to P12,000, and requested that it be paid preferentially.

Jose M. Casal was one of the attorneys for Francisco Bastida in civil case No. 31956 and on September 9, 1933, he filed a notice of attorney's lien for the sum of P6,000 with the records and notified Menzi & Co., Inc., thereof; on the 12th of said month this court, in a resolution, made said attorney's lien of record. Attorney Casal later transferred all his interest in said attorney's lien to Macondray & Co., Inc., who substituted him in this appeal.

In civil case No. 44123 of the Court of First Instance of Manila, the Philippine Guaranty Co., Inc., obtained judgment against Francisco Bastida for the recovery of a certain sum of money. On August 17, 1933, said company, through the sheriff, attached the judgment finally obtained by Bastida in civil case No. 31956 to enforce the execution issued for the sum of P6,045.36, notifying Menzi & Co., Inc., thereof.

Alberto Barretto is one of the attorneys who defended Francisco Bastida in civil case No. 31956. On September 15, 1933, he filed a notice of attorney's lien in the case and notified Menzi & Co., Inc., thereof. This court, in a resolution of the 19th of said month ordered that the attorney's lien be attached to the record. Said attorney claimed 10 per cent of the funds on deposit, or P2,977.45. The court, however, reduced it to 91,000.

The Bank of the Philippine Islands claims that in the appealed judgment the court erred: (1) In not holding that the transfer or assignment made by Francisco Bastida in favor of Levy Hermanos, Inc., was fictitious; (2) in holding that the credit of Levy Hermanos, Inc., enjoys priority over the other claims; (3) in holding that Alberto Barretters credit enjoys preference over its claims; (4) in also giving preference to Jose M. Casal's credit over its claim; (5) in also giving preference to Claro M. Recto's credit over its claim; (6) in granting to the attorneys for the herein plaintiff fees in the sum of P100 and in considering said fees as preference credit over its claim; (7) in holding its claim inferior to those of Levy Hermanos, Inc., Recto, Barretto, Casal and to the fees of the attorneys for the plaintiff; (8) in not holding its claim superior to those of the other creditors; (9) in not rendering judgment in its

favor ordering payment of its credit with preference to the other claims; and (10) in rendering the appealed judgment.

In its brief the Bank of the Philippine Islands discusses its first two assignments of error jointly. Following the same order we shall also pass upon said assignments at once. The Bank of the Philippine Islands did not present any evidence to prove its allegation that the assignment made by Bastida in favor of Levy Hermanos, Inc., was fictitious. The defect thus alleged is equivalent to fraud. Fraud cannot be presumed but it must be proved with the same degree of certainty with which the essential elements of a contract alleged to be false are proved (art. 1300 of the Civil Code; *Campania General de Tabacos vs. Obed*, 13 Phil., 391; *Arroyo vs. Granada and Gentero*, 18 Phil., 484; *Antonio vs. Aloe*, 25 Phil., 147). The record shows that when Bastida assigned his judgment credit to Levy Hermanos, Inc., he was indebted to said company in the huge sum of P18,531.42 plus interest thereon at 10 per cent per annum and that the trucks and automobile with which he secured the obligation had greatly depreciated in value by reason of the regular and constant use thereof. To settle his debt Bastida had a perfect right to assign the necessary part of his judgment credit in accordance with the provisions of article 1175 of the Civil Code. The circumstance that the obligation was then secured by two chattel mortgages did not prevent Bastida from making the assignment or Levy Hermanos, Inc., from accepting it. When Bastida assigned his judgment credit, he was the absolute owner thereof and no writ of attachment of his property was issued against him. Therefore the Bank of the Philippine Islands cannot invoke the provisions of article 1297 of the Civil Code. It is superfluous to state that in the assignment there was valid cause or consideration, consisting in the debt, and therefore neither can it be claimed that the transfer was gratuitous. We shall discuss the credits of the other claimants as well as the priority or preference thereof when we take into consideration the said appellant's other assignments of error. It follows, therefore, that the first two assignments of error are not well founded.

In its third assignment of error the Bank of the Philippine Islands discusses Attorney Alberto Barretto's credit for fees and contends that its credit has preference over the latter's. It will be remembered that the court granted this attorney fees in the sum of P1,000 for services rendered to Francisco Bastida in civil case No. 31956. The first time this attorney made his attorney's lien appear of record and notified Menzi & Co. thereof was on September 15, 1933. Francisco Bastida mortgaged his judgment credit to the Bank of the Philippine Islands on November 9, 1932, and the deed executed to that effect was duly registered on December 3d of said year. It follows, therefore, that the mortgage credit of the Bank of the Philippine Islands is prior to Attorney Barretto's lien and, consequently; the former should be paid in preference to the latter. According to section 37 of the Code of Civil Procedure on which Attorney Barretto bases his claim, a lawyer's lien on judgments and decrees for the payment of money and the preference thereof arise only from the date on which the right is caused to be entered upon the records and the adverse party notified thereof. We therefore hold that the third assignment of error is well founded and that the credit of the Bank of the Philippine Islands is superior and has preference over that of Attorney Barretto.

In the fourth assignment of error the Bank of the Philippine Islands questions Attorney Jose M. Casal's credit which, as stated, was assigned or transferred to the other appellant Macondray & Co. Casal caused his lien to be entered upon the records and notified Menzi & Co., Inc., thereof on September 9, 1933, after which he assigned all his right to Macondray & Co. The Bank of the Philippine Islands contends that as the lien had been assigned the preference thereof has ceased. The principle sought to be applied does not seem to us correct nor just. The generally accepted doctrine is that an attorney's lien may be assigned or transferred without the preference thereof being extinguished, with the exception that the doctrine does not extend to cases where the assignment carries with it a breach of the attorney's duty to preserve his client's confidence inviolate (6 C. J., 769, 770). "Although an attorney cannot assign a contract for his services to be rendered, and substitute another attorney in his place, without the consent of his client, he may assign a debt substantially due for services rendered; and where a firm of

attorneys was to receive a certain compensation for their services, provided they should accomplish certain results, the surviving partner may, after the services which they promised to render, and the ends which they agreed to accomplish, were all practically rendered and accomplished, assign all the right and title of the firm in the contract for such services, and all the moneys due or to become due thereunder, and the assignee may recover upon the contract." (Taylor vs. Black Diamond Coal Mining Company, 86 Cal., 589.) "The assignment by an attorney of a specified sum to be paid out of the first money to be received by him upon a percentage fee contracted to be paid on the value of the property realized by his client creates an equitable lien on such percentage fee in favor of the assignee in the sum specified." (Goad vs. Hart, 128 Cal., 197.) We hold, therefore, that the mere assignment of the attorney's lien did not result in extinguishing the preference. However, it appears that Attorney Casal's lien was caused to appear in the records and notice thereof to the adverse party was made only on September 9, 1933, long after the mortgage executed by Bastida in favor of the Bank of the Philippine Islands, which was registered on December 3, 1932. Resolving Attorney Barretto's claim we stated that pursuant to the provisions of section 37 of the Code of Civil Procedure, an attorney's lien enjoys preference only from the time it is entered upon the records and notice thereof served on the adverse party. This provision is applicable to the case of Attorney Casal and therefore his claim is inferior to the mortgage credit of the Bank of the Philippine Islands and cannot be paid preferentially. We hold, therefore, that the fourth assignment of error is likewise well founded.

In its fifth assignment of error, the Bank of the Philippine Islands questions Attorney Claro M. Recto's credit and the preference thereof. In a resolution of March 18, 1936, said claimant was eliminated as party to the case and in view thereof, and because he is no longer interested in any judgment to be rendered therein, it is unnecessary to pass upon this fifth assignment of error.

The Bank of the Philippine Islands contends in its sixth assignment of error that the court should not have granted fees in the sum of P100 to the attorneys for the herein plaintiff, Menzi & Co., Inc. Counsel for the Bank of the Philippine Islands cites no authority in support of his theory. Section 120 of the Code of Civil Procedure which authorizes the bringing of an action of interpleading contains no provision relative to fees of the attorney for the plaintiff in such actions. However, taking into consideration the purpose of an action of interpleading, it seems just that the fees of an interpleader's attorney be defrayed with the funds sought to be distributed, unless there be some reason justifying payment thereof by some of the defendants in the case. "According to many authorities, complainant is entitled, as a part of his costs, to an attorney's fee commensurate with the services of his counsel in the cause, eventually to fall on the claimant who was in the wrong and made the litigation necessary, and this is expressly provided by statute in some jurisdictions. * * * In any case, the allowance for attorney's fees should be limited to a reasonable fee for necessary services." (33 C. J., 470, and the cases therein cited.) It appears that the amount of the fees granted is not questioned nor is it claimed that it is exorbitant or unreasonable. Truly, the sum fixed is very reasonable and proportionate to the amount and quality of the professional services rendered. As to the order of payment of these fees, the law is likewise silent; but being in the nature of costs, according to the American doctrine referred to above, they should be paid in preference to all claims and at the same time as judicial costs. In its brief the plaintiff-appellee likewise prays that it be granted the costs of both instances, including the expenses incurred in the printing of its brief. We agree to the recovery of costs but we cannot authorize the refund of the expenses incurred in the printing of its brief because it is expressly prohibited by section 494 of the Code of Civil Procedure.

The rest of the assignments of error of the Bank of the Philippine Islands do not require further discussion because the questions raised therein have already been settled in the foregoing considerations.

Macondray & Co., the other appellant and assignee of Attorney Jose M. Casal's lien, assigns the following errors

as committed in the judgment, to wit: (1) In holding that the credit of Levy Hermanos, Inc., enjoys preference over Attorney Casal's lien, and consequently over its credit; (2) in holding that Attorney Claro M. Recto's lien has priority over its credit, and (3) in reducing Attorney Casal's fees to P4,000.

The first assignment does not require further discussion. It has already been settled that Casal's credit, now Macondray & Co.'s, is inferior to that of Levy Hermanos, Inc., Joy virtue of the provisions of section 37 of the Code of Civil Procedure that an attorney's lien enjoys preference only from the date a statement thereof is caused to be entered upon the records and notice thereof served to the adverse party. Casal's lien was caused to be entered upon the records jind Menzi & Co., Inc., notified thereof long after Bastida had transferred his judgment credit to Levy Hermanos and also after said Bastida had mortgaged it to the Bank of the Philippine Islands. We, therefore, hold that the first assignment of error is unfounded.

The second assignment, referring to Attorney Recto who has already ceased to be a party to the suit, does not require further consideration.

Neither is it necessary to dwell at length upon the last assignment of error in view of the fact that the funds to be distributed will not be sufficient to pay Attorney Casal's claim, now Macondray & Co.'s, and therefore the question relative to the amount of said attorney's fees is immaterial.

The last appeal is that taken by the Philippine Guaranty Co., Inc. This appellant claims that the judgment of the court erred: (1) In not declaring that the assignment made by Bastida to Levy Hermanos, Inc., is fraudulent; (2) in not holding that the mortgage constituted by Bastida in favor of the Bank of the Philippine Islands is null and void; (3) in holding that the claims of Barretto and Recto for attorney's fees have preference over its credit; (4) in holding that the claim of Macondray & Co. has preference over its credit; (5) in granting fees in the sum of P100 to the attorneys of Menzi & Co., Inc., and (6) in not holding that its credit is superior and preferential to all the rest.

In its brief, the Philippine Guaranty Co., Inc., discusses jointly its first and second assignments of error. In considering the first two assignments of error of the appellant Bank of the Philippine Islands, we already stated that the assignment made by Bastida, in favor of Levy Hermanos, Inc., was legal and valid and not vitiated by alleged fraud. We then stated at length our reasons for arriving at that conclusion. The Philippine Guaranty Co., Inc., offers no new arguments nor citations of legal authorities in its brief. The same point having been sufficiently discussed, we see no advantage in repeating herein the same considerations already made. With respect to the claim of the Bank of the Philippine Islands, it is, by reason of dates, superior and preferential to that of the Philippine Guaranty Co., Inc. The mortgage credit of the former was legally registered prior to the latter's garnishment. There is not the slightest token that the mortgage is fraudulent or that some defect invalidating it was present at the execution thereof. We hold that these first and second assignments of error are unfounded.

In its third assignment of error, the Philippine Guaranty Co., Inc., impugns the claims of Attorneys Barretto and Recto and the preference thereof. The questions now raised by it have already been passed upon when the same claims were discussed in connections with those of the Bank of the Philippine Islands and Macondray & Co. We have nothing to repeat as regards Attorney Recto because he has already ceased to be a party to the case. As to the Philippine Guaranty Co., Inc., Attorney Barretto's lien is inferior and enjoys no preference on the ground that said right was caused to be entered upon the records after the former's attachment, by way of garnishment, of the judgment obtained by Bastida, which took place on August 17, 1933.

In its fourth assignment of error, the Philippine Guaranty Co., Inc., contends that its claim has preference over that of Macondray & Co. By reason of dates, the former's claim is superior to that of the latter because Casal's lien and the transfer thereof to Macondray & Co. took place after the attachment made by the Philippine Guaranty Co.,

Inc.

In its fifth assignment of error said appellant likewise questions the correctness of the fees of the attorneys for the plaintiff Menzi & Co., Inc. This controversy has already been passed upon in discussing the sixth assignment of error of the Bank of the Philippine Islands. It is unnecessary to repeat here all that has then been stated. We hold that the fifth assignment of error is unfounded.

In its sixth and last assignment of error, the Philippine Guaranty Co., Inc., contends that its claim is superior and preferential to the claims of all the rest. Under the considerations set forth in the foregoing paragraphs we hold that its claim should occupy the fourth place and should be paid in the order later to be established, in case the funds on deposit are sufficient.

As a corollary of all the foregoing, we hold that the claims involved in these appeals enjoy preference in the order as follows: (1) The fees of the attorneys for the plaintiff Menzi & Co., Inc., and the costs of both instances to which it is entitled under sections 492 and 494 of the Code of Civil Procedure; (2) the claim or credit of Levy Hermanos, Inc.; (3) the claim or credit of the Bank of the Philippine Islands; (4) the claim or credit of the Philippine Guaranty Co., Inc.; (5) the claim or credit of Macondray & Co.; and (6) the claim or credit of Alberto Barretto. These claims will be payable in the order established if the funds on deposit are sufficient.

Wherefore, with modification of the appealed judgment, it is ordered that of the sum of P29,774.49 deposited by the plaintiff with the clerk of the Court of First Instance of Manila, the following be paid: First, the costs of both instances to said plaintiff and the sum of "P100 to the attorneys thereof; second, the sum of P23,041.69 to Levy Hermanos, Inc., and third, the entire balance of the amount of money on deposit to the Bank of the Philippine Islands, as partial payment of its claim. That part of the appealed judgment releasing the plaintiff from all further responsibility arising from the judgment rendered in civil case No. 31956, is affirmed. So ordered.

Avanceña, C. J., Villa-Real, Abad Santos, Diaz, and Laurel, JJ., concur.

RESOLUTION ON MOTION FOR RECONSIDERATION

July 17, 1936

IMPERIAL, J.;

Macondray & Co., Inc., and Alberto Barretto filed a motion for reconsideration seeking to set aside the decision rendered in the cause and praying that another be rendered declaring that their credits have preference over those of Levy Hermanos, Inc., and the Bank of the Philippine Islands, so that the latter's credits be paid after theirs.

The first ground of the motion alleges that "Levy Hermanos, Inc., in causing the assignment to it of a part of the judgment rendered by the Court of First Instance of Manila in civil case No. 31956, to be entered upon the records, became a quasi party to the suit and cannot recover any amount or part thereof without first paying the fees of the attorneys who intervened in said litigation." The contention is untenable and finds no support in any law. In legal technicality quasi parties are those who are already represented in the suit, or who come within the compass of the proceedings pendente lite (*Atlantic Refining Co. vs. Port Lobos Petroleum Corporation*, 280 Fed., 934, 939). Under section 114 of the Code of Civil Procedure, a party to an action or proceeding is the person who has a material and direct interest in the pending action, or who has an interest in the subject of the action and in obtaining the relief demanded. Even after Levy Hermanos, Inc., had obtained the assignment and caused the acquisition thereof to be entered upon the records, it had no interest in the subject matter of the litigation between Bastida and Menzi & Co., Inc. It was not formerly represented in the suit. It had neither direct nor indirect interest

in Bastida's causes of action against Menzi & Co., Inc. All the interest obtained by it had direct bearing on the judgment obtained by Bastida against Menzi & Co., Inc. Its right to that part of the judgment acquired under the assignment was contingent and inchoative inasmuch as it was enforceable only upon the affirmation of modification of the judgment, as done by the appellate court.

The second ground offers the following proposition: "The assignee of a litigious credit does not acquire, by virtue of the assignment, a personal or real property susceptible of identification and immediate delivery; all that he acquires are the rights of the assignor and such acquisition is subject to the lien created by law, for the benefit of the attorneys who intervened in the suit." The proposition is based upon two incorrect premises. In the first place the case does not exactly involve an assignment of a litigious credit. It should be noted that what the parties litigated was not the judgment obtained by Bastida, part of which was the subject matter of the assignment, but Bastida's allegations of claims or causes of action against Menzi & Co., Inc. The judgment was the result of the suit, but not the suit itself. It was the court's adjudication of the rights and remedies invoked by Bastida, but not the credits or claims which he intended to enforce. In the second place, aside from section 37 of the Code of Civil Procedure which we shall again discuss hereafter, no law has been cited, from which it may be inferred that the fees of Attorneys Casal and Barretto enjoy preference over the claims of Levy Hermanos, Inc., and the Bank of the Philippine Islands. On this point it is not amiss to state that when Bastida made the assignment to Levy Hermanos, Inc., and executed the mortgage in favor of the Bank of the Philippine Islands, there was no legal bar to prevent him from executing the deeds which he signed. Neither can he be accused of fraud or deceit because he did not then know that the judgment to be finally obtained by him would be insufficient to pay his attorney's fees. We conclude that the second assignment of error is likewise untenable.

It is insisted in the third and last assignment of error that our interpretation of section 37 of the Code of Civil Procedure is contrary to the spirit that pervades it, nullifies its provisions and opens the doors to fraud. We have again examined this legal aspect of the case and arrived at the conclusion that the ruling is in accordance with the law in this jurisdiction. There is no question that under section 37 an attorney's lien in this jurisdiction arises and exists only from the time it is caused to be entered upon the records and notice thereof served to the adverse party. Nothing else may be inferred from the language therein used which says "from and after, but not before, the time when he shall have caused a statement of his claim of such lien to be entered upon the records of the court rendering such judgment or decree, or issuing such execution, and shall have caused written notice thereof to be delivered to the adverse party." The decisions of some courts of the Union therein cited are inapplicable to and cannot be invoked in favor of the motion for reconsideration because they are based on provisions different from those of section 37 of our Code of Civil Procedure.

In the case of *Boston & Colorado Smelting Co. vs. Pless* (10 Pac.,t 652), the Supreme Court of Colorado, interpreting section 85 of the General Statutes which acknowledges an attorney's lien without subjecting it to the necessity of causing a statement thereof to be entered upon the records and notifying the adverse party thereof, held that the last requisite was necessary. The pertinent part of the decision reads:

"* * * Nor are Stuart Bros, aided by a reliance upon section 85 of the General Statutes, giving attorneys a lien for fees upon judgments obtained by them. While this lien attaches to the judgment at once upon its recovery, as between attorney and client, so that nothing more is necessary prior to the enforcement thereof against the latter by proper action, we are inclined to the opinion that, to hold the judgment debtor for the creditor's attorney's fee, the former must be notified of the attorney's intention to take advantage of the statute. If, without knowledge of this intention, either through a formal notice, or through credible information derived in some other way, the debtor make a bona fide settlement of the judgment with the creditor, by payment or otherwise the attorney cannot look to the former for his unpaid fee.

"The statutory lien is a security of the benefit of which the attorney may or may not avail himself. He is, of

course, not entitled to it unless there remain due to him unpaid fees. The judgment debtor is a stranger to the contract for fees between the judgment creditor and his attorney; hence, in our opinion, the former is entitled to notice before being charged with liability in the premises. He is not bound to presume, in the absence of information on the subject, that the attorney's fee of the latter has not been paid; nor is he, by virtue of the statute, required to take notice that the attorney will elect to claim the benefit of the lien thereby provided for. It is more reasonable to suppose that the legislature intended to leave in force the common-law rule requiring notice in such cases. Stat- ing this common-law rule, see Whart. Ag., sees. 628, 629; Weeks, Attys., sees. 379, 384.

"We are aware that there is at least one state wherein, under a statute somewhat similar to our section 85, it is held that the judgment debtor is charged without notice; but we do not feel satisfied with the reasons stated in support of this view, and have therefore declined to follow the opinions announcing it. The position taken in some decisions that where a judgment is for costs only the record is itself notice to all parties of the attorney's lien thereon for his costs need not be here considered, because, in the first place, we are dealing with a statute which does not refer to costs, and, secondly, such was not the judgment in the case at bar. There is no pretense that actual notice of the reliance by Stuart Bros, upon the statute was given the company until after the settlement; and simply placing the papers above mentioned upon the files was not constructive notice to the company of their intention in the premises."

In the State of Nebraska, section 8, c. 7, of the Comp. Stat. provides that: "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, 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. The Supreme Court of said State, interpreting the provision in question, similar to our section 37, In the case of Elliott vs. Atkins (42 N. W., 403-405), said:

***** An attorney, therefore, who desires to enforce a claim for his services must file a lien to that effect; otherwise he cannot enforce a claim against the adverse party. This claim for a lien may be filed with the papers in the case, and the adverse party will be chargeable with notice of its existence. The existence of a contract between a client and his attorney, where there is no claim for a lien, would not be notice to the adverse party that he intended to assert the claim against him, as it might be presumed that such attorney intended to rely on the responsibility of his own client. In the case at bar there is no lien claimed or filed on behalf of the plaintiffs, and nothing to apprise the defend- ants that a claim would be asserted against them. * * *

In the State of Oregon, section 1044 of Hill's Annotated Laws contains a provision relative to an attorney's lien, similar to section 37 of our Code of Civil Procedure. The Supreme Court of said State, interpreting said provision in Day vs. Larsen (47 Pac, 101, 102), said:

"By section 1044 of Hill's Annotated Laws it is provided that an attorney has a lien for his compensation to the extent the same may have been specially agreed on, 'from the giving notice thereof to the party against whom the judgment or decree is given, and filing the original with the clerk where such judgment or decree is entered and docketed. These words carry their meaning plain upon their face, and fix, as the time when the lien shall attach as against the judgment debtor, the giving of notice to him, and filing the same with the clerk. The right to ac- quire the lien is a privilege of which the attorney may avail himself, by giving and filing the notice as required by the statute; but he has no lien or claim upon the judgment, as against the judgment debtor, prior to that time. As to him, the notice creates and originates the lien, and the statute specifically fixes the time from which it shall exist. He is a stranger to the contractual relations between the attorney and his client, and no right can be acquired against him under the statute before the prescribed notice is given. If, before that time, he makes a bona fide settlement of the judgment with the creditor, it is clear that there is nothing in existence to which the lien can attach, and any subsequent notice is therefore inoperative to create any liability against him. This is in harmony with the construction of analogous statutes in other states. (Henry vs. Traynor, 42 Minn., 234; 44 N. W., 11; Elliott vs. Atkins, 26 Neb., 409; 42 N. W., 403; Pirie vs. Harkness, 52 N. W., 581; Smelting

Co. vs. Pless, 9 Colo., 112; 10 Pac, 652.)"

In the case of Pirie vs. Harkness (52 N. W., 581, 582), the Supreme Court of South Dakota, interpreting the scope of section 470 of the Comp. Laws of said State, similar to section 37 of our Code of Civil Procedure, said:

"* * * Section 470, Comp. Laws, provides that an attorney has a lien upon 'money due his client in the hands of the adverse party * * * in an action or a proceeding in which the attorney claiming" the lien was employed, from the time of giving notice in writing to such adverse party', etc. Now, both of these rights exist under the statute, but each is a dormant right until asserted. Neither judgment holder may ever ask the court for a set-off, and the attorney may never take any steps to claim or perfect his lien. Both rights are simply possible, abstract rights, until asserted, and thus made active and operative. The attorney's lien attaches and becomes an active instead of a potential right, 'from the time of giving notice in writing to the adverse party;' * * *."

The above cited decisions show that in those states where provisions similar to section 37 of the Code of Civil Procedure exist it has invariably been held that an attorney's lien exists and is demandable only from the time it is caused to be entered upon the records or notice thereof served to the adverse party, according as the law requires one of the two conditions or both.

Wherefore, the motion for reconsideration is denied.

Avancena, C.J., Villa-Real, Abad Santos, Diaz, and Laurel, JJ., concur.

[1]58 Phil., 188.

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