

St. John's Law Review

Volume 10
Number 2 *Volume 10, April 1936, Number 2*

Article 9

May 2014

Attorneys' Liens

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ATTORNEYS' LIENS.

A client has the right (1) to terminate his relationship with his attorney at any time and for any reason,¹ (2) to change attorneys while an action is in progress,² (3) to discontinue³ or (4) to settle in good faith⁴ the litigation at any stage⁵ without the knowledge or consent⁶ of the attorney. The client's control over the cause of action remains inviolate, although there has been a contract of retainer⁷ and although the action has been successful in the trial court and is now on appeal.⁸

If the attorney agrees to accept a percentage of the proceeds of the recovery as his fee,⁹ or if he contracts to perform certain

¹ *Matter of Dunn*, 205 N. Y. 398, 98 N. E. 914 (1912); *Martin v. Camp*, 219 N. Y. 170, 114 N. E. 46 (1916) (The unique relationship necessitates such a rule.); *Matter of Krooks*, 257 N. Y. 329, 178 N. E. 548 (1931); *Johnson v. Ravitch*, 113 App. Div. 810, 99 N. Y. Supp. 1059 (2d Dept. 1906); *In re Montgomery's Estate*, — App. Div. —, 284 N. Y. Supp. 5 (4th Dept. 1935) (Such a right is implicit in the contract.); *In re Driscoll*, 131 Misc. 613, 228 N. Y. Supp. 335 (Sup. Ct. 1928); *Lewy et al. v. Union Ry. et al.*, 151 Misc. 724, 272 N. Y. Supp. 123 (Sup. Ct. 1934); *Bloom v. Irving Trust Co.*, 152 Misc. 50, 272 N. Y. Supp. 637 (Sup. Ct. 1934); see *Tenney v. Berger*, 93 N. Y. 524, 529 (1883).

² *In re Paschal*, 77 U. S. 483 (1870); *United States v. McMurtry*, 24 F. (2d) 145 (S. D. N. Y.) (An order of the court is requisite.); *Robinson v. Rogers*, 237 N. Y. 467, 143 N. E. 647 (1924) (The court may order substitution on such terms as may be just.); *Johnson v. Ravitch*, 113 App. Div. 810, 99 N. Y. Supp. 1059 (2d Dept. 1906); see R. 56, N. Y. RULES OF CIVIL PRACTICE.

³ *Lee v. Vacuum Oil Co.*, 126 N. Y. 579, 27 N. E. 1018 (1891); *Andrewes v. Haas*, 214 N. Y. 255, 108 N. E. 423 (1915); *Matter of City of New York*, 219 N. Y. 192, 114 N. E. 49 (1916).

⁴ *Fischer-Hansen v. Brooklyn Heights R. R.*, 173 N. Y. 492, 66 N. E. 395 (1903); *Matter of Regan*, 167 N. Y. 338, 60 N. E. 658 (1901) (Satisfaction set aside for collusion.); *Matter of Levy*, 249 N. Y. 168, 163 N. E. 244 (1928); see *Peri v. New York Central & Hudson River R. R.*, 152 N. Y. 521, 527, 46 N. E. 849, 850 (1897).

⁵ *Matter of Levy*, 249 N. Y. 168, 163 N. E. 244 (1928).

⁶ *Lee v. Vacuum Oil Co.*, 126 N. Y. 579, 27 N. E. 1018 (1891); *Bailey v. Murphy*, 136 N. Y. 50, 32 N. E. 627 (1892); *In re Snyder*, 190 N. Y. 66, 82 N. E. 742 (1907); *Matter of Levy*, 249 N. Y. 168, 163 N. E. 244 (1928). *Poole v. Belcha*, 131 N. Y. 200, 30 N. E. 53 (1892) *semble*.

⁷ *Martin v. Camp*, 219 N. Y. 170, 114 N. E. 46 (1916); *Matter of Levy*, 249 N. Y. 168, 163 N. E. 244 (1928); *Matter of Krooks*, 257 N. Y. 329, 178 N. E. 548 (1931); *Matter of Weitling*, 266 N. Y. 184, 194 N. E. 401 (1934); *Johnson v. Ravitch*, 113 App. Div. 810, 99 N. Y. Supp. 1059 (2d Dept. 1906); *Corcoran v. Kellogg Structural Co.*, 179 App. Div. 396, 166 N. Y. Supp. 269 (4th Dept. 1917).

⁸ *Matter of Levy*, 249 N. Y. 168, 163 N. E. 244 (1928); *Corcoran v. Kellogg Structural Co.*, 179 App. Div. 396, 166 N. Y. Supp. 269 (4th Dept. 1917).

⁹ *Matter of Krooks*, 257 N. Y. 329, 178 N. E. 548 (1931); *Matter of Tillman*, 259 N. Y. 133, 181 N. E. 75 (1932), *motion for reargument denied*, 259 N. Y. 526, 182 N. E. 165 (1932); *Matter of Weitling*, 266 N. Y. 184, 194 N. E. 401 (1934); *In re Driscoll*, 131 Misc. 613, 228 N. Y. Supp. 335 (Sup. Ct. 1928); *Bloom v. Irving Trust Co.*, 152 Misc. 50, 272 N. Y. Supp. 637 (Sup. Ct. 1934).

specified services for a fixed retainer,¹⁰ and he is discharged by his client through no fault of his own, he may recover from his client only on the basis of *quantum meruit*.¹¹ An action for breach of contract only arises from a contract of employment for a definite period.¹²

The clause in the contract of retainer which prohibits the client from settling the litigation without the consent of the attorney is void as being against public policy,¹³ and a statute which forbids settlement without the consent of the attorney is unconstitutional.¹⁴ The contract, however, may provide for a higher fee in case of settlement if that fee does not operate as a penalty or is not unconscionable.¹⁵

¹⁰ *In re Montgomery's Estate*, — App. Div. —, 284 N. Y. Supp. 5 (4th Dept. 1935).

¹¹ *Matter of Knapp*, 85 N. Y. 285 (1881) (The question is determined by the court in Special Term.); *Starin v. Mayor*, 106 N. Y. 82, 12 N. E. 762 (1887); *Ward v. Craig*, 87 N. Y. 550 (1882); *Martin v. Camp*, 219 N. Y. 170, 114 N. E. 46 (1916); *Matter of City of New York*, 219 N. Y. 192, 114 N. E. 49 (1916) (In the absence of any claim for the reasonable value of the services, the lien is cancelled.); *In re Driscoll*, 131 Misc. 613, 228 N. Y. Supp. 335 (Sup. Ct. 1928) (The referee must find, independently of the contract, what the reasonable value of the services are.); *Bloom v. Irving Trust Co.*, 152 Misc. 50, 272 N. Y. Supp. 637 (Sup. Ct. 1934); see *Matter of Weitling*, 266 N. Y. 184, 186, 194 N. E. 401, 402 (1934).

No action for damages or for the amount of a fixed retainer lies unless all the services are completed and the attorney shows proper performance. *Tenney v. Berger*, 93 N. Y. 524 (1883) (The contract is entire.); *Matter of Krooks*, 257 N. Y. 329, 178 N. E. 548 (1931) (Final award in condemnation proceedings not yet made. *Held*, services not complete, therefore, recovery on a *quantum meruit* basis only.); *Matter of Tillman*, 259 N. Y. 133, 181 N. E. 75 (1932), cited note 9, *supra* (The contract cannot be partially abrogated.); *Murray v. Waring Hat Manufacturing Co.*, 142 App. Div. 514, 127 N. Y. Supp. 78 (2d Dept. 1911); *In re Driscoll*, 131 Misc. 613, 228 N. Y. Supp. 335 (Sup. Ct. 1928) (The incurring of expense prior to notification of discharge would not keep alive nor give the attorney a cause of action for breach of contract.); *Bloom v. Irving Trust Co.*, 152 Misc. 50, 272 N. Y. Supp. 637 (Sup. Ct. 1934); see N. Y. Laws 1909, c. 35, JUDICIARY LAW § 474.

¹² *Greenberg v. Remick & Co.*, 230 N. Y. 70, 129 N. E. 211 (1920).

¹³ *In re Snyder*, 190 N. Y. 66, 82 N. E. 742 (1907); (1929) 6 N. Y. U. L. Q. Rev. 201.

¹⁴ N. Y. Laws 1913, c. 603, JUDICIARY LAW § 480: "If, in an action commenced to recover damages for a personal injury, or for death as a result of a personal injury, an attorney having or claiming to have a lien for services performed or to be performed who shall have appeared for the person or persons having or claiming to have a right of action for such injury or death, no settlement or adjustment of such action shall be valid, unless consented to in writing by such attorney and by the person or persons for whom he shall have appeared, or approved by an order of the court in which such action is brought." *Strahlendorf v. Long Island R. R.*, 162 App. Div. 358, 147 N. Y. Supp. 806 (2d Dept. 1914) (*Held*, unconstitutional, in that it restricts the client in the exercise of his vested property rights and his constitutional freedom of contract.).

¹⁵ *Ward v. Orsini*, 243 N. Y. 123, 152 N. E. 196 (1926).

The courts, in order to prevent the client from cheating the attorney,¹⁶ as well as to protect the attorney in case of the client's insolvency,¹⁷ created the attorney's liens and justified them¹⁸ on the same theory that supports the artisan's liens.

The Retaining Lien.

The retaining lien, also called a general¹⁹ or possessory lien²⁰ exists by virtue of the common law,²¹ and extends to the general balance of the account for professional services rendered²² and disbursements.²³ The client's money,²⁴ securities,²⁵ papers²⁶ and property²⁷ which come into the possession of the attorney in the course of his professional employment²⁸ are subject to the lien.²⁹ It would

¹⁶ *Goodrich v. McDonald*, 112 N. Y. 157, 19 N. E. 649 (1889); *Robinson v. Rogers*, 237 N. Y. 467, 143 N. E. 647 (1924); see *Matter of Levy*, 249 N. Y. 168, 170, 163 N. E. 244 (1928); *Matter of Krooks*, 257 N. Y. 329, 332, 178 N. E. 548, 549 (1931).

¹⁷ *Matter of Knapp*, 85 N. Y. 285 (1881); see *Peri v. New York Central & Hudson River R. R.*, 152 N. Y. 521, 528, 46 N. E. 849, 850 (1897); (1929) 6 N. Y. U. L. Q. REV. 201.

¹⁸ *Coughlin v. New York Central & Hudson River R. R.*, 71 N. Y. 443 (1877); *Matter of Knapp*, 85 N. Y. 285 (1881); see *Rooney v. Second Avenue R. R.*, 18 N. Y. 368, 370 (1858); *Matter of Heinsheimer*, 214 N. Y. 361, 366, 108 N. E. 636, 638 (1915).

¹⁹ *Matter of Heinsheimer*, 214 N. Y. 361, 108 N. E. 636 (1915); *Robinson v. Rogers*, 237 N. Y. 467, 143 N. E. 647 (1924); *Leask v. Hoagland*, 64 Misc. 156, 118 N. Y. Supp. 1035 (Sup. Ct. 1909, *aff'd memo.*, 136 App. Div. 658, 121 N. Y. Supp. 197 (1st Dept. 1910); see *In re Pyrocolor Corp.*, 46 F. (2d) 554, 556 (S. D. N. Y. 1930).

²⁰ *Matter of Knapp*, 85 N. Y. 285 (1881); *Matter of Sebring*, 238 App. Div. 281, 264 N. Y. Supp. 379 (4th Dept. 1933); *Leask v. Hoagland*, 64 Misc. 156, 118 N. Y. Supp. 1035 (Sup. Ct. 1909), *aff'd memo.*, 136 App. Div. 658, 121 N. Y. Supp. 197 (1st Dept. 1910).

²¹ *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489 (1873); *Ward v. Craig*, 87 N. Y. 550 (1882). For an interesting history of the retaining lien, see *Matter of Knapp*, 85 N. Y. 285 (1881) ("It comes to us *super antiquas vias.*").

²² *Matter of H—*, an Attorney, 87 N. Y. 521 (1882) (Lien not confined merely to a litigation which terminates in a technical judgment.); *Ward v. Craig*, 87 N. Y. 550 (1882); *Matter of Heinsheimer*, 214 N. Y. 361, 108 N. E. 636 (1915); *Ideal Title Corp. v. N. T. Investing Corp.*, 111 N. J. Eq. 241, 162 Atl. 111 (1932).

²³ *In re Paschal*, 77 U. S. 483 (1870); *Matter of Knapp*, 85 N. Y. 285 (1881).

²⁴ *In re Paschal*, 77 U. S. 483 (1870); *Matter of Knapp*, 85 N. Y. 285 (1881); *In re Babcock*, 230 App. Div. 323, 243 N. Y. Supp. 489 (4th Dept. 1930) (Attorney cannot appropriate the money to his own use.).

²⁵ *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489 (1873).

²⁶ *Matter of Knapp*, 85 N. Y. 285 (1881); *Robinson v. Rogers*, 237 N. Y. 467, 143 N. E. 647 (1924).

²⁷ *In re Pyrocolor*, 46 F. (2d) 554 (S. D. N. Y. 1930).

²⁸ *Matter of Knapp*, 85 N. Y. 285 (1881); see *Underhill v. Doll & Sons*, 69 F. (2d) 519, 520 (C. C. A. 2d, 1934) (Does not apply to property which comes into attorney's hands by accident, mistake, or unauthorized act of an agent.).

²⁹ *The Flush*, 277 Fed. 25 (C. C. A. 2d, 1921); *In re Pyrocolor*, 46 F. (2d)

seem that since this lien is dependent upon possession,³⁰ the attorney should not be called upon, in the absence of misconduct,³¹ to surrender any of his client's property until he has been paid for services rendered.³²

English courts of chancery first held that where the client had a *pressing necessity* for his papers, the attorney would be required to deliver them if security were deposited.³³ It was later ruled that such a necessity notwithstanding, the court was powerless where no payment was made.³⁴ They finally oscillated back to the original doctrine.³⁵ The New York courts seem to have followed the test of pressing necessity as a condition precedent to compelling an attorney to surrender the client's property.³⁶ Thus, where a man was being tried on an indictment for first-degree murder *in another state*, the court ordered the attorney to deliver the papers and no deposit by the client was required.³⁷ In other cases the court will order that the attorney be paid the reasonable value of his services before he

554 (S. D. N. Y. 1930); *Robinson v. Rogers*, 237 N. Y. 467, 143 N. E. 647 (1924); *Matter of H—*, an Attorney, 87 N. Y. 521 (1882) (Lien not affected by the fact that the client is an executor.); *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489 (1873) (The member of a firm of attorneys has no lien for an individual demand upon such papers received by his firm.).

³⁰ *Robinson v. Rogers*, 237 N. Y. 467, 143 N. E. 647 (1924); *Matter of Mekames*, 238 App. Div. 534, 265 N. Y. Supp. 518 (4th Dept. 1933); *In re Cutting's Estate*, 56 Hun 649, 169 N. Y. Supp. 205 (Surr. Ct. 1918); see *In re Pyrocolor*, 46 F. (2d) 554, 556 (S. D. N. Y. 1930); *Matter of Heinsheimer*, 214 N. Y. 361, 364, 108 N. E. 636, 637 (1915); *Matter of Sebring*, 238 App. Div. 281, 284, 264 N. Y. Supp. 379, 383 (4th Dept. 1933).

³¹ *In re Paschal*, 77 U. S. 483 (1870); *Matter of H—*, an Attorney, 87 N. Y. 521 (1882); *Matter of Weitling*, 266 N. Y. 184, 194 N. E. 401 (1934) (All: The court may not determine from the affidavits alone what is unprofessional conduct.); see *In re Badger*, 9 F. (2d) 560, 562 (C. C. A. 2d, 1925) (Where there is justifiable cause for discharge, no recovery even on a *quantum meruit* basis.).

³² *Robinson v. Rogers*, 237 N. Y. 467, 143 N. E. 647 (1924); *Matter of Weitling*, 266 N. Y. 184, 194 N. E. 401 (1934); *Phillips v. Hodgson*, 227 App. Div. 754, 237 N. Y. Supp. 32 (2d Dept. 1929).

A motion to compel an attorney to turn over papers to a substituted attorney must be made in a court of original jurisdiction. *People ex rel. Hoffman v. Board of Education*, 141 N. Y. 86, 35 N. E. 1087 (1894); *Matter of Hollins*, 197 N. Y. 361, 90 N. E. 997 (1910); *Matter of Lydig*, 262 N. Y. 408, 187 N. E. 298 (1933).

³³ *Clutton v. Pardon, Turner & Russell* 301 (Ch. 1823).

³⁴ *Richards v. Platel, Craig & Phillips* 79 (Ch. 1841).

³⁵ *Matter of Jewitt*, 34 Beav. 22 (Ch. 1864); *Matter of Galland*, 31 Ch. 296 (1885).

³⁶ *Robinson v. Rogers*, 237 N. Y. 467, 143 N. E. 647 (1924) (Under such circumstances insistence upon a lien is not in accordance with the standard of conduct which a court may properly require of its officers.); see *In re Badger*, 9 F. (2d) 560, 561 (C. C. A. 2d, 1925).

³⁷ *Hauptman v. Fawcett*, 243 App. Div. 613; 276 N. Y. Supp. 523 (2d Dept. 1935). However, the court held that even in this instance the attorney shall not be deemed to have waived his lien, and decreed that the papers be returned to the attorney after the completion of the trial. 243 App. Div. 616, 277 N. Y. Supp. 631 (2d Dept. 1935).

will be required to surrender the property,³⁸ or before the client will be permitted to see the papers.³⁹ If the only purpose of the client is to produce the papers on a trial in this state, the client has available a *subpoena duces tecum*, and a surrender is not necessary.⁴⁰

There are *dicta* to the effect that when property is given to the attorney for a specific purpose, no lien attaches.⁴¹ These *dicta* are based upon the case of *West v. Bacon*,⁴² which held that where an attorney makes a formal and explicit declaration of trust in favor of his client at the time he receives the property, he expressly waives any lien he may have had on that property. It is submitted that the rule of *West v. Bacon* should be limited to a case of waiver. The lien may, of course, be waived by a voluntary surrender of the property,⁴³ or by agreement,⁴⁴ as is true in the case of the artisan's lien.⁴⁵ Where the attorney acts wrongfully, he forfeits the lien.⁴⁶ If the papers are stolen or are obtained from the attorney by fraud, the proper action is not to impress a lien, but is a replevin action.⁴⁷

There is no lien for prospective salary,⁴⁸ and the mere contract of retainer gives the attorney no lien for services unperformed.⁴⁹ If the attorney proves that his services are worth the amount retained by him, the client cannot recover that amount.⁵⁰

³⁸ *Matter of H—*, an Attorney, 87 N. Y. 521 (1882); *Robinson v. Rogers*, 237 N. Y. 467, 143 N. E. 647 (1924); *Matter of Hollins*, 197 N. Y. 361, 90 N. E. 997 (1910); *Matter of Weitling*, 266 N. Y. 184, 194 N. E. 401 (1934); *Hausvater v. Wikler & Diamont, Inc.*, *et al.*, 154 Misc. 555, 277 N. Y. Supp. 810 (City Ct. 1935).

³⁹ *The Flush*, 277 Fed. 25 (C. C. A. 2d, 1921).

⁴⁰ *Matter of Mekames*, 238 App. Div. 534, 265 N. Y. Supp. 518 (4th Dept. 1933).

⁴¹ See *Matter of Hollins*, 197 N. Y. 361, 364, 90 N. E. 997, 998 (1910). *Matter of Heinsheimer*, 214 N. Y. 361, 108 N. E. 636 (1915) *semble*.

⁴² 164 N. Y. 425, 58 N. E. 522 (1900).

⁴³ *McCarthy v. McCarthy*, 117 N. J. Eq. 22, 171 Atl. 751 (1934); see *Matter of Heinsheimer*, 214 N. Y. 361, 366, 108 N. E. 636, 638 (1915).

⁴⁴ *Progressive Merchants Co., Inc. v. Elkat Realty Co., Inc.*, *et al.*, 136 Misc. 682, 244 N. Y. Supp. 17 (Sup. Ct. 1930).

⁴⁵ *Wiles Laundering Co. v. Hahlo*, 105 N. Y. 234, 11 N. E. 500 (1887).

⁴⁶ *Matter of Dunn*, 205 N. Y. 398, 98 N. E. 914 (1912) (Refusal to continue the litigation without just cause is misconduct.); *Eisenberg v. Brand*, 144 Misc. 878, 259 N. Y. Supp. 57 (Sup. Ct. 1932) (Attorney's conduct in demanding that client procure new counsel and in withdrawing from the case himself is to work a forfeiture of the lien.); *In re Burroughs & Brown*, 239 App. Div. 794, 263 N. Y. Supp. 772 (2d Dept. 1933) (Attorney does not lose his lien if the client consents to the substitution of attorneys.).

⁴⁷ *Matter of Sebring*, 238 App. Div. 281, 264 N. Y. Supp. 379 (4th Dept. 1933).

⁴⁸ See *Matter of Heinsheimer*, 214 N. Y. 361, 368, 108 N. E. 636, 638 (1915) (The facts of the case must be looked at to see whether the attorney has taken security incompatible with the existence of his lien, or has made with his client an arrangement which sufficiently indicates the intention of the parties that the right shall no longer exist.).

⁴⁹ *Johnson v. Ravitch*, 113 App. Div. 810, 99 N. Y. Supp. 1059 (2d Dept. 1906).

⁵⁰ *Ward v. Craig*, 87 N. Y. 550 (1882).

The retaining lien is generally unassignable because of the confidential nature of the property retained.⁵¹

The Charging Lien.

The charging lien,⁵² also denominated a particular lien,⁵³ is a creature of both common law⁵⁴ and statute.⁵⁵ It arises from the services rendered in a particular action or proceeding,⁵⁶ and is confined to the services rendered and to the disbursements in that very action or proceeding.⁵⁷ This lien was created to "save the attorney's rights where he had been unable to get possession."⁵⁸

At common law the charging lien arose only after judgment,⁵⁹ but it now arises at the commencement of the action or special proceeding.⁶⁰ A summons must therefore be served before the lien attaches.⁶¹ When service is made, it is notice to the defendant that

⁵¹ *Leask v. Hoagland*, 64 Misc. 156, 118 N. Y. Supp. 1035 (Sup. Ct. 1909); *Sullivan v. Mayor*, 68 Hun 544, 22 N. Y. Supp. 1041 (Sup. Ct. 1893); see *In re Pyrocolor*, 46 F. (2d) 554, 556 (S. D. N. Y. 1930); Note (1935) ORE. L. Rev. 536.

⁵² For a history of the development of this lien, see *Fischer-Hansen v. Brooklyn Heights R. R.*, 173 N. Y. 492, 66 N. E. 395 (1903).

⁵³ *In re Pyrocolor Corp.*, 46 F. (2d) 554 (S. D. N. Y. 1930); *Matter of Sebring*, 238 App. Div. 281, 264 N. Y. Supp. 379 (4th Dept. 1933).

⁵⁴ *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489 (1873); *Ward v. Craig*, 87 N. Y. 550 (1882).

⁵⁵ N. Y. Laws 1909, c. 35, JUDICIARY LAW § 475: "*Attorney's lien in action or special proceeding.* From the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever [*sic*] hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment or final order. The court upon the petition of the client, or attorney, may determine and enforce the lien." See *Fischer-Hansen v. Brooklyn Heights R. R.*, 173 N. Y. 492, 502, 66 N. E. 395, 398 (1903) (The statute has the effect of enlarging the rights of the attorney in respect to this lien, and therefore the statutory definition supersedes the common law); *Matter of Heinsheimer*, 214 N. Y. 361, 365, 108 N. E. 636, 637 (1915); *In re Podell*, 138 Misc. 428, 429, 245 N. Y. Supp. 27, 28 (Sup. Ct. 1930) (Courts are generous rather than narrow in construing the statute because the purpose is to protect the attorney from the scheming client).

⁵⁶ *Robinson v. Rogers*, 237 N. Y. 467, 143 N. Y. 647 (1924).

⁵⁷ *Williams v. Ingersoll*, 89 N. Y. 508 (1882); *In re Pyrocolor Corp.*, 46 F. (2d) 554 (S. D. N. Y. 1930); *Matter of Heinsheimer*, 214 N. Y. 361, 108 N. E. 636 (1915) (Charging lien cannot be sustained for services rendered under a general retainer.); *Anderson v. United States Fidelity & Guarantee Co.*, 238 App. Div. 48, 263 N. Y. Supp. 338 (1st Dept. 1933); *In re Dutcher*, 238 App. Div. 793, 268 N. Y. Supp. 149 (4th Dept. 1934).

⁵⁸ *Matter of Heinsheimer*, 214 N. Y. 361, 108 N. E. 636 (1915); *Robinson v. Rogers*, 237 N. Y. 467, 143 N. E. 647 (1924); *Bloom v. Irving Trust Co.*, 152 Misc. 50, 272 N. Y. Supp. 637 (Sup. Ct. 1934).

⁵⁹ *Randall v. Van Wagenen*, 115 N. Y. 527, 22 N. E. 361 (1889).

⁶⁰ N. Y. Laws 1909, c. 35, JUDICIARY LAW § 475, *supra* note 55.

⁶¹ See *Janowski, Attorney's Lien*, N. Y. L. J., April 18, 1935, at 1986 (cor.).

the attorney has been retained in the litigation,⁶² and one settling with a client without the attorney's knowledge of such settlement does so at his own risk,⁶³ and the lien follows⁶⁴ any fund created by settlement,⁶⁵ "verdict, report, decision, or judgment in his client's favor and the proceeds thereof."⁶⁶ In an attempt to justify the existence of the attorney's charging lien, New York courts have held that a contingent retainer agreement creates an equitable assignment of that portion of the claim to the attorney.⁶⁷ This legal fiction, carried to its logical conclusion, led courts into difficulty,⁶⁸ inasmuch as it had to be held that where the proceeds of the action were unassignable for some reason or other, no equitable assignment could issue.⁶⁹ Nor is the theory of the equitable assignment compatible with the inclination of the courts to give the client the complete control over the cause of action.⁷⁰ It is rather apparent that the attorney owns no part of the cause of action, the lien giving him no right to property,⁷¹ but only a charge on the cause of action,⁷² and

⁶² *Peri v. New York Central & Hudson River R. R.*, 152 N. Y. 521, 46 N. E. 849 (1897).

⁶³ *Sargent v. McLeod*, 209 N. Y. 360, 103 N. E. 164 (1913) (A defendant having knowledge of the lien of an attorney may not disregard it upon settlement with the plaintiff, and part with the entire fund. He is bound to retain, and the law conclusively assumes he has retained, sufficient to pay the sum which the attorney was entitled to receive.); *Oishei v. Pennsylvania R. R.*, 117 App. Div. 110, 102 N. Y. Supp. 368 (1st Dept. 1907), *aff'd memo.*, 197 N. Y. 544, 85 N. E. 1113 (1908).

⁶⁴ N. Y. Laws 1909, JUDICIARY LAW § 475, *supra* note 55; see *Matter of Levy*, 249 N. Y. 168, 170, 163 N. E. 244 (1928).

⁶⁵ *Fischer-Hansen v. Brooklyn Heights R. R.*, 173 N. Y. 492, 66 N. E. 395 (1903).

⁶⁶ N. Y. Laws 1909, c. 35, JUDICIARY LAW § 475, *supra* note 55.

⁶⁷ *Rooney v. Second Ave. R. R.*, 18 N. Y. 368 (1858); *McGregor v. Comstock*, 28 N. Y. 237 (1863); *Ely v. Cooke*, 28 N. Y. 365 (1863); *Wright v. Wright*, 70 N. Y. 98 (1877); *Williams v. Ingersoll*, 89 N. Y. 508 (1882); *Fairbanks v. Sargent*, 117 N. Y. 320, 22 N. E. 1039 (1889); *Holmes v. Evans*, 129 N. Y. 140, 29 N. E. 233 (1891); *Harwood v. La Grange*, 137 N. Y. 538, 33 N. E. 336 (1893); *Lynch v. Conger*, 181 App. Div. 221, 168 N. Y. Supp. 885 (3d Dept. 1917).

⁶⁸ See Note (1929) CORN. L. Q. 322, 324.

⁶⁹ *Conklin v. Conklin*, 201 App. Div. 170, 194 N. Y. Supp. 685 (3d Dept. 1922), *aff'd memo.*, 234 N. Y. 546, 138 N. E. 441 (1922) (Alimony in a divorce action.); *In re Madison's Estate*, 151 Misc. 85, 270 N. Y. Supp. 621 (Surr. Ct. 1934) (Attorney retained by decedent to prosecute personal injury action, and substituted under stipulation reserving right to share in proceeds of action, had no lien on the proceeds of an action brought by the administratrix of the decedent from the same injury, because the lien terminated on the death of the decedent and action for wrongful death was independent of the personal injury action.).

⁷⁰ See text to notes 1-11, *supra*.

⁷¹ *Lee v. Vacuum Oil Co.*, 126 N. Y. 579, 27 N. E. 1018 (1891); *Poole v. Belcha*, 131 N. Y. 200, 30 N. E. 53 (1892); *In re Madison's Estate*, 151 Misc. 85, 270 N. Y. Supp. 621 (Surr. Ct. 1934).

⁷² *Lee v. Vacuum Oil Co.*, 126 N. Y. 579, 27 N. E. 1018 (1891); *Fischer-Hansen v. Brooklyn Heights R. R.*, 173 N. Y. 49, 66 N. E. 395 (1903).

that he has no right to interfere with the settlement of the action.⁷³

Should the client settle for an amount less than the judgment, there being a contingent percentage retainer, the *quantum* of the lien is not computed on the basis of the judgment, but rather on the amount of the settlement,⁷⁴ and the lien may be enforced by a suit in equity against the client and the other party to the litigation.⁷⁵ Where the settlement has been made collusively for the purpose of cheating the attorney, the court will order the satisfaction of judgment to be vacated and will permit execution to issue for the enforcement of the judgment to the extent of the lien.⁷⁶

In enforcing an attorney's lien against one not a client, a special proceeding is required. No motion for such determination may be made in an existing action.⁷⁷ The party proceeded against has a right to interpose any defense available to him in an equitable action.⁷⁸

Either the attorney or the client may petition the court to determine and enforce the attorney's lien,⁷⁹ the *quantum* being determined either by the court in Special Term⁸⁰ or by the referee.⁸¹ Where the attorney permits payment to be made to his client, the lien is waived.⁸² A finding of unprofessional conduct justifying an

⁷³ *Poole v. Belcha*, 131 N. Y. 200, 30 N. E. 53 (1892); *Fischer-Hansen v. Brooklyn Heights R. R.*, 173 N. Y. 492, 66 N. Y. 395 (1903); *Matter of Levy*, 249 N. Y. 168, 163 N. E. 244 (1928).

⁷⁴ *Matter of Levy*, 249 N. Y. 168, 163 N. E. 244 (1928). For a review of the conflict of authority before this case, see Note (1929) 14 CORN. L. Q. 322. Cf. where the settlement is before judgment, recovery is only on *quantum meruit*, text to notes 1-11, *supra*.

⁷⁵ *Fischer-Hansen v. Brooklyn Heights R. R.*, 173 N. Y. 492, 66 N. E. 395 (1903).

⁷⁶ *Matter of Regan*, 167 N. Y. 338, 60 N. E. 658 (1901); *Neier v. Droesch Realty Corp.*, 232 App. Div. 534, 250 N. Y. Supp. 535 (2d Dept. 1931); see *Lee v. Vacuum Oil Co.*, 126 N. Y. 579, 587, 27 N. E. 1018, 1019 (1891); *Poole v. Belcha*, 131 N. Y. 200, 203, 30 N. E. 53, 54 (1892); *Peri v. New York Central & Hudson River R. R.*, 152 N. Y. 521, 528, 46 N. E. 849, 850 (1897); *Fischer-Hansen v. Brooklyn Heights R. R.*, 173 N. Y. 492, 501, 66 N. E. 395, 397 (1903). In any event, the fairness or lack of fairness of the settlement seems to be evidence of collusion. See *Matter of Levy*, 249 N. Y. 168, 171, 163 N. E. 244 (1928).

⁷⁷ *Peri v. New York Central & Hudson River R. R.*, 152 N. Y. 521, 46 N. E. 849 (1897); *Rochfort v. Metropolitan St. R. R.*, 50 App. Div. 261, 63 N. Y. Supp. 1036 (1st Dept. 1900); *McNally v. Young et al.*, 237 App. Div. 787, 262 N. Y. Supp. 828 (1st Dept. 1933); see *Matter of Tillman*, 259 N. Y. 133, 136, 181 N. E. 75, 76 (1932).

⁷⁸ *Schneller v. Rogers*, 136 Misc. 84, 240 N. Y. Supp. 440 (Sup. Ct. 1930), *aff'd memo.*, 228 App. Div. 807, 243 N. Y. Supp. 875 (2d Dept. 1930); *In re Podell*, 138 Misc. 428, 245 N. Y. Supp. 27 (Sup. Ct. 1930) (The court cannot order a framing of the issues for jury.).

⁷⁹ N. Y. Laws 1909, c. 35, JUDICIARY LAW § 475, *supra* note 55.

⁸⁰ *Matter of Knapp*, 85 N. Y. 285 (1881); *Matter of the City of New York*, 219 N. Y. 192, 114 N. E. 49 (1916).

⁸¹ *Coster v. Greenpoint Ferry Co.*, 5 Civ. Proc. 146 (1884), *aff'd memo.*, 98 N. Y. 660 (1885); *Matter of King*, 168 N. Y. 53, 60 N. E. 1054 (1901).

⁸² *Matter of King*, 168 N. Y. 53, 60 N. E. 1054 (1901) *semble* (The mere statement by the attorney that he did not want a lien does not constitute a waiver.).

order depriving the attorney of the retaining lien would also require that his charging lien be forfeited.⁸³

Upon the granting of a petition for the substitution of attorneys, the lien of the discharged attorney must be fixed, the order of substitution being made without prejudice to or interference with the lien.⁸⁴

Inasmuch as the lien attaches only to the proceeds of an action⁸⁵ or special proceeding,⁸⁶ it is not allowed for services in special tribunals.⁸⁷ The lien created by the statute is one of substance, and the federal courts will therefore enforce it⁸⁸ regardless of whether or not the suit for services in which the lien was claimed was originally brought in a state court or a federal court.⁸⁹ The state courts have enforced liens claimed for services rendered in a suit brought in a federal court,⁹⁰ provided that the court in which the cause of action was originally brought is within the territorial confines of the state.⁹¹ The lien extends to a decree in the Surrogate's Court,⁹² and the same court has power to protect the attorney's lien.⁹³ A

⁸³ See *Matter of Weitling*, 266 N. Y. 184, 187, 194 N. E. 401, 402 (1934).

⁸⁴ *Matter of Lydig*, 262 N. Y. 408, 187 N. E. 298 (1933).

⁸⁵ *Ekelman v. Marano*, 251 N. Y. 173, 167 N. E. 211 (1929) (Attorney for the defendant cannot get a lien on a cause of action unless the answer contains a counterclaim.). For an interesting argument for the application of the lien to recovery in special tribunals, see (1932) 32 Col. L. Rev. 900.

⁸⁶ *In re Allen Street in the City of New York*, 148 Misc. 488, 266 N. Y. Supp. 277 (Sup. Ct. 1933); *Swartz, Inc. v. City of Utica*, 223 App. Div. 506, 228 N. Y. Supp. 660 (4th Dept. 1928), *aff'd memo.*, 252 N. Y. 573, 170 N. E. 148 (1920) (Both: condemnation proceeding is a special proceeding.); *In re Flower*, 167 N. Y. Supp. 778 (Sup. Ct. 1917) (Proceeding against estate in bankruptcy is a special proceeding.); *Matter of Dutcher*, 238 App. Div. 793, 268 N. Y. Supp. 149 (4th Dept. 1934).

⁸⁷ *Matter of Albrecht*, 253 N. Y. 537, 171 N. E. 772 (1930) (Board of Tax Appeals is a special tribunal.); *Brooks v. Mandel-Witte Co.*, 54 F. (2d) 992 (C. C. A. 2d, 1932) (The United States Customs Court is a judicial, not a special, tribunal.); see *Irish Free State et al. v. Guaranty Safe Deposit Co. et al.*, 148 Misc. 256, 259, 266 N. Y. Supp. 8, 10 (Sup. Ct. 1933), *aff'd memo.*, 242 App. Div. 612, 271 N. Y. Supp. 1071 (1st Dept. 1934) (Not applicable to services rendered in obtaining bond certificates "through diplomatic channels.").

⁸⁸ *In re Paschal*, 77 U. S. 483 (1870); *Central R. R. & Banking Co. of Georgia v. Pettus*, 113 U. S. 116, 5 Sup. Ct. 387 (1885); *Meighan v. American Grass Twine Co.*, 154 Fed. 346 (C. C. A. 2d, 1907); *Spellman v. Banker's Trust Co.*, 6 F. (2d) 799 (C. C. A. 2d, 1925); *In re Pyrocolor*, 46 F. (2d) 554 (S. D. N. Y. 1930); *Brooks v. Mandel-Witte Co.*, 54 F. (2d) 992 (C. C. A. 2d, 1932).

⁸⁹ *In re Baxter*, 154 Fed. 22 (C. C. A. 2d, 1907); *Machcinski v. Lehigh Valley Ry.*, 272 Fed. 920 (C. C. A. 2d, 1921).

⁹⁰ *McKennel v. Payne*, 197 App. Div. 340, 189 N. Y. Supp. 7 (2d Dept. 1931); *Chorosh v. Woodbury et al.*, 135 Misc. 910, 240 N. Y. Supp. 157 (Sup. Ct. 1930).

⁹¹ *Matter of Albrecht*, 253 N. Y. 537, 171 N. E. 772 (1930).

⁹² *Matter of Regan*, 167 N. Y. 338, 60 N. E. 658 (1901); *In re Eno's Estate*, 112 Misc. 451, 182 N. Y. Supp. 571 (Surr. Ct. 1920); *In re Abruzzo's Estate*, 139 Misc. 559, 249 N. Y. Supp. 72 (Surr. Ct. 1931).

⁹³ *Matter of Regan*, 167 N. Y. 338, 60 N. E. 658 (1901); *In re Fitzsimmons*, 174 N. Y. 15, 66 N. E. 554 (1903); *In re Matheson's Estate*, 265 N. Y. 81,

proceeding to enforce this lien is one *in rem*.⁹⁴ An attorney procuring a judgment in the Municipal Court of the City of New York has a lien enforceable in the Supreme Court.⁹⁵

The attorney's charging lien takes priority over attaching creditors.⁹⁶

The right to the charging lien is assignable where the assignment carries with it no breach of the attorney's duty to preserve his client's confidence inviolate.⁹⁷

Conclusion.

The general attitude of the courts toward attorneys' liens, as gleaned from the foregoing cases, is one of benevolent despotism. If the attorney has been ethical, the court will go far to protect his rights. For example, where an attorney had neither a retaining nor a charging lien, the court went so far as to create an equitable lien in his favor.⁹⁸

From the time he is first retained, an attorney has a retaining lien on the client's property which comes into his possession. The retaining lien covers all the services he has rendered and all disbursements made. When the attorney undertakes to prosecute a claim in the client's favor, he has a charging lien on the proceeds of the action, but his protection as against third parties operates only from the time a summons is served.

WILLIAM H. QUASHA.

INCIDENTS OF PROGRESSIVE TAXATION.

"Equity in taxation" observed a learned author¹ "is an elusive mistress, whom perhaps it is only worth the while of philosophers to pursue ardently and of politicians to watch warily." This elusive mistress has, however, exercised a powerful influence upon events in the

191 N. E. 842 (1934); *In re Levin's Estate*, 154 Misc. 700, 278 N. Y. Supp. 36 (Surr. Ct. 1935).

⁹⁴ *Oishei v. Pennsylvania R. R.*, 117 App. Div. 110, 102 N. Y. Supp. 368 (1st Dept. 1907), *aff'd memo.*, 197 N. Y. 544, 85 N. E. 1113 (1908).

⁹⁵ *Tynan v. Mart*, 53 Misc. 49, 103 N. Y. Supp. 1033 (Sup. Ct. 1907); *Duringshoff v. Coates & Co.*, 93 Misc. 485, 157 N. Y. Supp. 230 (Sup. Ct. 1916).

⁹⁶ *Williams v. Ingersoll*, 89 N. Y. 508 (1882).

⁹⁷ See *Leask v. Hoagland*, 64 Misc. 156, 164, 118 N. Y. Supp. 1035, 1041 (Sup. Ct. 1909), *aff'd memo.*, 136 App. Div. 658, 121 N. Y. Supp. 197 (1st Dept. 1910). *Cf.* text to note 51, *supra*.

⁹⁸ *Schoenherr v. Van Meter*, 215 N. Y. 548, 109 N. E. 625 (1915) (Corporation having appropriated the benefit of an attorney's services, subsequently became bankrupt and refused payment to the attorney.).

¹ DALTON, PRINCIPLES OF PUBLIC FINANCE (1929) 94.