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differs from Section 52 in that, under the latter statute, the cause of action arises in New York and the state has a valid objective in exercising its police power in protecting the life and limb of residents. Here, objection may be raised on the ground that there is no reason for the exercise of that inherent power. Further objection may be made that the statute ". . . would involve us not only in problems of constitutional power and complications of international usage, but in a cumbrous and inconsistent and unworkable procedure which would disorganize the scheme disclosed in other statutes, and there carefully developed, for the administration of estates." [65]

Whether the New York public policy which favors arbitration agreements is strong enough to effectively eliminate state boundaries in this area will, of course, eventually have to be determined by the Supreme Court. It is not believed that a statute extending the jurisdiction of the state in this manner would be held to be constitutional. However, the arbitration law will continue to be defective if an attempt to correct it is not made; it will do no harm to try the remedy.

NOTICE OF ATTORNEY'S LIEN—ACQUISITION OF LIEN PRIOR TO COMMENCEMENT OF AN ACTION

Introduction

The common law afforded an attorney protection from the "knavery" [1] of his clients by securing payment for his services. This was accomplished by two types of lien: one, the retaining lien on all the client's papers in the attorney's possession, the other, the charging lien on the judgment recovered through the attorney's efforts.[2] These liens were first created by the courts ". . . in an effort to protect an attorney from a client, who was willing to take the benefit of his attorney's skill and labor, but who was unwilling to give anything in return." [3]

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[65] Cardozo, J., in Helme v. Buckelew, 229 N.Y. 363, 373, 128 N.E. 216, 219 (1920).

[1] Goodrich v. McDonald, 112 N.Y. 157, 163, 19 N.E. 649, 651 (1889).

[2] See Goodrich v. McDonald, *supra* note 1; Matter of Senitha, 252 App. Div. 304, 299 N.Y. Supp. 407 (3d Dep't 1937), *aff'd mem.*, 284 N.Y. 730, 31 N.E. 200 (1940); Ozorowski v. Pawloski, 207 Misc. 407, 139 N.Y.S.2d 31 (County Ct. 1955). As far back as early Roman Law, an advocate had the right to retain papers and instruments of his client until his fee was paid. See WEEKS, A TREATISE ON ATTORNEYS AND COUNSELLORS AT LAW 43 (2d ed. 1892).

[3] Matter of Sebring, 238 App. Div. 281, 286, 264 N.Y. Supp. 379, 385 (4th Dep't 1933).

Retaining Lien

The retaining lien gives an attorney who has actual charge of a case [4] the right to hold any papers,[5] securities or money of his client that have come into his possession in his professional capacity, until all the compensation that may be owed to him is paid.[6] This lien is general, which means that the lawyer may exercise it to secure payment for professional services rendered, even though such services are unrelated to any litigation, or to the particular papers or property retained.[7] While the lien is akin to a mechanic's lien,[8] it differs in that it is purely passive, *i.e.*, the attorney may not enforce it by foreclosure and sale of the articles held; [9] he must hold the subject of the lien until his fees are paid. Thus, the effectiveness of the lien is directly proportionate to the value placed upon the property by the client.[10] If the attorney withholds articles which his client may not need or want, the lien is, for all practical purposes, worthless. On the other hand, if the attorney retains something which is of great value to his client, such as a deed, the lien becomes coercive and induces payment. The effectiveness of the lien is increased by the fact that a lawyer may deny permission to the client to inspect the articles which are being held, despite the fact that such denial might impede

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[4] This is true even though he is not the attorney of record [Harding v. Conlon, 146 App. Div. 842, 131 N.Y. Supp. 903 (1st Dep't 1911)], but not if he is merely counsel. Matter of Kitzen, 25 N.Y.S.2d 738 (Sup. Ct. 1940); see Schmidt v. Massapequa Co., 240 App. Div. 1011, 268 N.Y. Supp. 543 (2d Dep't 1934).

[5] Matter of Hollins, 197 N.Y. 361, 90 N.E. 997 (1910).

[6] Matter of Heinsheimer, 214 N.Y. 361, 364, 108 N.E. 636, 637 (1915) (dictum); Matter of Hollins, *supra* note 5 at 364, 90 N.E. at 998 (dictum). Although the attorney may retain possession of papers left with him by his client, his lien is not applicable to records and papers which by the rules of the court must be filed in court, and which have been delivered to the attorney for that purpose. Matter of Bergstrom & Co., 131 App. Div. 791, 116 N.Y. Supp. 245 (1st Dep't 1909) (printed record of a case on appeal necessary in order to make an appeal effective). Furthermore, where an attorney receives possession of property for a specific purpose he must execute the directions under which he received such property irrespective of any lien he might otherwise have. Matter of Hollins, *supra* note 5 at 364, 90 N.E. at 998 (dictum).

[7] Bowling Green Sav. Bank v. Todd, 52 N.Y. 489, 491 (1873) (dictum); see Matter of H———, an Attorney, 87 N.Y. 521 (1882); Matter of Sebring, *supra* note 3.

[8] See Matter of Heinsheimer, *supra* note 6.

[9] In re Wilson, 12 Fed. 235, 238 (S.D. N.Y. 1882) (dictum); Goldman v. Rafel Estates, Inc., 269 App. Div. 647, 649, 58 N.Y.S.2d 168, 171 (1st Dep't 1945) (dictum); Matter of Sebring, 238 App. Div. 281, 286, 264 N.Y. Supp. 379, 385 (4th Dep't 1933) (dictum). If the attorney has his client's funds in his possession, he may satisfy his claim out of such funds, in certain instances, upon application to the court to determine the attorney's fees. See Matter of Welsh, 173 Misc. 22, 18 N.Y.S.2d 157 (Surr. Ct. 1939). But he may not appropriate the funds before the amount due him is fixed by the court. Bull v. Pendock Co., 239 App. Div. 590, 267 N.Y. Supp. 788 (4th Dep't 1933).

[10] See Goldman v. Rafel Estates, Inc., *supra* note 9.

the successful litigation of a pending suit.[11] Since it is wholly dependent upon possession, it follows that the lien is lost when the attorney relinquishes possession of the property.[12] However, if the subject of the lien is wrongfully obtained from him, the lien is retained, and the lawyer may replevy the property.[13]

Statutory or Charging Lien

The common law also developed an entirely distinct and independent lien called the charging or special lien.[14] Its effect is to give an attorney a guaranty of payment by binding the particular judgment in regard to which he has rendered services.[15] This type of lien has been virtually [16] superseded by statute.[17] In the language of the provisions of the New York Judiciary Law which prescribe it, the charging lien grants an attorney "who appears for a party" [18] its protection by attaching ". . . to a verdict, . . . judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may

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[11] *Ibid.* See Levine v. Levine, 206 Misc. 884, 135 N.Y.S.2d 304 (Sup. Ct. 1954). As was stated analogously in The Flush, 277 Fed. 25 (2d Cir. 1921), ". . . a blacksmith has a lien on a horse for its shoeing, and can retain possession of the horse. If he were compelled to let the owner have the use of the horse whenever he so desired, the blacksmith would simply be left with the privileges of feeding and caring for the horse." *Id.* at 31.

[12] See Goldman v. Rafel Estates, Inc., *supra* note 9; Matter of Senitha, 252 App. Div. 304, 299 N.Y. Supp. 407 (3d Dep't 1937), *aff'd mem.*, 284 N.Y. 730, 31 N.E. 200 (1940). The attorney alone can assert a retaining lien, for it is non-assignable. Sullivan v. City of New York, 68 Hun 544, 545 (N.Y. Gen. T. 1st Dep't 1893) (dictum). "The relation between a client and his attorney is one of trust and confidence, and it is a violation of that trust for an attorney in any way to divulge any of the information given to him by his client, or allow any of the papers or documents held by him as attorney to go out of his possession. . . ." *Id.* at 546.

[13] Matter of Sebring, *supra* note 9 at 288, 264 N.Y. Supp. at 388 (dictum); *cf.* Kline v. Green, 83 Hun 190, 191 (N.Y. Gen. T. 2d Dep't 1894) (dictum).

[14] See Citizen's Bank v. Oglesby, 270 App. Div. 136, 58 N.Y.S.2d 591 (2d Dep't 1945).

[15] See Robinson v. Rogers, 237 N.Y. 467, 143 N.E. 647 (1924); Matter of Senitha, *supra* note 12.

[16] An action to establish an equitable lien under general equitable principles is, at times, permitted where there would be no lien allowed under the statute, *e.g.*, in cases of trust funds recovered in an action, or a stockholder's derivative action whereby the corporation receives the award. See 1 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE 354-55 (1952).

[17] See Robinson v. Rogers, *supra* note 15; Matter of Senitha, 252 App. Div. 304, 299 N.Y. Supp. 407 (3d Dep't 1937), *aff'd mem.*, 284 N.Y. 730, 31 N.E.2d 200 (1940); Matter of Sebring, 238 App. Div. 281, 264 N.Y. Supp. 379 (4th Dep't 1933). The legislation regulating a charging lien is found in Sections 475 and 475-a of the New York Judiciary Law.

[18] This means the attorney of record. Weinstein v. Seidmann, 173 App. Div. 219, 159 N.Y. Supp. 371 (1st Dep't 1916). Its protection does not extend to an attorney who acts as counsel. Matter of Sebring, *supra* note 17. The new amendment, Section 475-a of the Judiciary Law, by its very nature, contains no such qualification.

come; and the lien cannot be affected by any settlement between the parties before or after judgment. . . ." [19] Thus the lien may be actively enforced against any recovery received by the client, whether in settlement or in payment of the judgment, for the amount due the attorney.[20]

When there is a settlement effected between the parties the lien will attach to the fund the instant it is created by the settlement, and the lawyer may follow the proceeds into the hands of his client.[21] Furthermore, if a settlement is made without notice to the attorney, and the client is financially irresponsible,[22] or goes beyond the jurisdiction of the court after obtaining the funds, the attorney may look to the defendant for payment.[23] Good faith on the part of the defendant is irrelevant,[24] since ". . . the law conclusively assumes [the defendant] . . . has retained [an amount] sufficient to pay the sum which the [attorney] . . . was entitled to receive." [25] Basing the assumption in logic, it is reasoned that because the lien attaches to the sum agreed upon in settlement the instant the agreement is made, and because the defendant has both actual and constructive notice [26] of the lien, he is liable.[27] It is prudent, therefore, for the defendant to retain a sufficient sum to provide for the lien of the plaintiff's attorney. If the amount to be retained is unknown to the defendant, he is under an obligation to ascertain it.[28] Since the Judiciary Law

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[19] N.Y. JUDICIARY LAW § 475. "The first sentence of [Section 475-a] . . . is patterned after the language of Section 475, except that [it] . . . omits the word 'judgment' appearing in the provision of Section 475 that the lien attaches to 'a verdict, report, determination, decision, judgment or final order.' The sentence also provides, as does Section 475, that the lien cannot be affected by any settlement between the parties after notice of the lien is given." But "[t]he apparently inadvertent omission of the word 'judgment' creates a surface inconsistency with Section 475, but . . . judgments would appear to be comprehended in the other terms used." N.Y.C. BAR ASSOC., LEGIS. BULL. No. 1, 13-14 (1955).

[20] An attorney for a defendant may have a statutory lien only where the answer contains a counterclaim. Ekelman v. Marano, 251 N.Y. 173, 167 N.E. 211 (1929); National Exhibition Co. v. Crane, 167 N.Y. 505, 508, 60 N.E. 768, 769 (1901) (dictum).

[21] Fischer-Hansen v. Brooklyn Heights R.R., 173 N.Y. 492, 500, 66 N.E. 395, 397 (1903) (dictum). "The lien was not affected by the adjustment, but leaped from the extinguished cause of action to the amount agreed upon in settlement." *Id.* at 502, 66 N.E. at 398.

[22] Ozorowski v. Pawloski, 207 Misc. 407, 139 N.Y.S.2d 31 (County Ct. 1955).

[23] Fischer-Hansen v. Brooklyn Heights R.R., *supra* note 21.

[24] *Ibid.*

[25] Sargent v. McLeod, 209 N.Y. 360, 365, 103 N.E. 164, 166 (1913).

[26] "This is a statutory lien of which all the world must take notice, and any one settling with a plaintiff without the knowledge of his attorney, does so at his own risk." Peri v. New York Cent. R.R., 152 N.Y. 521, 527, 46 N.E. 849, 850 (1897).

[27] See Fischer-Hansen v. Brooklyn Heights R.R., 173 N.Y. 492, 66 N.E. 395 (1903); Morgan v. Drewry, 285 App. Div. 1, 135 N.Y.S.2d 171 (1st Dep't 1954).

[28] Fischer-Hansen v. Brooklyn Heights R.R., *supra* note 27 at 501, 66 N.E.

provides that the charging lien attaches to the proceeds of a determination "in whatever hands they may come," the attorney may also follow the recovery into the hands of third parties.[29]

Unlike the retaining lien which may be used to collect a general balance due,[30] the statutory charging lien may be enforced only for services and "disbursements" in the particular action or proceeding in which the recovery is made.[31] However, the charging lien is not confined to an attachment of the recovery from the particular proceeding for which the attorney is retained, but attaches to the client's cause of action and to any recovery thereon, even though it was obtained in a different proceeding.[32]

Inasmuch as the lien is satisfied out of the judgment, it is apparent that the lien will not attach if the judgment awarded is not, of itself, the proper subject of a lien. Thus, where an injunction is granted, there are no proceeds or funds to which an attorney's lien might attach and, therefore, the protection conferred by the Judiciary Law is denied.[33] On the other hand, any property right which the judgment may protect, secure, or enforce, is properly denominated the proceeds of a judgment and is, therefore, subject to attachment.[34] Thus, where the ownership of property is in issue and it is adjudged to belong to the attorney's client, the attorney may impress a lien on that particular property.[35] This rule is limited, however, and the lien will not attach if the judgment recovered for the client is for his exclusive benefit and ". . . is of such a nature that permitting a lien to attach to it would be inimical to the purpose for which it was awarded." [36] This rule would apply, for example, to alimony for the support of the client.[37]

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at 398 (dictum); Ozorowski v. Pawloski, 207 Misc. 407, 409, 139 N.Y.S.2d 31, 33 (County Ct. 1955) (dictum).

[29] Peri v. New York Cent. R.R., *supra* note 26 at 528, 46 N.E. at 850 (1897) (dictum).

[30] See note 6 *supra*.

[31] Matter of Heinsheimer, 214 N.Y. 361, 108 N.E. 636 (1915); Irish Free State v. Guaranty Safe Deposit Co., 148 Misc. 256, 266 N.Y. Supp. 8 (Sup. Ct. 1933), *aff'd mem.*, 242 App. Div. 612 (1st Dep't 1934).

[32] Morgan v. Drewry, 285 App. Div. 1, 135 N.Y.S.2d 171 (1st Dep't 1954); Matter of Lourie, 254 App. Div. 555, 3 N.Y.S.2d 191 (1st Dep't 1938).

[33] Kovarsky v. Brooklyn Union Gas Co., 170 Misc. 855, 11 N.Y.S.2d 286 (Sup. Ct. 1939), *aff'd mem.*, 261 App. Div. 822, 25 N.Y.S.2d 784 (2d Dep't 1941); Irish Free State v. Guaranty Safe Deposit Co., *supra* note 31 at 258, 266 N.Y. Supp. at 10.

[34] See 1 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE 364 (1952).

[35] See West v. Bacon, 13 App. Div. 371, 43 N.Y. Supp. 206 (1st Dep't 1897), *modified*, 164 N.Y. 425, 58 N.E. 522 (1900). However, in the case where an attorney successfully defends an action to divest his client of title to property, the attorney has no charging lien on the property where his client's answer did not contain a counterclaim. Ekelman v. Marano, 251 N.Y. 173, 167 N.E. 211 (1929). See note 20 *supra*.

[36] 1 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE 367 (1952). See Branth v. Branth, 57 Hun 592, 10 N.Y. Supp. 638 (Gen. T. 1st Dep't 1890).

[37] Branth v. Branth, *supra* note 36; see Levine v. Levine, 206 Misc. 884, 135

Lien Upon Substitution or Discharge

An attorney may be discharged or withdraw at any stage of a proceeding, even if under a definite contract.[38] The client is at liberty to terminate the lawyer-client relationship with or without cause.[39] However, he cannot defeat the lawyer's right to be compensated for services already rendered.[40] The client will be obligated to the attorney for the reasonable value of the services up to the time of discharge.[41] Where the services were rendered in connection with a recovery which the client ultimately obtained, the court will protect the attorney by impressing a lien for that amount upon the fund so recovered.[42]

The question arises, under what circumstances will an attorney be denied his retaining lien or his charging lien? If he is discharged without cause,[43] or voluntarily withdraws from a case with just cause,[44] both his charging and his retaining liens remain. Aside from fault, there may be other occasions when the court will deprive a lawyer of his retaining lien. If the action has reached the trial stage and the client wishes to substitute attorneys, he must make an application to the court to obtain a new attorney of record.[45] The court in granting the order to substitute attorneys may, where the interests of justice necessitate it,[46] compel an attorney to give up papers upon

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N.Y.S.2d 304 (Sup. Ct. 1954). "The purpose of alimony is support. Equity, which creates the fund, will not suffer its purpose to be nullified. . . . In such circumstances, equity, confining the fund to the purposes of its creation, declines to charge it with liens which would absorb and consume it. . . ." Turner v. Woolworth, 221 N.Y. 425, 429-30, 117 N.E. 814, 816 (1917).

[38] See Matter of Dunn, 205 N.Y. 398, 98 N.E. 914 (1912).

[39] Matter of Lydig, 262 N.Y. 408, 187 N.E. 298 (1933) (per curiam); see Robinson v. Rogers, 237 N.Y. 467, 143 N.E. 647 (1924); WHITNEY, CONTRACTS 284 (5th ed. 1953).

[40] Robinson v. Rogers, *supra* note 39; Matter of Board of Water Supply, 179 App. Div. 877, 167 N.Y. Supp. 531 (3d Dep't 1917). See Matter of Senitha, 252 App. Div. 304, 299 N.Y. Supp. 407 (3d Dep't 1937), *aff'd mem.*, 284 N.Y. 730, 31 N.E.2d 200 (1940).

[41] Matter of Senitha, *supra* note 40; Levine v. Levine, *supra* note 37. If the attorney fully performs his contract prior to discharge, he may stand upon that and recover the contracted value of his services. McAvoy v. Schramme, 238 App. Div. 225, 264 N.Y. Supp. 181 (1st Dep't), *aff'd mem.*, 263 N.Y. 548, 189 N.E. 691 (1933).

[42] Matter of Board of Water Supply, *supra* note 40.

[43] Robinson v. Rogers, *supra* note 39; Matarrese v. Wilson, 202 Misc. 994, 118 N.Y.S.2d 5 (Sup. Ct. 1952).

[44] See Goldman v. Rafel Estates, Inc., 269 App. Div. 647, 58 N.Y.S.2d 168 (1st Dep't 1945); Dunn v. New York, 269 App. Div. 1002, 58 N.Y.S.2d 534 (3d Dep't 1945).

[45] See PRASHKER, NEW YORK PRACTICE 208 (3d ed. 1954).

[46] See Hauptmann v. Fawcett, 243 App. Div. 613, 276 N.Y. Supp. 523, *modified mem.*, 243 App. Div. 616, 277 N.Y. Supp. 631 (2d Dep't 1935); Doubleday & Co. v. Garden Spot Apartments, Inc., 68 N.Y.S.2d 716 (Sup. Ct. 1947) (both were cases in which the client had immediate need for papers).

which he claims a retaining lien, if the client furnishes security.[47] This right is founded upon the power which the courts have over attorneys as officers of the court to compel them to act equitably and in a fair manner with their clients, and is not an attempt to destroy the lien upon the giving of security.[48]

New Legislation

Since the benefits afforded by Section 475 of the Judiciary Law arise only after the institution of suit,[49] an attorney who felt that his client might retain another attorney served a summons as soon as possible in order to establish his lien.[50] Thus, many suits which were eventually settled before trial were instituted merely to satisfy the provisions of Section 475.[51] In referring to the large number of personal injury claims which were first brought to the attention of casualty insurance companies by the service of a summons and complaint, the Temporary Commission on the Courts reported that, "[c]onvincing evidence has been furnished that a substantial number of these claims could have been adjusted without suit if the claimant's attorney and the insurance company representative had carried on negotiations." [52] The necessity for attorneys to comply with the provisions of Section 475, in order to establish their lien, was advanced as one of the principal causes of such needless suits.[53]

It is obvious that the above practice burdened an already congested court calendar in New York. Accordingly, Section 475 was supplemented by the addition of Section 475-a of the Judiciary Law.[54]

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[47] Doubleday & Co. v. Garden Spot Apartments, Inc., *supra* note 46; Robinson v. Rogers, 237 N.Y. 467, 474, 143 N.E. 647, 649 (1924) (dictum).

[48] Robinson v. Rogers, *supra* note 47 at 472, 143 N.E. at 649 (dictum); see Matter of Makames, 238 App. Div. 534, 265 N.Y. Supp. 515 (4th Dep't 1933).

[49] N.Y. JUDICIARY LAW § 475.

[50] See REPORT OF TEMPORARY COMM'N ON THE COURTS, LEG. DOC. No. 45 at 29 (1955).

[51] See Prashker, *1955 Civil Practice Changes*, 27 N.Y. STATE BAR BULL. 159, 164 (1955).

[52] See note 50 *supra* at 28.

[53] *Id.* at 29.

[54] "If prior to the commencement of an action, special or other proceeding, an attorney serves a notice of lien upon the person or persons against whom his client has or may have a claim or cause of action, the attorney has a lien upon the claim or cause of action from the time such notice is given, which attaches to a verdict, report, determination, decision or final order in his client's favor of any court or of any state, municipal or federal department, except a department of labor, and to any money or property which may be recovered on account of such claim or cause of action in whatever hands they may come; and the lien cannot be affected by any settlement between the parties after such notice of lien is given. The notice shall, (1) be served by either personal service or registered mail; (2) be in writing; (3) state that the relationship of attorney and client has been established, the nature of the claim or cause of action, and that the attorney claims a lien on such claim or cause of action;

The new section, while granting a timelier lien, has the same effect and is enforceable in the same manner as a lien obtained under Section 475.[55] Now, a lien may be acquired prior to the commencement of an "action, special or other proceeding," if the attorney serves a notice of lien upon the person or persons against whom his client may have a claim or cause of action. The lien attaches at the time such notice is given. However, it is to be cautioned that the new section requires that the notice be in writing, state that the relationship of attorney and client has been established, and be served either personally or by registered mail. In addition, the notice must be signed by *both* the attorney and the client, or by a person in his behalf whose relationship is shown, which signature shall also be witnessed by a disinterested person whose address is given.

The advantages of this section are obvious. By safeguarding the interests of the attorney at an earlier stage of the dispute, it enables claims to be disposed of prior to the institution of suit. In the words of its proponents, it is designed ". . . to encourage attorneys to enter into discussions of claims with the prospective defendant, his attorney or insurance carrier before rather than after the commencement of suit, thus facilitating adjustments at an early stage and easing calendar congestion by forestalling the initiation of litigation." [56]

Conclusion

The extent of the practice of instituting suit merely to establish a lien is, of necessity, conjectural. Enactment of the new section, however, is a laudable step toward relief from the calendar congestion in New York State. This statute is not novel, similar statutes having been enacted in Illinois [57] in 1909, and in Rhode Island [58] in 1923. The beneficial results which have been achieved under these statutes indicate that Section 475-a should effectively remedy the situation which prompted its enactment.

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(4) be signed by the client, or by a person on his behalf whose relationship is shown, and which signature shall also be witnessed by a disinterested person whose address shall also be given; and (5) be signed by the attorney. A lien obtained under this section shall otherwise have the same effect and be enforced in the same manner as a lien obtained under section four hundred seventy-five of this chapter. Added L.1955, c. 551, eff. April 21, 1955." N.Y. JUDICIARY LAW § 475-a.

[55] See note 54 *supra*.

[56] N.Y.C. BAR ASSOC., LEGIS. BULL. No. 1, 14 (1955).

[57] ILL. REV. STAT. c. 13, § 14 (1951).

[58] R.I. GEN. LAWS c. 450, § 1 (1938).