

THE RIGHT OF COUNSEL TO MAINTAIN A LIEN AGAINST HIS CLIENT FOR UNPAID FEES: THE THEORY AND THE PRACTICE

Chike B. Okosa*

Abstract

Recent developments in legal practice have raised the question of when and how counsel may assert a lien against his client for due but unpaid fees. Further questions of how any such lien may be protected, enforced and discharged are also raised. In answer, we analysed the right of a solicitor to be remunerated for professional services rendered to a client. Using that right as a predicate, we established that where a client fails to remunerate a legal practitioner for services duly rendered to him, the legal practitioner has a right to assert a lien for recovery of his fees. We then analysed the different types of liens permitted by the law and the circumstances under which each may be created. We also established the time when each of these liens attaches, their duration and termination and the procedure for their perfection. From this background, we disclosed the protection that the law affords the legal practitioner during the pendency of the lien. This protection ensures that the asset upon which the lien is asserted is not assigned or dissipated by the client to the prejudice of the solicitor. We finally established that where a passive maintenance of the lien does not propel the client to pay the due sums, the solicitor has a right in certain circumstances to initiate proceedings for realisation of the lien. We conclude that the right of a solicitor to maintain a lien for payment of his fees is protected by the Rules of Professional Conduct in the Legal Profession and by common law.

Keywords

Solicitor, Legal services, Remuneration, Lien, Retaining lien, Charging lien

1. Introduction

The right of lawyers to maintain liens against their clients for payment of their legal fees is a topical issue in legal practice. From March, 2020, due to the public health precipitated lockdown, many business models became challenged. Legal practice also suffered this challenge. Timelines for completion of professional assignments were not met. Projected or agreed costs were overshoot. In several instances, disputes arose between lawyers and clients regarding either payment of additional fees for extra effort or refund of part of paid fees for failure to deliver timeously. In some of these disputes, pending resolution, lawyers asserted a right to maintain a lien over client's documents in their possession. Clients on their own part resorted complaints to law enforcement agencies or the legal practitioner's disciplinary body for

*PhD. The writer is a member of the Faculty of Law, Chukwuemeka Odumegwu Ojukwu University, Igbariam, Anambra State.

the failure of their lawyers to release their documents. In some of these instances, the rights of the lawyers concerned to maintain liens were properly exercised. However, in other instances, the rights were wrongly asserted. Most times, the erroneous assertion of a right of lien was not due to an intention to overreach, but largely due to ignorance of the dynamics for assertion of a lien. We have in this paper undertaken a comprehensive and integrated explanation of a legal practitioner's right to maintain a lien against his client for unpaid fees. In the section next, we have, by setting out the right of counsel to be remunerated for services rendered, laid the theoretical basis for a counsel's right to maintain a lien upon failure of remuneration. In the section thereafter, we examined the modalities for creation and maintenance of liens. Thereafter, we examined the procedure for protection and enforcement of liens, and then concluded.

2. Right of Counsel to be Remunerated for Services Rendered

Ordinarily, where an attorney renders services voluntarily, or in such a way as to authorise the inference that he did not intend to charge thereof, such services, no matter how beneficial they may be, will be supposed to be gratuitous, and he is not entitled to recover¹. However, and generally, one who practices a profession, and renders his professional services to another at his request is entitled to collect remuneration or professional fees from the beneficiary of such professional services unless he voluntarily waives the payment². Accordingly, the employing of a professional person implies an undertaking to remunerate him; although the inference may be rebutted by circumstances³; but in any event, once the relation of agent and client is constituted, the obligation of the client to remunerate the agent for his services is implied unless expressly dispensed with⁴. Attorneys are entitled to have allowed to them for their professional services what they reasonably deserve therefore, having due reference to the nature of the service and their own standing in the profession for learning, skill and proficiency⁵. Statutorily, a lawyer, although precluded from entering into an agreement for, or charging or collecting an illegal or

¹ In *Re Lear's Estate*, 7A CJS 520

² *Owena Bank of Nigeria Plc v. Adedeji*, [2000] 7 NWLR Part 666, 609; *First Bank of Nigeria Plc v. Ndoma-Egba*, [2006] All FWLR Part 307, 1012; in *Akingbehin v. Thompson*, [2008] 6 NWLR Part 1083, 270, Justice Dongban-Mensem, JCA stated at 294A-E '*The case put forward by the respondent is self-limiting. Having admitted, albeit tacitly, asking the appellant to oversee her interest in the transaction with the bank, she cannot now be heard to say that the bank's solicitors were engaged to serve her interest. She felt uncomfortable. She was apprehensive that the bank might take undue advantage of her, being, both the provider and of the facility and the lawyer to drawing up the terms. With good sense she approached the appellant conscious of his professional calling. If the respondent was not engaging the professional skills of the appellant, why did she not ask her house-help or hairdresser to represent her at the transaction? A learned counsel watching proceedings of whatever nature, in brief, entails the allocation of time, some mental alertness, physical presence and travel from one point to the next. All these activities are time consuming and time is money. Thus, the appellant as a good labourer deserves his wages.*'

³ *Mauson v. Baillie* (1855), 43 E&ED 136

⁴ *Bell v. Ogilvie* (1863), 43 E&ED

⁵ *Stanton v. Embrey*, 93 U.S. 548, 23 L Ed 983

clearly excessive fee is entitled to be paid adequate remuneration for his service to the client⁶. Thus, a legal practitioner has a right to be remunerated for his services. He can either be paid in advance upon named fees or rely on the terms of any agreement reached for his fees⁷; and an attorney may agree to do work for a client for a lump sum in lieu of his ordinary fees⁸.

Commonly, the creation of the relation of attorney and client by contract, express or implied, is essential to the right of an attorney to recover compensation for services.⁹ Each litigant must pay his own counsel's fees. An attorney cannot make another party who receives an indirect benefit, his debtor by voluntarily rendering services in his behalf without his express or implied assent;¹⁰ and one who had received benefits from services rendered by an attorney to his clients, but who had no contract for employment of the attorney, and made no request for the services, is not liable for the reasonable value of such services on quasi contract, which applies only to prevent unjust enrichment of one party at the expense of another.¹¹ Although ordinarily, an attorney is entitled to collect any fee for which he has express or implied contract with his client;¹² however, an attorney is entitled to no more than a reasonable fee, no matter what fee is specified in his contract with his client.¹³ Thus, attorneys and solicitors are entitled to have allowed them for their professional services what they reasonably deserve to have therefore, having due reference to the nature of the service, and their own standing in the profession for learning, skill and proficiency. A written agreement made by a legal practitioner with his client in respect of any professional business done or to be done by him for a sum should appear to be fair and ought to be such that was not made under circumstances of suspicion of an improper attempt by the solicitor to benefit himself at his client's expense; and a written agreement made by a legal practitioner with his client in

⁶ Article 48(1) & (2) of Rules of Professional Conduct for Legal Practitioners, 2007 (hereinafter, 'RPC'); under subsection (3) a fee would be found clearly excessive when after a review of the facts, it is that it does not take into account the consideration set out in rule 48 (now 51). In *Re Geddies & Wilson* (1869), 43 E&ED 143, it was held that no bargain between a solicitor and client, whereby the latter undertakes to pay more than the recognized fees for the work to be done, can be enforced.

⁷ *Oyo v. Mercantile Bank of Nigeria Ltd.*, [1989] 3 NWLR Part 108, 213

⁸ *Incorporated Law Society v. Hubbard*, (1904) 43 E&ED 143; in *G.M.O. Nworah & Sons Co. Ltd. v. Akputa*, [2010] 9 NWLR Part 1200, 443, the Supreme Court cited Order 34 rule 5(a) of the High Court of Anambra State (Civil Procedure) Rules, 1988, which provided that notwithstanding any authorised scale of fees, it is lawful for any legal practitioner to enter into an agreement with a client to act for him and conduct his case in any cause or matter in the court for an amount to cover all fees for his services as legal practitioner up to final judgment provided that every such agreement shall be in writing.

⁹ *Wylie v. City Commission of Grand Rapids*, 7 Am Jur 2d 277

¹⁰ *Richter v. US*, 4 F.P.D. 2d 751; however, in *Clarks v. Hot Springs Electric Light & Power Co.*, 6 F D 396; certiorari denied 56 S Ct 147, 296 US 624, 80 L Ed 443, where services rendered by attorneys resulted in substantial recovery for bondholders other than plaintiffs, it was held that such bondholders so benefited should pay for services, since it would be inequitable to permit them to share in proceeds without contributing to expense.

¹¹ *Aronstam v. All-Russian Central Union of Consumers' Societies*, 6 F D 396; in *Guinness Nigeria Plc v. Nwoke*, [2000] 15 NWLR Part 689, 135, in a claim for detinue, the plaintiff had also claimed certain sums as special damages in respect of fees paid to its solicitor. In dismissing the claim, the court held that it is unethical and an affront to public policy for a litigant to pass on the burden of solicitor's fees to his opponent in a suit. See also *Shell Petroleum Development Company of Nigeria Ltd v. Okonodo*, [2008] 9 NWLR Part 1091, 85

¹² *Andrews v. Central Sur. Ins. Co.*, (supra)

¹³ *Kiser v. Miller*, 4 F.P.D. 2d 763

respect of any professional business done or to be done by him for a sum is usually jealously regarded by the court and the tendency is to lean in favour of the client and put the burden of justifying its propriety on the legal practitioner¹⁴.

3. Creation and Maintenance of Solicitors' Liens

3.1 Nature of and right to lien

There are two common law rights of solicitors, known as liens. One is the *general* or, *retaining lien* –the right of the solicitor to retain all papers or other chattels of his client, which come into his possession as the client's solicitor, until all his costs and charges as solicitor are paid. The other is a *lien* over any property, except real property, recovered or preserved, or any judgment obtained, for the client by his exertions in litigation. It is a particular lien, and does not extend to any of his costs except the costs of recovering or preserving that property or obtaining that judgment. It is not a mere right of retention; it extends to property which is not in the solicitor's possession, and includes a right to the intervention of the Court for its protection¹⁵. Ordinarily, the court has an inherent jurisdiction over a solicitor, as its officer, to order him summarily to deliver up money and documents received by him as a solicitor, if he has no lien thereon; but if there is a bona fide dispute as to the right to hold the papers, the applicant should be left to his remedy by action¹⁶. An attorney's lien can be established under one of three conditions: First, where a distinct proportion or percentage of the fund recovered has been by agreement assigned or set aside for the payment of the fee of the attorney; second, where a judgment has been recovered by the attorney, or moneys are payable thereon, or there is a fund in court against which a "charging lien" may arise; and, third, where the attorney is rightfully in possession of money or papers belonging to his client subject to a "*retaining*" or "*possessory*" lien¹⁷. An attorney has as security for his fees a charging lien on his client's cause of action and a retaining lien on the papers of his client which come into his possession in the course of his professional employment¹⁸. The authorisation to acquire a lien in addition to the permission to enter into a contingent fee arrangement are the only exceptions to the prohibition of a lawyer acquiring a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, so that a lawyer is duly permitted to acquire a lien granted by law to secure his fees and expenses¹⁹. Furthermore, when a client changes his lawyer, the lawyer is entitled to

¹⁴ Oyekanmi v. NEPA, [2000] 15 NWLR Part 690, 414

¹⁵ The Supreme Court Practice, 1997, vol. 2, para 3884

¹⁶ Ex p Cobeldick, (1883) 12 Q.B.D. 149

¹⁷ Bullowa v. Thurston, 34 S Ct 674, 234 US 756, 58 L Ed 1578

¹⁸ In Re Prudence Co., certiorari denied MacGrath v. Davison, 59 S Ct 75, 305 US 616, 83 L Ed 393

¹⁹ Article 17 of RPC, 2007; article 50(3) of RPC, 2007 also authorise a lawyer to acquire a lien granted by law to secure his fee and expenses

a lien on the papers or documents of his client in respect of unpaid fees²⁰. The word '*lien*' is a generic term, and standing alone, includes liens acquired by property and by operation of law. Generally, a lien is a claim, encumbrance or charge on property for payment of some debt, obligation or duty. It is a qualified right of property which a creditor has in or over specific property of his debtor, as security for the debt or charge or for performance of some act. It is also a right or claim against some interest in property created by law as an incident of contract. It is the right to retain property for the payment of a debt or demand²¹. An attorney's lien is the right of an attorney at law to hold or retain in his possession, the money or property of a client until his proper charges have been adjusted and paid. It requires no equitable proceedings for its establishment. It is also a lien on funds in court payable to the client, or on a judgment or decree or award in his favour, recovered through the exertions of the attorney, and for the enforcement of which he must invoke the equitable aid of the court²². A lien is equivalent to a security created by contract, and there is no distinction, in point of law, between the lien of a solicitor and that of any other party; and where therefore a solicitor has a lien, in respect of his bill, upon documents in his possession belonging to his client, he cannot be compelled to deliver them up until the bill is paid²³.

The right of an attorney to receive his due remuneration for services rendered to a client is founded on the contract or retainer between him and his client and does not depend on the existence of a lien. Consequently, where a lien exists and is held by the attorney, it constitutes merely collateral for his right to receive his due compensation. However, even though the attorney's lien is security for his compensation, it is also more than mere security, and is enforceable by a remedy in the nature of foreclosure, and furthermore, may not be extinguished by an action of the parties²⁴. It is necessary to the existence of a valid lien for attorney's fees and costs on judgment that there be a valid contract for fees, either express or implied, entered into between the attorney and the client²⁵. The lien which an attorney has on the papers in his hands is only commensurate with the right which the party delivering the papers to him has therein. Every one, whether attorney or not, has by the common law a lien on the specific deed

²⁰ Article 29 (3)(d) of RPC, 2007; in *Re Austin, Ex p. Yalden* (1876), 4 Ch. D. 129; 35 L. T. 720, the trustee of a bankrupt's estate appointed a solicitor whose appointment was duly confirmed, and who transacted considerable professional business for the trustee as such. After several years the trustee was removed by creditors, and a new trustee appointed, who called upon the solicitor to hand over all documents relating to the estate to himself or his solicitor. The solicitor of the old trustee opposed this application on the ground that he had a lien on them for his costs. It was held that the solicitor had a lien upon all documents, the fruits of his own labour or expense.

²¹ Black's Law Dictionary, (West: St Paul, 6th edn.) 922

²² Black's Law Dictionary, 129

²³ *Richards v. Platel* (1841), 10 L. J. Ch. 375; 41 E. R. 419, L. C. (1842), 11 L. J. Ch. 409, L. C.; the court would take care that the lien of a solicitor on a document, should not be productive of injury to or loss of the property to which the document related, and would direct it to be delivered up, if such a step were necessary for the preservation of the property, but without prejudice to the solicitor's lien thereon, and, in the case of a policy of assurance, would order the proceeds arising therefrom to be paid into court, subject to the same right of lien thereon as previously existed on the policy.

²⁴ *US v. Pay-O-Matic Corp*, 7A CJS 707

²⁵ *Hanna Paint Manufacturing Co. v. Rodey, Dickason, Sloan, Akin & Robb*, 4 F.P.D. 2d 784

or paper delivered to him to do any work or business thereon, but not on other muniments of the same party, unless the person claiming the lien be an attorney or solicitor²⁶.

The general lien of a solicitor is merely a right to keep from his client the deeds and papers which he holds as solicitor until his bill of costs is satisfied. It is a right derived through the client, and therefore, on the most obvious principles of justice, cannot go beyond the right of the client himself. If the client's right to the deeds which came to the hands of solicitor is absolute, so will be the right of the solicitor. If they are subject to the rights of third parties, such rights will follow them. These consequences flow from the nature of the relationship existing between the client and his solicitor. A solicitor can have no lien of a higher nature than the interest the client himself has in the deeds²⁷. Thus, a solicitor may detain title deeds as against a client till payment of his bill, but not against persons who have antecedent rights²⁸. In any event, a person can have no right of lien over property which he acquires in an assumed character or by tortuous means²⁹. Aside from whatever right an attorney may have to a particular type of lien, or his right to assert a lien under particular circumstances, it is notable that the relationship of attorney and client is the foundation of the right to an attorney's lien, so that such lien applies solely to the personal relation existing between the attorney and his client, and may not be extended to, or affect the rights of other persons who may be interested in the litigation but who have not employed such attorney³⁰. Thus, an attorney's retaining and charging liens apply solely to the personal relation between the attorney and his client, and may not be extended to or affect the rights of third persons who may be interested in the litigation, but who have not employed such attorney; the liens being allowed to cover only the interest of the client in the property charged, subject to any rights in the property which are valid against the client at the time the liens attach³¹.

A solicitor can claim a lien on title deeds in his custody against a person demanding their delivery if, but not unless, at the date of such demand his possession of them is referable to the relationship of solicitor and client between himself and the claimant. If this condition is not satisfied, the solicitor cannot make

²⁶ Hollis v. Claridge (1813), 128 E. R. 549, 43 E&ED 293

²⁷ Pelly v. Wathen (1851), 21 L. J. Ch. 105, 42 E. R. 457, 43 E&ED 293

²⁸ Marsh v. Bathoe (1744), 27 E. R. 822, 43 E&ED 293; in Bell v. Taylor (1836), 59 E. R. 87, 43 E&ED 293, the defendant was decreed to deliver up certain deeds to the plaintiff. The deeds were in the possession of the defendant's solicitor, who claimed a lien on them for costs; but the court, on motion, ordered him to deliver them up, and to pay the costs of the motion.

²⁹ Wickens v. Townshend (1830), 39 E. R. 140, 43 E&ED 301, a solicitor who receives rents in a cause without the authority of the court will be ordered to pay them over to the receiver, and cannot retain them on the ground of lien, or set them off against costs alleged to be due to him from the plaintiff.

³⁰ Sisters of Charity of Providence of Montana v. Nichols, 7A CJS 708; in Nancy Lee Mines Inc v. Harrison, (ibid), where a corporation's former legal counsel attempted to use attorney's lien to recover compensation for managerial services rendered to corporation unrelated to the legal services performed by him, it was held that no valid attorney's lien was ever created in his favour upon the corporation's books and records.

³¹ In Re Gillaspie, 6 FD 440

good his lien by showing that he originally received the deeds from the claimant as his client and subsequently retained physical possession of them down to some past date in the right and on behalf of the claimant, but that thereafter and at the date of the demand he retains them in the right and on behalf of some other person through whom the claimant now makes title³². Where a mortgagee has been paid by the mortgagor, his principal, interest, and costs, and has given the mortgagor a release, the mortgagee's solicitor has no right to retain the deeds as against the mortgagor, even for costs due to the mortgagee's solicitor for work done relating to the mortgaged property during the continuance of the mortgage. The equitable right of the mortgagor to have back from the mortgagee his deeds on payment of principal, interest, and costs, prevails against the solicitor's lien claimed in right of the mortgagee³³.

A solicitor acting for mortgagee as well as mortgagor in the preparation of a mortgage thereby loses his lien on the title deeds in his possession for costs due to him from the mortgagor, unless such lien is expressly reserved, even though the mortgagee may have known that the solicitor had such lien as against the mortgagor³⁴; and a solicitor acting for a mortgagee, as well as mortgagor in the preparation of a mortgage thereby loses his lien on the title deeds in his possession for costs due to him from the mortgagor, even though the costs were incurred prior to the mortgage and the title deeds never left the solicitor's office³⁵. As a general rule, solicitors employed by trustees in matters relating to the trust estate are retained by the trustees personally, and have no claim against, or lien upon, the trust estate for their costs. They can, therefore, only obtain payment by such means as a charging order in respect of recovery or preservation of the property, or through the trustees when the latter are entitled to their costs out of the trust estate. The solicitors' right to costs, therefore, is no defence to an application for payment into court of money received with notice that it is trust money³⁶. A solicitor's common law lien for costs is given

³² Barratt v. Gough-Thomas, [1950] 2 All E. R. 1048; 94 Sol. Jo. 760, C. A.

³³ Re Llewellyn, [1891] 3 Ch. 145; [1891- 4] All E. R. Rep. 1106; 60 L. J. Ch. 732; 65 L. T. 249; in Wakefield v. Newbon (1844), 6 Q. B. 276; 13 L. J. Q. B. 258; 115 E. R. 107, the mortgagee of lands handed over the deeds to his attorney. The mortgagor paid the principal and interest, and the lands were reconveyed to him. It was held that the attorney could not retain the deeds against him, as a security for the expenses of the transaction due from the mortgagee to the attorney; and the mortgagor, having, under protest, paid such expenses to the attorney in order to get the deeds back might maintain *assumpsit* for money had and received against the attorney for the money so paid; and the attorney was a principal in the transaction, and could not allege that the action should have been brought against the mortgagee.

³⁴ Re Snell (1877), 6 Ch. D. 105; 46 L. J. Ch. 627; 37 L. T. 350, here, a company having issued a debenture loan, a deed was prepared by their solicitor mortgaging their property to two of the directors as trustees for the debenture holders, the same solicitor acting also for the trustees. The mortgage contained a power of sale and the usual covenant against incumbrances. The company afterwards passed a resolution for a voluntary winding-up, whereupon the trustees acting under their power of sale contracted to sell the mortgaged property to a purchaser and applied to the solicitor for the company's title deeds, which were in his possession. He however, refused to give them up, claiming a lien upon them for costs incurred by the company prior to the mortgage. Upon a petition by the trustees and a debenture holder praying that the solicitor might be ordered to deliver up the title deeds to them. It was held that the solicitor was not entitled to a lien on the deeds, and they must be delivered up to petitioners.

³⁵ Re Nicholson, Ex p. Quinn (1883), 53 L. J. Ch. 302; 49 L. T. 811

³⁶ Staniar v. Evans, Evans V. Staniar (1886), 34 Ch. D. 470; 56 L. J. Ch. 581; 56 L. T. 87; 3 T. L. R. 215, in Stafford v. Hutt Park Committee (1908), 28 N. Z. L. R. 318, 43 E&ED 296, it was equally stated that a solicitor employed by trustees to act as their solicitor in respect of the trust estate is not retained or employed by the trust estate, but by the trustees personally, who

him for his protection, not for the benefit of his client, and the court will not interfere to enforce the lien where it is not shown, at least *prima facie*, that the solicitor cannot collect his costs from his client³⁷. The purpose of the right of lien asserted by an attorney is to ensure that he receive the due compensation for services rendered by him to his client. Where an attorney asserts a lien merely so as to overreach or impose on his client, the client would be entitled to appropriate remedy, so that upon a proper application, a court would exercise its equitable jurisdiction to grant relief from unwarranted claims under such liens; and such relief may where necessary be granted in a summary manner by an application filed in the cause in which judgment was rendered.

The lawyer is entitled to a lien on the papers or documents of his client in respect of unpaid fees³⁸. This general or retaining lien extends to all papers or other chattels of his client (with certain exceptions) which come into his possession as the client's solicitor, and it is available in respect of all costs of the solicitor whether statute-barred or not³⁹. It applies to money held in client accounts and the Court may order the release of money from the client account to enable the solicitors to recoup their costs⁴⁰. It avails only against the client and therefore gives the solicitor no greater rights against a third person than the client has, and it is not destroyed by the bankruptcy or winding up of the client⁴¹; or the death of either party. It does not cease when the solicitor ceases to be the solicitor in the action, unless he is discharged by the client for misconduct; if he discharges himself he may be ordered to deliver up the papers to the new solicitor on the latter undertaking to hold them without prejudice to his lien and to return them intact after the action is over and allow the former solicitor access to them in the meantime⁴².

The attorney's general lien for charges on his client's papers which has its origin in the power of courts over the relations of attorney and client, is merely passive and retaining, and may not be actively

are liable to pay his costs, and the solicitor has no lien upon the trust estate for his costs; although the trustees have a lien on the trust estate for all expenses properly incurred by them, including the costs of employing a solicitor.

³⁷ *Re Fort Frances Pulp & Paper Co. v. Telegram Ptg. Co., Phillips & Scarth v. London Guarantee & Accident Co.*, 43 E&ED 301

³⁸ Article 29(3) of RPC, 2007

³⁹ *Curwen v. Milburn* (1889) 42 Ch. D. 424; *Re Margetts* [1896] 2 Ch. 263

⁴⁰ *Prekookeanska Plovdiva v. L.N.T. Lines Srl.* [1988] 3 All E.R. 897; *Loescher v. Dean*, [1950] 2 All E. R. 124; [1950] Ch. 491; 66 (pt. 1) T. L. R. 1208, a purchaser in an action for specific performance obtained judgment and an order that the defendant vendor should convey to the plaintiff the property in the suit on the payment by the plaintiff of a stated sum. Completion was effected, the plaintiff paying the sum to the defendant's solicitors who paid it into their "client account." The plaintiff then obtained a garnishee order *nisi* in respect of his costs to attach all debts due by defendant's solicitors to defendant. Defendant's solicitors, who had not rendered a bill of costs to their client, took out a summons for a charging order on the sum paid by the plaintiff under Solicitors Act, 1932, s. 69. On the hearing of this summons for a charging order on the sum paid by plaintiff, and of the summons to make the garnishee order absolute; it was held: (1) the solicitors had a lien on the money in the client account to the extent of defendant's debt to them, and the garnishee order could only be made absolute subject to that lien

⁴¹ *Re Meter Cabs Ltd.* [1911] 2 Ch. 557

⁴² *Robins v. Goldingham* (1872) L.R. 13 Eq. 440; see also *Gamlen Chemical Co. (U.K) Ltd. v. Rochem Ltd* [1980] 1 W.L.R. 614; [1980] 1 All E.R. 1049

enforced⁴³. An attorney's possessory lien is a right to retain property or money of his client until his fees are paid⁴⁴. Its nature and purpose involve inconvenience to the client; and its function is to assure payment of the fees due for services rendered⁴⁵; so that it is a judicial device for the protection of the attorney⁴⁶. Such a lien is a valuable right notwithstanding the fact that some of the papers and documents which the lien is asserted against have no intrinsic value, the lien being valuable in proportion to the inconvenience to the client caused by the denial of access to the papers and documents⁴⁷; and this is because, the final point of a retaining lien is not the objective worth of the property, but the subjective worth to the client and those who represent him, so that the retaining line may not be defeated by a claim that the intrinsic value of the property is immaterial⁴⁸.

When the attorney has possession of papers, moneys, and the like, he has the right to retain them until the general balance due him for legal services is paid. The client cannot discharge him and withdraw such papers or money from his hands without firsts paying the general balance due him for legal services, whether growing out of the special matters then in his hands or other legal matters⁴⁹. The general or retaining lien of the attorney exists, not only for all costs, charges, and disbursements due him in the particular cause in which they came into his possession, but also for the costs and the amount due him for professional business and employment in other causes. In other words, the lien extends to the general balance due for professional services rendered to the client⁵⁰. Attorney's retaining lien runs against property, not against the attorney's debtor⁵¹; accordingly, an attorney's retaining lien is possessory in nature⁵², so that in order for such a lien to exist, it is essential that the attorney claiming the lien have possession of something to which the lien can attach⁵³.

There is a clear distinction between a retaining lien and a charging lien, and the failure to distinguish between them has in many cases led to conflict and confusion in the decisions on the subject⁵⁴. An

⁴³ Everett, Clarke & Benedict v. Alpha Portland Cement Co., 6 FD 428

⁴⁴ In Re Gillaspie, 6 FD 429

⁴⁵ Sorin v. Shahmoon Industries Inc., 7A CJS 711

⁴⁶ Steiner v. Stein, 7A CJS 711

⁴⁷ Goldman v. Rafel Estates, 7A CJS 712

⁴⁸ Brauer v. Hotel Associates Inc. 7A CJS 712

⁴⁹ Weed Sewing Machine Co v. Boutelle, 7 Am Jur 2d 334

⁵⁰ Morse v. Eight Judicial District Court, 3 A L R 2d 136

⁵¹ Beardsley v. Cockerell, 4 F.P.D. 2d 783, here it was held documents and items received by the attorney from a corporation to assist the attorney's prosecution of patent applications were subject to the attorney's retaining lien as against the corporation, patent applicant, or trust established in the name of the applicant, enabling the attorney to retain possession and refuse inspection of the materials until he had been paid moneys owed him for professional services as patent attorney and also non-patent legal work performed for the corporation.

⁵² Mercantini v. Innamorati, 7A CJS 713

⁵³ US v. Fidelity Philadelphia Trust Co, 7A CJS 713

⁵⁴ Weed Sewing Machine Co v. Boutelle, (supra)

attorney has a lien upon moneys collected in the suit, for his fees and disbursements⁵⁵. The special or charging lien of an attorney is an equitable right to have the fees and costs due to him for services in a suit secured to him out of the judgment or recovery in that particular suit, and the charging lien is enforceable on the theory that the fund or judgment is the product of the services and skills of the attorney⁵⁶. A charging lien is an attorney's lien for his proper compensation, on the fund or judgment which his client has recovered by means of his professional aid and services. It is a specific lien covering only the services rendered by the Counsel in the action in which the judgment was obtained. This specificity is in contradistinction to a retaining lien which is a general lien for the balance of the account between the attorney and his client, and applies to the property of the client which may come into the attorney's possession in the course of his employment⁵⁷. The lien is based on the natural equity that the plaintiff should not be allowed to appropriate the entire judgment in his favour without paying there out for the services of his attorney in obtaining such judgment⁵⁸. The object of a special or charging lien is to protect the claim of an attorney by the equitable interference of the court and to secure to him payment of his just charges out of the fruits of his own labour⁵⁹. Indeed, the purpose of a charging lien is to protect an attorney from being cheated by his client by preventing the client from receiving the fruit of recovery without paying for the valuable services by which the recovery is obtained⁶⁰. The lien, as recognised by common law, gives an attorney the right to recover his taxable costs, or his fees and money expended on behalf of his clients, from a fund recovered by his aid, and the right to have the court interfere to prevent the payment by the judgment debtor to the creditor in fraud of the attorney's right to it, and to prevent or set aside assignments or settlements made in fraud of his right⁶¹; so that an attorney who has a charging lien for his services, is to the extent of such services, to be regarded as an equitable assignee of the judgment or funds produced by his efforts⁶². Accordingly, and by necessary implication, an attorney who represented a defendant cannot have a charging lien for attorney's fees in the absence of a counterclaim⁶³. Even though a charging lien is ordinarily upheld on the theory that the attorney's entitlement thereof arises from the fact that his skill and service produced the judgment, that fact, standing on its own may

⁵⁵ *In Re Paschal*, 17 US 483, 483, 19 L Ed 992

⁵⁶ *Hanna Paint Manufacturing Co v. Rodey, Dickason, Sloan, Akin & Robb*, 7A CJS 713; in *Re Gillaspie*, 6 FD 429, it was held that an attorney's charging lien is the equitable right to be paid for services out of the proceeds of the judgment obtained by his labour and skill; the attorney to the extent of such services being regarded as an equitable assignee of the judgment.

⁵⁷ *Black's Law Dictionary*, 130

⁵⁸ *Graeber v. McMullin*, 7A CJS 714

⁵⁹ *Myers v. Miller*, 117 A L R 977, in *Midvale Motors Inc v. Saunders*, 7 Am Jur 2d 337, it was held that an order granting an attorney a lien on property involved in the lawsuit was erroneous where the attorney had filed a motion for withdrawal after reversal on appeal of a judgment adverse to his client, since at that time there was no fruit from the attorney's labour to which a lien could attach, the client having no verdict, report, decision or judgment in his favour.

⁶⁰ *US v. 72.71 Acres of Land, More or Less, Situate in Montgomery County, Maryland*, 7A CJS 714

⁶¹ *Hale v. Tyson*, 7 Am Jur 2d 337; *Weed Sewing Machine Co v. Boutelle*, (supra)

⁶² *Jacobson v. Miller*, 34 A L R 317

⁶³ *US v. Clinton*, 4 F.P.D. 2d 784

not be sufficient to sustain the attorney's charge on the funds. Consequently, since the essence of a charging lien is to give an attorney the right to recover his compensation from the fund charged, it is requisite, to the existence of the lien that there be a valid contract for fees, either express or implied, entered into between the attorney and his client⁶⁴.

A lien may be created by an express agreement on the part of the client that the attorney shall have a lien for his compensation on the amount recovered⁶⁵. Where there is a distinct appropriation of fund, or terms of agreement show that it was intended that a fund should stand as security, the attorney will have an equitable lien on the fund. Thus, where the parties contract that the attorney shall receive his fee from the amount recovered, the agreement creates an equitable lien in favour of the attorney to the extent of the amount stipulated⁶⁶; and a writing from a client authorising an attorney to retain as compensation part of any judgment recovered amounts to an assignment and does not destroy, but confirms the attorney's common law lien on the judgment for his compensation⁶⁷. An agreement that the attorney shall '*have*' for his contingent fee a part of the very fund recovered, or other agreement of like substance leaves little doubts that, at the least, an equitable lien is created in his favour⁶⁸. An agreement '*to pay*' a lawyer's contingent fee '*from*' or '*out of*' the proceeds of the litigation is at least some indication of an intent to create an equitable lien, if not an equitable agreement⁶⁹. An equitable lien does not arise merely by virtue of a contract for a contingent fee. The test is whether the party contracting for the services sufficiently indicates an intention to make the fund described in the contract security for the debt. Such intention need not be express, but may be implied from the terms of the agreement construed with reference to the situation of the parties at the time of the contract and by the attendant circumstances⁷⁰. Even where the agreement is merely that the attorney shall receive for his services a specified percent of the amount recovered for the client, the effect may be to give the attorney an equitable assignment or lien, if in view of all the circumstances of the case, including the conduct of the parties and any declarations made by them in construction of their agreement, it is to be concluded that their understanding was that the attorney should have an interest in or charge on the fund recovered⁷¹.

⁶⁴ Wright v. Ellison, 68 US 16, 17 L Ed 555

⁶⁵ Grand Rapids & I R Co v. Cheboygan Circuit Judge, 7 Am Jur 2d 338

⁶⁶ Ingersoll v. Coram, 211 US 335, 53 L Ed 208, 29 S Ct 42

⁶⁷ Bent v. Lipscomb, 7 Am Jur 2d 338

⁶⁸ Barnes v. Alexander, 232 US 117, 58 L Ed 530, 34 S Ct 276

⁶⁹ Koons v. Beach, 7 Am Jur 2d 338

⁷⁰ Button's Estate v. Anderson, 143 A L R 195

⁷¹ La Fetra v. Hudson Trust Co., 7 Am Jur 2d 339, in Scott v. Kirtley, 93 A L R 661, where an attorney was employed by a widow for the purpose of, and was successful in, procuring for her a child's part in the estate of her husband, under an agreement with her that the attorney would of necessity have to be paid out of and from any all property obtained by her for his services in securing such part, it was held that the attorney was entitled to an equitable lien on the property recovered for reasonable compensation for his services, even though there was no agreement as to the amount of the compensation that should be paid, nor any express agreement as to any lien that the attorney should have to secure the same.

3.2 Persons entitled

Fundamentally, the right to assert a lien pertains only to duly licensed attorneys properly retained or employed to render service to a client. The right to assert a lien would not exist in respect of a contract to commit an illegality and may not be asserted by an attorney whose disbarment or suspension prevented his full performance of his retainer⁷². Implicit in the definition, concept and nature of a lien which is the right of an attorney at law to hold or retain in his possession, the money or property of a client until his proper charges have been adjusted and paid, makes it obvious that although a retaining lien may be properly asserted by either counsel to the plaintiff or defendant, a charging lien, which is an attorney's lien for his proper compensation, on the fund or judgment which his client has recovered by means of his professional aid and services, may only be asserted by counsel to the plaintiff, who necessarily is the person that has made a recovery. However, the attorney for the plaintiff is not the only one entitled to a lien; there may be instances where the attorney for the defendant is entitled to a charging lien. If for example, the defence attorney succeeds in obtaining an affirmative judgment in favour of his client, as in the case of a set-off or counterclaim, he may claim a lien for his services⁷³. Furthermore, an agreement between the attorney and his client may quite competently give the attorney a lien on property, the title to which he successfully defends against the claim of third persons⁷⁴. The right to be exercised by a solicitor claiming a lien largely depends upon the circumstances under which he has ceased to act for his client, the test being whether the solicitor has discharged himself or has been discharged by the client⁷⁵. A discharged attorney, other than one discharged for cause, has a retaining lien on the entire client's property in his possession, and a charging lien upon the client's claim in any recovery which might be obtained⁷⁶. When several attorneys have rendered services for the complainant in a suit, they are equally entitled to a lien for compensation on the fruits of the judgment⁷⁷. However, the mere fact that an attorney has aided by his professional services in obtaining a fund for his client does not ordinarily give him a lien upon it for his fees; possession is a necessary prerequisite⁷⁸. In any event, the attorney's lien for services in procuring a judgment is limited to the attorney of record, and its benefit does not extend to attorneys

⁷² In *Re Polansky*, 7A CJS 720, it was held that an attorney whose disbarment prevented his performance of a contract to handle a negligence action on contingent fee basis after he had performed substantial legal work but had neither effected settlement nor obtained verdict was entitled to no lien on either papers or proceeds of action.

⁷³ *T. Harlan & Co v. Bennett, Robbins & Thomas*, 7 Am Jur 2d 341

⁷⁴ *Mackall v. Willoughby*, 167 US 681, 42 L Ed 323, 17 S Ct 954

⁷⁵ *Aishabibi v. Ahmed Bin Essa* (1910), I. L. R. 35 Bom. 352, 43 E&ED 285

⁷⁶ *Gangewere v. Bernstein*, 4 F.P.D. 2d 786; in *re Badger*, 6 FD 438, it was also held that a discharged attorney has a general lien for balance of account for services on client's papers, securities, or moneys in his possession, and charging lien on client's cause of action. In *Bai Kesserbai v. Naranji Walji* (1880), I. L. R. 4 Bom. 353, 43 E&ED 289, it was held that a solicitor who is discharged by his client holds the papers entrusted to him subject to his lien for costs, and has the same lien upon translations as he has upon other documents, and the fact they have been made by the court's interpreters makes no difference.

⁷⁷ *Massachusetts & S. Const. Co. v. Township of Gill's Creek*, 6 FD 431, appeal dismissed 14 S. Ct. 1154, 154 U.S. 521, 38 L. Ed. 1073

⁷⁸ *Adams Express Co. v. Adams*, 6 FD 431

employed to advise and assist him⁷⁹, and to enforce attorney's lien against verdict or judgment for client and proceeds thereof, the attorney must appear as attorney of record⁸⁰.

3.4 Services and fees covered

A solicitor has apart from any order of the court or any statute, a lien over any property recovered or preserved, or the proceeds of any judgment, obtained for his client by the solicitor's exertions. The right of the solicitor is, in essence, a claim to the equitable interference of the court for the protection of the solicitor, and the question of the solicitor's lien is still governed by the relevant principles of English law⁸¹. The rule giving attorneys and solicitors a lien upon the recovery for compensation for their services extends also to expenses incurred in rendering the services⁸², so that a solicitor's lien extends only to his taxable costs, charges, and expenses, which category includes all disbursements which can be moderated by the taxing master⁸³, and where a solicitor has a lien upon his client's deeds for costs incurred by him, and the client upon application refuses to pay those costs, and the solicitor is driven to bring an action for them, the lien extended as well to the costs incurred by the client himself⁸⁴.

A charging lien covers not merely disbursements made on behalf of the client included in the taxable costs, but also compensation for the services of the attorney⁸⁵. If the amount of the compensation was agreed upon, the attorney has a lien to that extent⁸⁶; and if there was no specific agreement in respect of the attorney's fees, he is entitled to a reasonable compensation for his services, and he has a lien to that extent⁸⁷. A solicitor's particular lien over property recovered in proceedings conducted by him on behalf of his client is a right to the equitable interference of the court to enable the solicitor to retain, or to get a

⁷⁹ Foster v. Danforth, 6 FD 435

⁸⁰ Underhill v. Jacob Doll & Sons, 6 FD 435

⁸¹ Premasukhadas Singhania v. N. C. Bural & Pyne (1934), I. L. R. 61 Calc. 1005, 43 E&ED 301

⁸² McDougall v. Hazelton Tripod-Boiler Co., 6 FD 432

⁸³ Re Taylor, Stileman & Underwood, [1891] 1 Ch. 590; [1891—4] All E. R. Rep. 953; 60 L. J. Ch. 525; 7 T. L. R. 262; sub nom. Re Taylor, Stileman & Underwood, Ex p. Payne Collier, 64 L. T. 605, here, a firm of solicitors received for some years on behalf of a lady the income payable to her under the trusts of a will, and from time to time made advances to her and payments on her account. On being applied to for delivery up of her papers, they sent in an account of their receipts and payments showing a balance of £81 due to them, and claimed a lien for that sum. The only item in the account of such a nature that the taxing master could have moderated it was "*our costs to date, £20.*" She applied for an order for delivery of her papers on payment of £20 into court. The judge refused the application holding that the £81 ought to be paid into court. It was held that a solicitor's lien extends only to his taxable costs, charges, and expenses, which category includes all disbursements which can be moderated by the taxing master and are not necessarily allowed in full on being vouched, but does not include ordinary advances; there, therefore, was no lien for anything more than so much of the £20 as should be allowed on taxation, and the order asked for ought to have been made.

⁸⁴ Gray v. Graham (1855), 43 E&ED 298

⁸⁵ Central R. & Banking Co. v. Pettus, 113 US 116, 5 S Ct 387, 28 L Ed 915

⁸⁶ Carter v. Davis, 7 Am Jur 2d 340, in Blazek v. North American Life & Casualty Co., 99 A L R 2d 445, it was held that an agreement that client was to pay attorney one-third of all proceeds collected from an insurance company during the life of the client entitled the attorney not only to one-third of recovery up to the time of the judgment, but also one third of all future payments to be made under the insurance policy sued upon

⁸⁷ Slayton v. Russ, 146 A L R 64

charge on, the fund recovered, and is therefore limited to the costs incurred in the suit⁸⁸. In the absence of a statute or special agreement, a charging lien does not extend beyond the charges and fees in the suit in which the judgment was recovered; it does not cover any general balance that may be due the attorney from the client from the client for professional services rendered in other causes or transactions, so that normally, an attorney's special or charging lien on a judgment recovered by him never exceeds costs and fees due him in the particular suit⁸⁹. An attorney's lien upon the fruits of a suit is limited to the services rendered therein; and, although a number of separate suits involve the same questions, and are argued and determined together, the fruits of one are not subject to a lien for services rendered in the others⁹⁰. It is confined strictly to fees and costs due for services in the particular suit in which the judgment is rendered⁹¹, so that the value of services rendered in one suit cannot be included in a judgment establishing lien of an attorney for his fees on property recovered by his client in a different suit⁹². Consequently, the value of services rendered in one suit cannot be included in a judgment establishing the lien of an attorney for his fees on property received by his client in compromise of a judgment in a different suit⁹³. Although it does not secure a claim for unpaid fees under a general retainer, the charging lien, however, extends to and covers charges for fees and disbursements in suits incident to, or growing out of, the principal object of the employment⁹⁴; so that where a judgment has been obtained and an execution issued, and the attorney's lien has attached thereto, it will be held to extend to suits arising from and incidental to the enforcement of the judgment⁹⁵. Accordingly, even though, ordinarily, a charging lien for an attorney's fee can only be asserted against a judgment secured in the particular suit in which the services were rendered⁹⁶; the lien may however, extend to fees and disbursements in suits brought to recover other moneys covered by the same retainer, so that an attorney or solicitor in a case

⁸⁸ *Green Island Cement Co., Ltd. v. Deacon, Looker & Deacon* (1912) 43 E&ED 301

⁸⁹ *Everett, Clarke & Benedict v. Alpha Portland Cement Co.*, 6 FD 436; *Watson v. Maskell*, (1834) 131 ER 1158

⁹⁰ *Township of Gill's Creek v. Massachusetts & S. Const. Co.*, 14 S Ct 1154, 154 US 521, 38 L Ed 1073; however, in *Claflin v. Bennett*, 6 F D 400, where the amount due on a judgment recovered for the purchase price of property sold by the plaintiff to the defendant is paid into a court of equity for distribution, it was held that the plaintiff's attorneys are entitled to receive therefrom payment for meritorious services rendered by them to him in other suits growing out of said purchase, where such services were rendered with the expectation that they would be paid for out of the proceeds of such judgment.

⁹¹ *Markakis v. The Mparmpa Christos*, 7A CJS 723

⁹² *Chancey v. Bauer*, 6 FD 436

⁹³ *Davis v. Webber*, 7 Am Jur 2d 341

⁹⁴ *Re Paschal*, 77 US 483, 19 L Ed 992; in *Sympson v. Prothero*, (1857) 26 LJ Ch.671, S. and W. acted as attorneys for P., the plaintiff in an action for damages, and also as his solicitors in a suit instituted against him in equity to restrain the proceedings in the action. The court made an order in the suit, directing payment to P. of a gross sum for damages and costs. It was held that S. and W. had a lien upon the fund for their costs, both in the action and in the suit. In *Re Meter Cabs Ltd.* [1911] 2 Ch. 557; [1911-1913] All ER Rep. 1118; 81 LJ Ch. 82; 105 LT 572, a limited liability company employed a solicitor to establish a claim in an arbitration. Pending the arbitration, the company went into liquidation, and shortly after, the solicitor with the sanction of both liquidators compromised the claim for £29 which was paid to him and credited to the liquidators. It was held: (i) as the £29 was recovered by the exertions of the solicitor in the arbitration, he had a common law lien thereon for his costs of recovery, including the costs incurred prior to the liquidation; (ii) the solicitor's lien extended to the costs of establishing his retainer against one of the liquidators who disputed it.

⁹⁵ *Newbert v. Cunningham*, 7 Am Jur 2d 341

⁹⁶ *Thurston v. Bullowa*, 6 FD 436, certiorari denied *Bullowa v. Thurston*, 34 S.Ct. 674, 234 U.S. 756, 58 L.Ed. 1578

has a lien on moneys collected therein for his fees and disbursements in the case, and in any suit or proceeding brought to recover moneys and covered by the same retainer⁹⁷.

3.3 Proceedings to perfect

A retaining lien is complete and effective without notice to anyone⁹⁸, so that in the absence of statute, an attorney may not be required to give notice of a charging lien in order to make it effective⁹⁹. A lien is a creation of, and necessarily exists by operation of law. Consequently, between the attorney and his client, the giving of the notice of lien is not vital to the authority of a lien on a judgment recovered by the attorney. Beyond this, it is not necessary to give notice of lien to the opposite party, and no notice of lien is necessary to protect the attorney against an execution creditor of the client who levies on the judgment¹⁰⁰. Furthermore, it is not required that a notice of the lien be given to an assignee of the judgment¹⁰¹. However, the solicitor may give notice of his lien to the party liable to his client, who, if he nevertheless pays the client, becomes liable to the solicitor¹⁰², and as a general rule, a charging lien is not perfected until notice has been given to the person against whom such a lien is asserted¹⁰³. Consequently, a solicitor having a lien upon the title deeds of his client's estate, being retained by a lender to prepare a security for money to be advanced to the client on such estate, is bound to inform such lender of the existence of his own lien¹⁰⁴. The requirement for giving notice may however be obviated where the person against whom the lien is asserted has actual knowledge of the claim, or has notice of facts sufficient to put a prudent person on inquiry.

Where a statute requires that notice of a lien be given, if the statute does not prescribe the form and manner of the notice, no special form would be required. Consequently, actual notice of the claim, whether verbal or in writing answers every purpose of the requirement and is sufficient to protect the rights of the attorney¹⁰⁵. The manner of service of notice is not important, the chief consideration being the fact of service and the bringing home of notice to the party adjudged to pay¹⁰⁶.

⁹⁷ *In Re Paschal*, 77 US 483, 19 L Ed 992

⁹⁸ *Board of Commissioners of Edwards County v. Simmons*, 7A CJS 728

⁹⁹ *La Fleur v. Schiff*, 7A CJS 728

¹⁰⁰ *Barnes v. Verry*, 31 A L R 707

¹⁰¹ *Barnes v. Lipscomb*, (supra)

¹⁰² *Sullivan v. Pearson, Ex p. Morrison*, (1868) LR 4 QB153; 38 LJQB65; 19 LT 430

¹⁰³ *Home Insurance Co v. Jones*, 7A CJS 728

¹⁰⁴ *Gray v. Graham* (1855), 43 E&ED 298

¹⁰⁵ *Northrup v. Hayward*, 7 Am Jur 2d 342, where the judgment has actual notice of the lien or claim of the attorney, or where he has notice of such facts as to put a prudent person upon inquiry, it is sufficient to protect the rights of the attorney.

¹⁰⁶ *Alexander v. Clarkson*, 7 Am Jur 2d 342

3.4 Time when lien attaches

A contract that attorneys shall receive for their services a proportion of the amount recovered in a suit constitutes a valid lien upon a fund realized from a judgment recovered therein, which attaches immediately upon the rendition of the judgment, and is superior to all other liens, no matter how created¹⁰⁷. Attorney's lien attaches when cause of action to which it relates is commenced¹⁰⁸. The lien of an attorney on judgment for fees for services in a suit relates back to and takes effect from the commencement of the services¹⁰⁹. An attorney instituting a suit to enforce a client's right has a lien upon the cause of action from the commencement of the action and is not restricted to the cause of action in so far only as it may be enforced in court, but the lien exists even when the cause of action is prosecuted by private negotiation¹¹⁰. The attorney has a valid lien effective from the date he was retained by the client, but the lien was an inchoate lien until the date when the court, by virtue of its decision, made available a sum by which the lien could be computed and made choate¹¹¹, so that an attorney's lien cannot attach until some recovery is had for the client¹¹², and an attorney's charging lien does not attach until judgment is recovered, but, when recovered, the lien follows the judgment, and, where land is taken in satisfaction, the lien is transferred to the land¹¹³. Before judgment an attorney has no lien on his client's cause of action, and such a suit may be settled by plaintiff without the attorney's consent; and, where he does so, the suit must be dismissed¹¹⁴. Where a lawyer died before the full performance of a contract with a client involving contingent fees, a lien for the compensation to the extent the deceased performed the services arose in favour of the estate on successful completion of the cases¹¹⁵. A common law retaining lien on books and records in the possession of the attorney arises on the rendition of services by him regardless of whether the attorney has commenced any action on the client's behalf¹¹⁶.

3.5 Duration and termination of lien in general

Where possession of the res impressed with an attorney's retaining lien is essential to the existence thereof, such lien may continue so long as the attorney retains possession of the subject matter¹¹⁷. A client

¹⁰⁷ *Hutchinson v. Worthington*, 6 FD 433

¹⁰⁸ *Ingalls Iron Works Co. v. Fehlhaber Corp.*, 4 F.P.D. 2d 787

¹⁰⁹ *Hanna Paint Manufacturing Co. v. Rodey, Dickason, Sloan, Akin & Robb*, (supra)

¹¹⁰ *Universal Oil Products Co. v. Standard Oil Co. of Indiana*, 6 F D 442

¹¹¹ *Brooks v. US* 4 F.P.D. 2d 787

¹¹² *Lewis v. Canadian Pacific Railway Company*, 51 S. Ct. 76, 282 U.S. 869, 75 L. Ed 768; in *Cooper v. McNair*, 6 FD 439 it was also held that an attorney's suit to impress lien lies only after recovery of something to which lien can attach.

¹¹³ *Webster v. Sweat*, 6 F D 442, in *Mackall v. Willoughby* 17 S Ct 954, 167 U S 681, 42 L Ed 323 under an agreement by a client that the attorney shall have a lien for his fee upon whatever land may be "recovered" in certain suits, the attorney is entitled to a lien on all land, the title to which becomes vested in the client as the result of the suits, though not actually recovered therein

¹¹⁴ *Swanton v. Morning Star Mining Company*, 6 F D 442

¹¹⁵ *Mulqueen v. Commissioner of Internal Revenue*, 54 S Ct 62, 290 U S 644, 78 L Ed. 559

¹¹⁶ *Lerner v. Siegel*, 7A CJS 734

¹¹⁷ *Shannon v. Hendricks Circuit Court*, 7A CJS 735

employing a firm of solicitors is entitled to the services of all the members of the firm, and a dissolution of the partnership amounts to a discharge of the client. For the purpose of completing any business in hand at the time of discharging a client, the paper must be given up to his new solicitor, the lien of the former solicitor reviving on the completion of the business. The former solicitor is entitled to have a schedule of the documents so handed over, and the expense of preparing such schedule must fall upon the person requiring the papers¹¹⁸. Since the ultimate purpose of an attorney's retaining lien is to assist the attorney in procuring the amount due from his client, the client is entitled to delivery of the papers or documents on which the attorney has a retaining lien on payment of his indebtedness to the attorney¹¹⁹. Otherwise, an attorney's lien for compensation generally continues to exist until satisfied or released¹²⁰. An attorney's lien being a contractual right, ordinarily survives the death or disability of the client or the attorney. Provided it attached previous to such death or disability¹²¹.

3.7 Waiver, loss, or discharge of lien

On payment of his costs a solicitor's lien on documents of his client in his possession ceases; he is then bound to deliver them up on his client's demand, and cannot refuse delivery because third persons claim an interest in them¹²². The general or retaining lien is discharged by payment of the costs, by the solicitor parting with the papers except for a limited purpose (e.g. to enable a conveyance to be executed) or by waiver (e.g. where he acts for his client in obtaining a loan on the documents¹²³, or takes security for his costs¹²⁴. An attorney is entitled by an express act to waive his right to a lien. He would also be deemed to have his right to a lien if he, by an act inconsistent with the existence or assertion of the lien causes the lien to be lost. Consequently, an attorney may lose his lien by his failure or tardiness in asserting it expeditiously or in an accepted manner; though in order to lose his lien, the attorney must indicate either a waiver or an intention to waive. Accordingly, a lien may be waived by the party's setting up a claim to retain the chattel upon a different ground, and making no mention of the lien¹²⁵. Furthermore, an attorney may suffer deprivation of his right to a lien by reason of his failure to represent his client's interests

¹¹⁸ *Rawlinson v. Moss* (1861), 30 L. J. Ch. 797; 4 L. T. 619; 43 E. & E. D. 59

¹¹⁹ *McPherson v. Cox*, 96 US 404, 24 L Ed 746

¹²⁰ *Byram v. Miner*, 7A CJS 735; in *Gonzalez v. Sword Line Inc.*, (ibid), it was held that the retaining lien of attorneys on the papers of their client coming into their possession continues until the bill for services is fully paid.

¹²¹ *Simon v. Burke*, 7A CJS 735; in *Re Levine's Estate*, (ibid), it was held that the death of the deceased before his attorneys obtained judgment did not affect their attorney's lien which came into existence when special proceedings in customs court were instituted by them for the deceased. In *Kespohl v. Northern Trust Co.*, 33 A L R 3d 1368, where a client executed contingent fee contract with three attorneys and when one contracting attorney died some five years before the successful conclusion off the suit, the client did nothing inconsistent with the continuance of the contract. The second attorney dies during the pendency of proceedings to determine the compensation due to the attorneys. It was held that the death of the two contracting attorneys did not render the contract void, and the attorney was entitled to a lien for the services rendered.

¹²² *Re Emma Silver Mining Co.*, *Re Turner* (1875) 43 E&ED 297

¹²³ *Fitzgerald v. Bermingham*, *The Supreme Court Practice*, 1997, vol. 2, para 3885

¹²⁴ *Re Morris* [1908] 1 K.B. 473, C.A.

¹²⁵ *Weeks v. Goode* (1859), 141 E. R. 499, 43 E&ED 300

faithfully, honestly, and consistently, or by reason of his failure to discharge his duties with the strictest fidelity and utmost good faith¹²⁶.

The attorney's lien is not entirely extinguished by his death before termination of the litigation; it may be asserted to the extent of the reasonable value of the services rendered by him, even though his employment was on a contingent fee¹²⁷. When a client changes his lawyer on a pending matter, the client is entitled to: all letters written by the lawyer to other persons at the direction of the client; copies of letters written by the lawyer to other persons at the directions of the client; drafts and copies made in the course of business; and, documents prepared from such draft; and, the lawyer is entitled to: all letters written by the client to the lawyer; copies of letters address by the lawyer to the client; a lien on the papers or documents of his client in respect of unpaid fees¹²⁸. The court will upon application of a party to an action, permit him to change his attorney, allowing the attorney to retain in his hands the money, papers and documents belonging to his client until his claim shall be adjudicated¹²⁹. The discharge of an attorney by the client without good cause does not defeat a lien for attorney's fees¹³⁰. An attorney who terminates his services or withdraws from a suit without cause loses his inchoate right to a lien on the ultimate recovery¹³¹. However, his existing right to a lien on the papers in his possession is preserved¹³². Although a solicitor who discharges himself cannot set up a lien for costs as a reason for not delivering up papers necessary to enable his client to proceed with pending matters in litigation to which they relate, yet a solicitor who has been discharged by the client may set up such lien, and will not be ordered to produce or deliver up to the client the papers on which he claims the lien, although his not doing so will embarrass the client in prosecuting or defending his claims. Such lien is a general one, and extends to all costs due from the client to the solicitor¹³³. In this same manner, the court will not order the personal representative of a deceased solicitor to deliver the papers in the cause to another solicitor, without

¹²⁶ Western Life Insurance Co v. Nanney, 7A CJS 737

¹²⁷ Sergeant v. New York C & H R R Co., 7 AM Jur 2d 346

¹²⁸ Article 29(3) of RPC, 2007

¹²⁹ Texas v. White (Re Paschal) 19 L Ed 992

¹³⁰ Peresipka v. Elgin 59 A L R 2d 554; in Re Badger, 7A CJS 739, it was held that a discharged attorney has a general lien for a balance of account for services on his client's papers or securities, or moneys in his possession, and a charging lien on the client's cause of action. In Ambrose v. Detroit Edison Co., (ibid), where the client had caused a total breakdown in the attorney-client relationship, it was held that the attorney has a good cause to withdraw from the case and is entitled to a lien for his services on the ultimate judgment.

¹³¹ In Re Columbia Tobacco Co., 7A CJS 739

¹³² Hektograph Co v. Fouri, 7A CJS 739; in Robins v. Goldingham (1872), L. R. 13 Eq. 440; 41 L. J. Ch. 813; *sub nom.* Robins v. Goldingham, Re Suckling, 43 E. & E. D. 57, where a solicitor applied to his client for funds to carry on a suit, and upon the client not furnishing any, declined to continue to conduct the litigation, and the client appointed fresh solicitors, it was held that this was a discharge by the solicitor and he might be called upon to deliver to the new solicitors the papers relating to the matters in question in the suit, on their undertaking to hold them without prejudice to his lien, and to return them undefaced within twelve days after the conclusion of the suit, and to allow the former solicitor access to them for the purpose of carrying on an action for his costs

¹³³ Re Faithfull, Re London, Brighton & South Coast Railway Co. (1868), L. R. 6 Eq. 325; 18 L. T. 502

payment, or security for payment, of the solicitor's bill¹³⁴. An attorney's retaining lien survives bankruptcy, and is enforceable against clients or trustee; however, the attorney will be required to allow examination of the bankrupt's corporate books and records held under such lien where such examination is necessary for proper administration of the bankruptcy estate¹³⁵.

A charging lien held by an attorney on the client's claim is not disturbed by an order of substitution of the attorney or by any settlement between the parties. Attorneys working on contingent fee who have been discharged by the client have the option of taking a fixed sum compensation presently determined on the basis of *quantum meruit* or taking contingency amount also based on *quantum meruit* but with the amount determined in ancillary proceeding at the end of the case. Payment on either basis is in satisfaction of a charging lien on the client's claim¹³⁶.

A dissolution of a firm of solicitors amounts to a discharge of the client. If the solicitors discharging the client have a lien on the papers relating to a matter in progress, such papers must nevertheless be given up to his successors, the lien reviving on the completion of the business¹³⁷. Where a party has employed, as his solicitors in a cause, a firm of two solicitors in partnership, the retirement from the business of one of such partners, under an arrangement with the other, operates as a discharge of the client by the solicitors, and the client is thereupon entitled to require that the papers in the cause necessary for its prosecution shall be delivered up to his new solicitor, upon the usual undertaking for saving the lien, of the discharged solicitors¹³⁸. A solicitor does not acquire a lien for costs due to himself solely upon documents which came into the joint possession of himself and his partner or partners but he does not lose his lien for such costs upon documents which having come into his own possession are afterwards continued in the possession of himself and his partner or partners¹³⁹. Where a solicitor is in custody or detention in such circumstances that he is incapacitated from practicing, he would be ordered to deliver up his client's

¹³⁴ Redfearn v. Sowerby, Bolton V. Tate (1818), 36 E. R. 307, 43 E&ED 290; Swaby v. Dickson, Swaby v. Hamer (1848), 43 E&ED 291, the executrix of a deceased solicitor who, prior to his death, had carried on suits for a client, but who had declined to prosecute them, on the ground of advances for the necessary expenses not having been furnished to him by the client, but who had not discharged himself from being the client's solicitor, will not be ordered to deliver up to a new solicitor, all books, deeds, papers, and writings relating to the suits in her custody as executrix to the deceased solicitor, without the bills of costs of the late solicitor being first paid.

¹³⁵ Re Browy, 7 Am Jur 2d 335; in Re San Juan Gold, 6 FD 441, it was held that the lien which an attorney has for his fees upon papers of his client which come into his possession in course of his professional employment, is not invalidated by client's bankruptcy.

¹³⁶ Paolillo v. American Export Isbrandtsen Lines, 4 F P D 2d 751

¹³⁷ Rawlinson v. Moss (1861), 30 L. J. Ch. 797; 4 L. T. 619

¹³⁸ Griffiths v. Griffiths (1843), 12 L. J. Ch. 397; 67 E. R. 242

¹³⁹ Pelly v. Wathen (1849), 18 L. J. Ch. 281, 68 E. R. 144 Per Wigram, VC "A question was argued with reference to the continuance of the lien after the successive alterations in the firm of solicitors by whom the deeds were held. On this point I am clearly of opinion that the lien once acquired would not be affected by the circumstances that the party entitled to it afterwards admitted a partner or partners in his business; but I also think that the deeds which first came to the joint possession of the firm did not thereby become subject to a lien for costs due to some or one of the partners separately who may have acted as solicitor for the mortgagor before the constitution of the firm to which the deeds were delivered".

papers in pending suits, without payment of his costs, but to be held subject to his lien¹⁴⁰, and where a solicitor fairly carries on a suit, and there is no proof of misconduct or refusal on his part to proceed, although he becomes embarrassed and is changed, before final decree, that does not disentitle him to his lien for costs¹⁴¹.

A statute providing for an attorney's lien is solely for the protection of the attorney, and he may waive the benefits of the statute, but cannot be deprived thereof without his consent¹⁴². Accordingly, the lawyer is entitled at his option to release the lien which he has on the papers or documents of his client in respect of unpaid fees¹⁴³, but he may not be compelled to forgo or release the lien. An attorney waives his lien by releasing the lien of the judgment on which it exists, or by procuring satisfaction of such judgment¹⁴⁴. A charging lien is deemed to be waived if the attorney neglects to enforce it until the debtor has in good faith discharged the liability under the judgment or an innocent third person has, for valuable consideration, purchased the fruits of the judgment¹⁴⁵. Moreover, there is a waiver if the attorney agrees that the proceeds of the judgment shall be remitted as collected, and he shall receive payments as stated intervals¹⁴⁶. The purpose of the rule that an attorney's charging lien is waived if the attorney delivers the proceeds of the judgment to his client without exercising his lien is to avoid any misleading of third parties as to the status of the proceeds¹⁴⁷. Where a judgment on which there is a lien for contingent attorney's fees is assigned by the judgment creditor on the day it is recovered, upon an agreement by the assignee that he will pay the attorneys' fees first out of the proceeds of the judgment, the attorneys' acquiescence in such assignment will not constitute a waiver of their lien upon the judgment¹⁴⁸.

A solicitor's lien on papers is superseded by taking security¹⁴⁹, so that the right to pursue and claim the benefit of an attorney's lien may be waived by taking, or agreeing to take other security¹⁵⁰; and in this

¹⁴⁰ Re Williams (1860), 30 L. J. Ch. 609; 2 L. T. 764; 54 E. R. 444; Scott v. Fenning (1845), 15 L. J. Ch. 88; 43 E&ED 292, a solicitor, who had been the solicitor of the plaintiff in the cause, being detained in prison for debt, was ordered to deliver up to another solicitor appointed by the plaintiff, the proceedings in the cause, notwithstanding he had become a mortgagee of three fourths of the fund in question in the suit.

¹⁴¹ Re Smith (1861), 43 E&ED 293

¹⁴² McDougal v. Black Panther Oil & Gas Co., 6 F D 444

¹⁴³ Article 29(3) of RPC, 2007; in Caldwell v. Sumpters (a firm), [1971] 3 All E.R. 780, it was held that where solicitors who claimed a lien on certain deeds sent them to their clients' new solicitors with a letter saying they were being sent on the understanding that *"you will hold them to our order pending payment of our fees etc.,"* and the new solicitors replied that they were unable to accede to the request either to hold the deeds to the order of the former solicitors or to give undertakings mentioned the solicitors has lost their lien, but this decision was reversed by the Court of Appeal (see [1972] Ch. 478, [1972] 1 All E.R. 567

¹⁴⁴ Holbrook v. McKee, 7A CJS 739

¹⁴⁵ Fillmore v. Wells, 7 Am Jur 2d 345

¹⁴⁶ Gross v. Holzworth, 7 Am Jur 2d 345

¹⁴⁷ Ingalls Iron Works Co. v. Fehlhaber Corp., (supra)

¹⁴⁸ Hutchinson v. Worthington, 6 F D 444

¹⁴⁹ Cowell v. Simpson (1809), 33 E. R. 989, 43 E&ED 299

¹⁵⁰ In Re Graziane, 7A CJS 740; In Re Douglas Norman & Co., [1898] 1 Ch. 199; 67 L. J. Ch. 85; 77 L. T. 552, a client, on retaining a solicitor to negotiate for her a loan, upon the security of a reversionary interest to which she was entitled, signed a

respect, the facts of the case must be examined to ascertain whether the attorney has taken a security incompatible with existence of his charging lien¹⁵¹. Where securities are given by a client to a solicitor to secure the payment of particular costs, the solicitor's general lien is unaffected. Where a solicitor takes any security for his general costs which is inconsistent with the retention of his general lien, since it gives him some special advantage which the enforcement of the payment of his costs by the exercise of his right of lien would not give, that lien is gone unless he gives the client express notice of his intention to retain the lien. Thus, if a solicitor, when taking from his client any security for general costs intends to retain his lien, he ought, either to express words or by necessary implication, to make that intention known to his client¹⁵². Whether the taking security by a person having a lien is an abandonment of the lien depends on the intention, whether expressed or to be gathered from the circumstances of the case¹⁵³. The right to pursue and claim the benefit of an attorney's lien may also be waived by accepting payment under security previously given¹⁵⁴. The arrest of the clients' vessel does not amount to waiver of a solicitor's lien by taking alternative security¹⁵⁵; and the general practice of ordering papers to be handed over when the solicitors discharge themselves from their retainer may not be followed by the Court automatically but regard should be had to the conduct of the parties and the interests of justice¹⁵⁶. Nonetheless, the court has the power pursuant to an application brought for that purpose, and on a proper showing, to substitute a reasonable, appropriate and adequate security for that of a lien held by an attorney on his client's papers¹⁵⁷, so that the court has jurisdiction, upon payment into court, or giving security for a sum sufficient to answer the solicitor's demand, to order before taxation delivery up by a solicitor of the client's papers, where retention by the solicitor of the papers on which he claims a lien would embarrass the client in the prosecution or defence of pending actions¹⁵⁸.

The power of a court to compel a discharged attorney to deliver papers upon which he has a retaining lien is a discretionary power and may be invoked only upon proof that insistence by the attorney upon retention of the papers would be unfair if security is otherwise given to the attorney¹⁵⁹. Furthermore, an

document by which she charged that interest with the payment of the solicitor's costs. It was held that by taking this security the solicitor had waived his right to a lien in respect of his costs upon the documents belonging to the client which were in his possession.

¹⁵¹ Orwig v. Dixon, 7A CJS 740

¹⁵² Re Morris, [1908] 1 K. B. 473; 77 L. J. K. B. 265; 98 L. T. 500

¹⁵³ Re Taylor, Stileman & Underwood, [1891] 1 Ch. 590; [1891—4] All E. R. Rep. 953; 60 L. J. Ch. 525; 7 T. L. R. 262; sub nom. Re Taylor, Stileman & Underwood, Ex p. Payne Collier, 64 L. T. 605

¹⁵⁴ Orwig v. Dixon, 7A CJS 740

¹⁵⁵ A. v. B. [1984] 1 All E.R. 265

¹⁵⁶ The Supreme Court Practice, 1997, vol. 2, para 3885

¹⁵⁷ Simon v. Burke, 7A CJS 740; It was also held in Everett, Clarke & Benedict v. Alpha Portland Cement Co., 6 FD 441 that a court can order an attorney to deliver up his client's papers on security sufficient to meet demands.

¹⁵⁸ Re Galland (1885), 31 Ch. D. 296; 55 L. J. Ch. 473; 53 L. T. 921

¹⁵⁹ Singer v. Four Corner Service Station, 7A CJS 740; in Robins v. Goldingham (1872), L. R. 13 Eq. 440; 41 L. J. Ch. 813; sub nom. Robins v. Goldingham, Re Suckling, 43 E. & E. D. 57, where a solicitor applied to his client for funds to carry on a

attorney may be required to deliver the papers to the client, even though the retaining lien is thereby destroyed, where retention of the papers by the attorney may serve to embarrass the client, and the attorney is given security for his compensation¹⁶⁰. The overriding principle is that the Court should make such order as is most conclusive to the interests of justice by weighing up; the fact that the litigant should not be deprived of material relevant to the conduct of his case and, that litigation should be conducted with due regard to the interests of the Court's own officers who should not be left without payment for what was justify due to them¹⁶¹. Where an attorney sues his client on a claim for his services, and recovers judgment against his client, he will be deemed to have waived his lien. Thus, even though his lien is valid during the pendency of his action against his client for his compensation, upon a recovery of judgment, his lien lapses. This is because it would be unfair to permit him to contemporaneously assert both the claim and the judgment. Accordingly, he would be required to release the lien and proceed to a realisation of the judgement recovered.

An attorney's general or retaining lien may be defeated or lost when the attorney unjustifiably terminates his relationship with the client, or when the attorney is justifiably discharged by the client¹⁶². An attorney's retaining lien may be lost by voluntarily parting with possession of items to which it may have attached, even though the parting is by mistake¹⁶³, but where item is removed from the possession of the attorney fraudulently or in error or by accident, the lien is not lost¹⁶⁴. Where an attorney gives up his client's papers without payment of costs he cannot obtain an attachment for the non-payment of them¹⁶⁵, and if an attorney suffers a deed he has prepared to be executed before he is paid, he cannot afterwards detain it for his fees¹⁶⁶. However, the fact that the property is placed in the control of the attorney's agent does not affect the lien¹⁶⁷, and where the attorney permits the engrossment of the deed, or parts with

suit, and upon the client not furnishing any, declined to continue to conduct the litigation, and the client appointed fresh solicitors, it was held that this was a discharge by the solicitor and he might be called upon to deliver to the new solicitors the papers relating to the matters in question in the suit, on their undertaking to hold them without prejudice to his lien, and to return them undelayed within twelve days after the conclusion of the suit, and to allow the former solicitor access to them for the purpose of carrying on an action for his costs

¹⁶⁰ *Mercantini v. Innamorati*, (supra)

¹⁶¹ *Ismail v. Richards Butler*, (The Times, February 2, 1996), The Supreme Court Practice, 1997, vol. 2, para 3885

¹⁶² *The Flush*, 257 US 657, 66 L Ed 421, 42 S Ct 184, in *Western Life Insurance Co. v. Nanney*, 4 F.P.D. 2d 789, attorneys who had exclusive authority from client to take all legal steps necessary to enforce her claims under policies wherein she was named beneficiary and her children were secondary beneficiaries were not entitled to lien upon insurance fund interpleaded into the registry of the court, where the attorneys did not act faithfully, honestly, and consistently represent her interests and protect her rights, did not discharge their duties to her with the strictest fidelity, and did not observe the highest and utmost good faith towards her

¹⁶³ 7 Am Jur 2d § 322

¹⁶⁴ *In Re Carter*, *Carter v. Carter* (1885), 55 L. J. Ch. 230; 53 L. T. 630, one of the partners in a firm of solicitors left the firm, taking with him, unknown to the other partners, documents upon which they were entitled to a lien for costs. It was held that the lien of the firm was not destroyed by reason of the documents having gone out of their possession.

¹⁶⁵ *Hendy v. Collett* (1839), 43 E&ED 298

¹⁶⁶ *Anon.* (1694), 38; 91 E. R. 1393, 43 E&ED 298

¹⁶⁷ 7 Am Jur 2d § 322

possession of the documents on the express stipulation and that his lien is retained, the lien would in the circumstances be preserved¹⁶⁸. Additionally, an involuntary surrender, pursuant to the order of a court will not relinquish the lien¹⁶⁹. This is because, the court's power to compel attorney to deliver client's papers on which he has lien for compensation is based on court's control of his own officers, and the power to compel attorneys to act equitably toward client¹⁷⁰. Consequently, where an attorney, having a lien on papers, delivers them to an arbitrator to examine for the purpose of the arbitration, he does not lose his lien over the papers, and he may maintain trover, in case the arbitrator refuse to redeliver them, although, at the time of giving them up, he has not expressly reserved his lien¹⁷¹, and the court has no power to retain a deed which has been produced by a witness merely out of courtesy to facilitate proceedings¹⁷². A general retaining attorney's lien upon papers furnished by clients in connection with litigation commenced on behalf of clients would not be destroyed by the delivery of the papers in pursuance of a court order entered upon the client's motion for substitution of attorneys and for the turning over of the papers to the substituted attorney¹⁷³. However, where a client himself could not procure possession of papers from his attorney in violation of the attorney's right to retain possession of such papers in order to secure payment of his fees, a receiver of such client could not obtain the property from the attorney contrary to the lien rights of the attorney.¹⁷⁴ An attorney's retaining lien is not dissolved by the subsequent insolvency of the corporation and the appointment of a receiver. The receiver takes title to the corporation's property subject to any such retaining lien. Furthermore, the attorney's retaining lien on books and records of the corporation is not dissolved by his surrender of the books and records pursuant to an order of the bankruptcy court directing him to do so without prejudice to his lien¹⁷⁵. In any event, where a solicitor has a lien in respect of his costs over all the title deeds of his client, the client having several estates, the solicitor, in parting with the title deeds of one of those estates, does not lose

¹⁶⁸ *Watson v. Lyon* (1855), 24 L. J. Ch. 754; 44 E. R. 113, here, mortgagor instructed his solicitors, to whom he was indebted in a bill of costs, to prepare a reconveyance of the mortgaged property. They did so, and sent the engrossment to mortgagees' solicitors, with an intimation that they had a lien on it, and a request that mortgagee's solicitors would hold it on account of the mortgagor's solicitors. The engrossment was executed by mortgagees. The mortgage money was not paid, but mortgagor sold the property to purchasers who agreed to pay it. It was held that the mortgagor's solicitors had a lien on the engrossment, and such lien was not prejudiced by their having parted with the engrossment under the above circumstances, nor by the execution of it as a deed, nor by a promissory note delivered to the solicitors not covering their whole demand, and the purchaser had been properly restrained by injunction from proceeding at law to recover the deed.

¹⁶⁹ 7 Am Jur 2d § 322, in *Re Hauptmann*, (ibid), an attorney holding papers under a retaining lien has been indirectly ordered to surrender the papers to a former client for use as evidence in a murder case, the lien being judicially protected by provisions in the order that the papers were to be returned to the attorney after the murder trial, and that temporary loss of possession of the papers should not be deemed a loss of the attorney's lien.

¹⁷⁰ *In Re Badger*, 6 F D 390

¹⁷¹ *Whalley v. Halley* (1829), 43 E&ED 298

¹⁷² *Re Till, Ex p. Parsons* (1871), 43 E&ED 298, P., a witness, [a solicitor] having a lien upon a deed, was asked by the court to produce it. The deed was, upon its production, impounded by the court. It was held that the court had no power to retain the deed, even though it might be fraudulent.

¹⁷³ *Morse v. Eight Judicial District Court in and for Clark County*, 3 A L R 2d 138

¹⁷⁴ *In Re Wilkinson*, 7A CJS 742

¹⁷⁵ *In re Samuel August & Co.*, 4 F.P.D. 2d 789

his lien in the proportion which the value of such estate bears to the value of the whole estates, but he preserves the lien entire upon the remaining estates¹⁷⁶.

3.8 Subject matter of retaining lien

Ordinarily, counsel have a right to drafts as precedents, but not to detain them where either party may have a benefit from the inspection of them¹⁷⁷. Under the canons of professional practice, when a client changes his lawyer, the client is entitled to: all letters written by the lawyer to other persons at the direction of the client; copies of letters written by the lawyer to other persons at the directions of the client; drafts and copies made in the course of business; and documents prepared from such draft. On the other hand, the lawyer is entitled to: all letters written by the client to the lawyer; copies of letters address by the lawyer to the client; a lien on the papers or documents of his client in respect of unpaid fees¹⁷⁸. Accordingly, a solicitor is entitled to retain as his own property letters addressed to him by his client, and copies in his letter book his own letters to the client, after the client has transferred business to which such letters related to other solicitors¹⁷⁹. Usually, papers, books, files, records, securities, or other property delivered to an attorney by his client in the course of, and with reference to such attorney's professional employment may constitute the subject matter of a retaining lien¹⁸⁰. These would include ordinary legal documents, pleadings and processes in the possession of the attorney whether prepared by him or delivered to him in his capacity as attorney in the matter. It would also include deeds, conveyances, assignments, leases, deposit certificates, stock and bond certificates, land certificates, insurance policies, document drafts, and negotiable instruments¹⁸¹. Nevertheless, a solicitor has no lien upon the will of his client, and cannot refuse to produce a deed executed by the client in his favour, containing a reservation of a life interest, and a power of revocation¹⁸². A solicitor's lien for costs is not confined to deeds and papers, but extends to other articles delivered to him for the purpose of being

¹⁷⁶ Gray v. Graham (1855), 43 E&ED 298

¹⁷⁷ Stanhope v. Roberts, 26 E. R. 532, 3 E. & E. D. 375

¹⁷⁸ Article 29(3) of RPC, 2007

¹⁷⁹ *Re Wheatcroft* (1877), 6 Ch. D. 97; 46 L. J. Ch. 669; 43 E. & E. D. 60

¹⁸⁰ *Prichard v. Fulmer*, 2 A L R 474; in *Underhill v. Jacob Doll & Sons*, 6 FD 441, it was reiterated that an attorney has retaining or possessory lien on client's papers, securities, or moneys coming into his possession in course of professional employment. However, an attorney has a retaining lien on only such papers of his client as come into his possession lawfully in usual course of professional employment, not by accident, mistake, or unauthorized act of correspondent in foreign jurisdiction.

¹⁸¹ *Prichard v. Fulmer*, 2 A L R 474; In *Stevenson v. Blakelock* (1813), 105 E. R. 200, 43 E&ED 285, where C. gave his attorney a specific sum for the purpose of satisfying a debt for which an execution had issued against his goods at the suit of B., & the attorney paid the money to B., who thereupon delivered to him a lease which had been deposited by C. with B. as a security for the debt; it was held that the attorney has a line on it for his general balance due from C.

¹⁸² *Balch v. Symes* (1823), 37 E. R. 1028, 43 E&ED 288, where a deed is sought to be impeached, plaintiff is entitled to have it produced, and the defendant cannot resist the production upon the ground of lien. In a suit instituted against a solicitor who had also acted in the capacity of steward, for an account and for delivery of title deeds, the court upon motion ordered the deeds to be delivered up to the plaintiff upon payment into court of so much of the balance claimed by the answer as was not covered by any security.

exhibited to witnesses on the trial of an action¹⁸³. Since the attorney's possession of something to which the retaining lien can attach is essential to the existence of such a lien, in order for the subject matter of a retaining line to be considered as such, it must be in the actual possession of the attorney claiming such lien¹⁸⁴. For that reason, money cannot become the subject matter of a retaining lien until such money is actually collected and paid to the attorney, and a retaining lien does not extend to a judgment until the money is paid to the attorney¹⁸⁵. In this respect, an attorney has a lien on money in his possession collected for his client to secure a reasonable compensation for professional services and disbursements, and may retain enough of the money to pay the general balance due him for such services and disbursements, although rendered and made in different suits or litigations¹⁸⁶. In any event, an attorney has no lien on his client's money in his hands, beyond the amount in which the latter is indebted to him¹⁸⁷. Moreover, in order that the papers, securities or other property delivered to an attorney may constitute the subject matter of a retaining lien, it is essential that the particular subject matter come into the possession of the attorney in the course of his professional employment¹⁸⁸. Thus, although a solicitor has a lien on papers delivered to him in that character, for all professional business, but he has no lien as a solicitor on papers delivered to him as steward¹⁸⁹. However, even though, the attorney has a general lien on documents, securities, or money in his possession, he does not have any such lien on property in litigation, in which he acts as defendant's attorney¹⁹⁰.

A retaining lien permits an attorney to passively hold the subject matter of the lien against the settlement of his fees. Even though he may not be compelled to surrender or even permit the inspection or copying of the papers with respect to which he claims a lien, on the other hand, he does not possess any ownership rights over the papers and documents. Accordingly, where he deals with the property in a manner depicting ownership, his acts would be unlawful and would leave him open to a claim in damages. Attorneys general lien on client's papers is not limited to services in particular suit, but secures any

¹⁸³ *Friswell v. King* (1846), 60 E. R. 590, 43 E&ED 288; *General Share Trust Co. v. Chapman* (1876), 46 L. J. Q. B. 79; 36 L. T. 179

¹⁸⁴ *Reynolds v. Warner*, 97 A L R 1128; for the purposes of the subject matter of the retaining coming into the possession of the attorney, there is no requirement for their actual possession, thus constructive delivery of the items is sufficient for the attorney to obtain possession of them in order to assert his lien.

¹⁸⁵ *Anderson v. Brackeleer*, 7A CJS 744

¹⁸⁶ *Meloy v. Meloy*, 6 FD 437, here, it was further held that the lien secures charges for services performed for a deceased client, as well as those performed for the representative of the estate of the decedent.

¹⁸⁷ *Miller v. Atlee* (1849), 43 E&ED 285

¹⁸⁸ *Underhill v. Jacob Doll & Sons*, 7A CJS 744; in *Klein v. Acco Products*, (ibid), it was held that upon the substitution of attorneys, the former attorneys were entitled to a general lien on any papers in their possession as security for the payment of their fee. In *Re Weitling*, (ibid), it was held similarly that an attorney who is discharged during the pendency of litigation has a retaining lien for his services on papers pertaining to such action.

¹⁸⁹ *Champernown v. Scott* (1821), 56 E. R. 1026, 43 E&ED 287

¹⁹⁰ *Gray v. Hopkins-Carter Hardware Co.*, 6 FD 438

general balance¹⁹¹. Property or funds delivered for a special purpose by a client to his attorney cannot constitute the subject matter of a retaining lien in favour of such attorney¹⁹², so that an attorney possessing property solely as an escrow agent is not entitled to a retaining lien on such property¹⁹³, neither may he assert a lien over funds received by him in the capacity of trustee of the funds¹⁹⁴. Where funds or property are delivered to the attorney for a special purpose, on the failure of the special purpose for which it was deposited, the money or property would remain in their hands subject to a trust to repay or return it to their client, and they cannot set up their claim to costs in answer to a demand for the return of the money or property; and the money remains a debt due from them to their client which could be attached¹⁹⁵. However, as an exception to this principle, a solicitor has a lien for his costs, upon all papers that come into his hands for the purpose of business, though not papers in the cause in which he makes the demand¹⁹⁶.

3.9 Subject matter of charging lien

Customarily, an attorney's charging lien attaches to the fruits of his skill and labour¹⁹⁷, and attaches not to the cause of action or the ultimate balance due after all accounts are adjusted, but to the judgment itself which has been obtained by his efforts¹⁹⁸. The attorney's charging lien is only a lien on the fruits of the attorney's labour and is not intended to give a general lien on any other assets of the client¹⁹⁹, so that the general lien of a solicitor for costs due by his client does not extend to a fund which the client can reach

¹⁹¹ *Everett, Clarke & Benedict v. Alpha Portland Cement Co.*, 6 FD 436

¹⁹² *Spencer v. Spencer*, 7A CJS 745; in *Gajanand Panday v. Gayanand Panday* (1944), 1 L. R. 1 Cal. 445 43 E&ED 287, it was held that the particular lien of a solicitor which entitles him to have his costs out of the property obtained for his client by the solicitor's exertions, does not attach to money which has come into his hands for a particular purpose.

¹⁹³ *Trophy v. Reder*, 7A CJS 745; in *Entertainment and Amusements of Ohio Inc v. Barnes*, (ibid), where the subject matter of escrow agreement came to law firm solely as escrow agent and not in any professional capacity as attorneys for the plaintiff, the documents and cheques were deposited with the attorneys pursuant to an escrow contract to hold them as custodian until the plaintiff had complied with certain enumerated conditions, the escrow agreement was entirely independent of the retainer and made no reference to the attorneys' retainer or to any compensation or reimbursement for expenses of escrow, it was held that neither the attorney nor his firm had a retaining lien upon the escrow property prior to the trial of the action to determine who was entitled to the escrow property.

¹⁹⁴ *Re Clark, Ex p. Newland* (1876), 4 Ch. D. 515; 35 L. T. 916, here, the creditors of a liquidating debtor agreed to accept a composition payable by instalments. The amount required for the payment of the second instalment was received by the debtor's solicitor, who issued a circular to the creditors stating that he would be prepared to pay the instalment on a certain date. The solicitor having afterwards claimed a lien upon the money for payment of his costs, charges, and expenses; it was held that he had constituted himself a trustee for the creditors, and could claim no lien upon the fund.

¹⁹⁵ *Stumore v. Campbell & Co.*, [1892] 1 Q. B. 314; [1891-4] All E. R. Rep. 785; 61 L. J. Q. B. 463; 66 L. T. 218; 8 T. L. R. 99; 36 Sol. Jo. 90, C. A., here, the plaintiff, as execution creditor, applied to attach money in the hands of defendants, the garnishees. The money had been deposited by judgment debtor with defendants for a special purpose that had failed. Defendants claimed that the judgement debtor was indebted to them for law costs in a larger sum than that deposited with them, and that they would be entitled to counterclaim for the amount due to them. It was held that since, on the failure of the special purpose for which it was deposited with defendants, the money remained in their hands subject to a trust to repay it to judgment debtor, they could not have set up their claim to costs in answer to a demand for the return of the return of the money, and it was a debt due from them to judgment debtor which could be attached.

¹⁹⁶ *Ex p. Nesbitt* (1805), 43 E&ED 287

¹⁹⁷ *Wylie v. Coxe*, 56 US 415, 14 L Ed 753

¹⁹⁸ *Re Fairbairn, Brownscomb v. Tully*, 43 E. & E. D. 302

¹⁹⁹ *Midvale Motors Inc v. Saunders*, 7A CJS 746

without the assistance of the solicitor or the use of the papers in his possession²⁰⁰. The judgment, which has been procured by the efforts of an attorney while acting on behalf of his client, is primarily the subject matter of a charging lien in favour of such attorney²⁰¹. Consequently, if the attorney's work is sterile and produces no fruit, then he has no lien²⁰², so that an attorney cannot obtain a lien to funds to which his client has no claim²⁰³; and where nothing was recovered under contingent fee agreement, there is no fund to which lien could attach²⁰⁴. Attorney's lien for services rendered to a plaintiff does not attach to an order of dismissal of action, notwithstanding the order is a judgment subject to the control of the court, since it is not a judgment in favour of the plaintiff nor one which has pecuniary value to the plaintiff²⁰⁵; however, the lien of an attorney attaches upon money received by way of a compromise; though the verdict and the judgment be against his client²⁰⁶. Again, an attorney's general lien does not extend to a judgment uncollected by the attorney, so as to bind the proceeds when collected by the judgment creditor or his assignee, or other attorneys who may collect the same without the use of papers in his hands²⁰⁷.

However, courts have exercised authority to allow an attorney a lien for his fees on a fund his labours have created or assisted to bring into existence, unless some consideration of public policy or other special reasons stand in the way²⁰⁸. Accordingly, a judgment which has been procured by the efforts of the attorney while acting on behalf of the client is primarily the subject matter of a charging lien in favour of the attorney, whether the fund has been created or a motion is made to pay judgment so procured by way of a set-off²⁰⁹, and where a sum sufficient to cover the attorney's lien was set aside and deposited in special account subject to further order of court, court could enforce attorney's lien thereon²¹⁰. A contract

²⁰⁰ *Hodgens v. Kelly*, 43 E. & E. D. 302

²⁰¹ *US v. Transocean Air Lines Inc*, 7A CJS 747; in *Millsap v. Sparks*, (ibid), it was held that the legal effect of a contract between a creditor and an attorney, whereby the attorney, for suing the debtor was to have a portion of the amount recovered, was to create a lien on the judgment; and in *Linder v. Lewis, Roca, Scoville & Beauchamp*, (ibid), it was held that in order to create a charging lien against a judgment, it must appear that the parties looked to the fund itself for the payment of the attorney.

²⁰² *Midvale Motors Inc v. Sauders*, (supra)

²⁰³ *O'Keefe v. Landow*, 4 F.P.D. 2d 785

²⁰⁴ *Spellman v. Bankers' Trust Co.*, 6 FD 434

²⁰⁵ *Universal Oil Products Co. v. Standard Oil Co. of Indiana*, 6 FD 440

²⁰⁶ *Davies v. Lowndes* (1847) 136 ER 324

²⁰⁷ *In Re Wilson*, 6 FD 441

²⁰⁸ *Costigan v. Stewart*, 7 Am Jur 2d 347; in *Verity v. Wylde, Re Downes*, (1859) 28 LJ Ch. 561; 62 ER 164, it was explained that a solicitor's lien is not a general on a fund in court though brought in by his exertions, but only on what may, on the issue of the suit, belong to his client. Therefore, where by the exertions of a plaintiff's solicitor a fund was ordered to be brought into court on which the defendants had a primary claim, and afterwards the plaintiff changed his solicitor, and the parties were proceeding without bringing the fund into court to divide it under compromise, without paying the plaintiff's original solicitors. It was held that he had no lien on the fund, but it was ordered that no order should be made by compromise or otherwise for payment of any money to the plaintiff without notice to the plaintiff's original solicitor.

²⁰⁹ *Proie Bros Inc. v. Proie*, 4 F.P.D. 2d 787

²¹⁰ *Brooks v. Mandel-Witte Co.*, 6 FD 438; certiorari denied *Mandel-Witte Co. v. Brooks*, 52 S.Ct. 641, 286 U.S. 559, 76 L.Ed. 1292

for the payment of attorney's fees out of the judgment recovered operates as an equitable assignment of the fund *pro tanto* and creates a lien²¹¹, and the lien of an attorney on his client's judgment is equivalent to a *pro tanto* assignment of the judgment as collateral security for fees and disbursements²¹².

It is a question of fact what property is recovered or preserved²¹³, and this must be construed with reference to various classes of litigation²¹⁴. It includes an unpaid debt under a judgment or award²¹⁵; and costs ordered to be paid by one party to the other²¹⁶. It includes money payable on the compromise of an action, though the amount is not ascertained it may still be a 'sum recovered'²¹⁷. The term '*property recovered or preserved*' includes even the interest of persons not employed by the solicitor and not parties to the suit, if they adopt the benefit obtained by the suit²¹⁸. It includes money recovered for the client by the appointment of a receiver by way of equitable execution²¹⁹, when the order appointing the receiver has been completed²²⁰; and also the produce of rents paid into Court by the receiver appointed in the action²²¹, even if the proceedings are afterwards compromised²²², but not if they are discontinued²²³. It includes the client's interest in a fund in Court consisting of dividends payable to a company which has been wound up²²⁴. Property may have been '*recovered or preserved*' by a judgment for foreclosure of a mortgage²²⁵; so may the amounts recovered by a receiver in a debenture-holder's action as the result of proceedings taken by his solicitors²²⁶. Property devised and bequeathed by a will established in a probate

²¹¹ US v. Transocean Air Lines Inc. (supra)

²¹² Peresipka v. Elgin, (supra)

²¹³ Rowland v. Williams, The Supreme Court Practice, 1997, vol. 2, para 3894

²¹⁴ In the Estate of White (1933) 49 T.L.R. 325; in Loescher v. Dean, [1950] 2 All E. R. 124; [1950] Ch. 491; 66 (pt. 1) T. L. R. 1208, a purchaser in an action for specific performance obtained judgment and an order that the defendant vendor should convey to the plaintiff the property in the suit on the payment by the plaintiff of a stated sum. Completion was effected, the plaintiff paying the sum to the defendant's solicitors who paid it into their "client account." The plaintiff then obtained a garnishee order *nisi* in respect of his costs to attach all debts due by defendant's solicitors to defendant. Defendant's solicitors, who had not rendered a bill of costs to their client, took out a summons for a charging order on the sum paid by the plaintiff under Solicitors Act, 1932, s. 69. On the hearing of this summons for a charging order on the sum paid by plaintiff, and of the summons to make the garnishee order absolute; it was held: the sum paid by the plaintiff on completion was not money *recovered or preserved* by the solicitors within the Solicitors Act, 1932 (c. 37) s. 69, and the solicitors accordingly had no right to a charging order in respect of it.

²¹⁵ Birchall v. Pugin (1875) L.R.10 C.P. 397

²¹⁶ Dallow v. Garrold (1884) 14 Q.B.D. 54; Re Deakin [1900] 2 Q.B. 489

²¹⁷ The Paris [1896], The Supreme Court Practice, 1997, vol. 2, para 3894; Ross v. Buxton (1889) 42 Ch.D. 190

²¹⁸ Green v. Young, (1883) 24 Ch. D. 545

²¹⁹ Duff v. Tuite, the Supreme Court Practice, 1997, vol. 2, para 3894

²²⁰ Wingfield v. Wingfield, [1919] 1 Ch. 492

²²¹ Re Knight [1892] 2 Ch. 368

²²² Twynam v. Porter (1870) L.R. 11Eq. 181

²²³ Wingfield v. Wingfield, (supra)

²²⁴ Re Born [1900] 2 Ch. 433

²²⁵ Wilson v. Round, The Supreme Court Practice, 1997, vol. 2, para 3894

²²⁶ Re Home & Sons Ltd. [1906] 1 Ch. 271

action²²⁷, or property recovered under a declaration of intestacy, under which the client takes a share²²⁸, may be charged under this heading.

Money ordered to be paid into court by a defendant as a condition of leave to defend under is property '*recovered or preserved*' through the instrumentality of the plaintiff's solicitor, and he may obtain a charging order upon it²²⁹. The same applies to money paid into court by a defendant for the plaintiff may take it out²³⁰, and the plaintiff's solicitor may obtain such an order even if he has discharged himself, provided that he has not done so wrongfully²³¹. However, if the plaintiff does not take the money out of court and recovers a lesser sum at the trial, his solicitor could then only obtain a charging order on the sum recovered; and if there is a counterclaim by the defendant, which has succeeded, he may only obtain a charging order on the balance²³². Furthermore, money ordered to be paid into court by a party to abide the further order of the court, and later ordered to be repaid to that party- confirm exact provisions in local rules, is not money '*recovered*', or even '*preserved*'. The same applies to money paid into court as security for costs²³³. Where a fund was paid into court by one party to abide the court's decision, and it was not till later that the other party instructed his solicitor, who was successful in establishing his client's right to a share in the fund, that share was held to be '*property recovered or preserved*' and the solicitor was entitled to a charging order over it²³⁴.

Where an action is dismissed, and thereby the plaintiff's claim to property in the hands of the defendant is defeated, such property is '*preserved*' for the defendant²³⁵; and where a claim is resisted and a lesser claim established, the balance between the two may be '*property preserved*'²³⁶. Property, '*managed or retained*' for the person entitled is '*preserved*' within this rule, though yielding little or nothing²³⁷. The assets of a company '*preserved*' by a scheme approved by the court have been charged for the company's solicitor's costs of the winding-up and reconstruction²³⁸. Property may be preserved within this meaning by any proceedings for administration or relating to its ownership; but property is not '*preserved*' by the mere successful resistance to an application for a mandatory injunction respecting light and air²³⁹, and

²²⁷ Ex p. Tweed (1899) 2 Q.B. 167

²²⁸ In the Estate of White, (supra)

²²⁹ Moxon v. Sheppard (1890) 24 Q. B. D. 627

²³⁰ Emden v. Carte (1881) 19 Ch. D. 311 C.A.

²³¹ Clover v. Adams (1881) 6 Q.B.D. 622

²³² Westacott v. Bevan (1891) 1 Q.B. 774

²³³ Re Wadsworth (1885) 29 Ch.D. 517; Pierson v. Knutsford Estates Co. (1884) 13 Q.B.D. 666

²³⁴ Wimborne v. Fine [1952] Ch. 869

²³⁵ Bulley v. Bulley (1878) 8 Ch. D. 479; Ex p. Tweed [1899] 2 Q.B.167, C.A.

²³⁶ The Birnam Wood, The Supreme Court Practice, 1997, vol. 2, para 3895

²³⁷ Re Turner [1907] 2 Ch. 1260

²³⁸ Re John Clayton Ltd. (1905) 92 L.T. 223

²³⁹ Foxon v. Gascoigne, (1874) L.R. 9 Ch. 654

property preserved from a solicitor's own attacks is not property preserved for the owner²⁴⁰. However, the court will not, in the exercise of its discretion, make a charging order on property which, by statute or rule, is intended for the benefit of the client or is intended to be inalienable. So, although a gross or annual sum secured to the wife after dissolution or nullity of marriage may be charged²⁴¹, monthly or weekly payments of maintenance and alimony pendente lite are not chargeable²⁴².

In absence of any recovery, proof of agreement that attorney should be paid from a particular fund together with a definite appropriation by the debtor of specific fund for that purpose is necessary for creation of lien²⁴³; and an agreement between attorney and client that, to secure the attorney's pay for work done in a number of cases, he shall have a lien on the recovery in any one case, gives an equitable lien or assignment of corresponding scope²⁴⁴.

After judgment, the cause of action is merged in the judgment, and the attorney's lien accordingly attaches to the judgment²⁴⁵. The charging lien of an attorney may attach to the fruits of his labour in whatever manner they may be realised so long as they result from his exertion²⁴⁶. An attorney's lien attaches to the client's cause of action, and any recovery thereon, albeit recovery is effected in an action other than the action in which the services were rendered; and this is especially so where recovery is effected in an action which is a logical sequence of a prior action in connection with which the services were rendered²⁴⁷. An attorney's charging lien may attach to money judgments or to judgments relating to real or personal property²⁴⁸.

Subject to the rule that a charging lien may under certain circumstances attach to the judgment recovered by an attorney and the proceeds in whatever form and in whosoever hands they may be, it is generally considered that a charging lien may not extend to money in the hands of a third person²⁴⁹. An attorney has a lien upon the funds in his hands for the amount of his fees and disbursements in the action.

²⁴⁰ *Wingfield v. Wingfield*, (supra)

²⁴¹ *Harrison v. Harrison*, *The Supreme Court Practice*, 1997, vol. 2, para 3895

²⁴² *Watkins v. Watkins*; *Smith v. Smith*; *Leete v. Leet*; *The Supreme Court Practice*, 1997, vol. 2, para 3895; *Cross v. Cross* (1880) 43 L.T. 533

²⁴³ *Dempsey v. Pink*, 6 FD 434, certiorari denied 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520; in *Woods v. Dickinson*, 6 FD 435, an attorney sought to establish a lien upon funds recovered by him for his client, other than a technical attorney's lien for the value of his services. It was held, that a mere agreement to pay out of a particular fund is not sufficient to establish an equitable lien thereon, but there must be such an appropriation or transfer of the fund as will authorize the holder to pay the amount directly to the creditor.

²⁴⁴ In *Re McCrory Stores Corporation*, 6 FD 435; in *Woodbury v. Andrew Jergens Co.*, 6 FD 435, it was held that under plaintiff's agreement to pay his attorneys, one of whom was not attorney of record, third of amount recovered from defendant, such attorney became equitable assignee of cause of action pro tanto, though he had no charging lien for fees.

²⁴⁵ *Noell v. Missouri Pacific Rail Co.*, 94 A L R 684

²⁴⁶ *Prichard v. Fulmer*, 2 A L R 474

²⁴⁷ *Neimark v. Martin*, 7A CJS 749

²⁴⁸ *Grace v. Solomon*, 7A CJS 751

²⁴⁹ *Lyman v. Campbell*, 7A CJS 752

Consequently, the court will deny a motion that he pays the money into court²⁵⁰. However, an attorney's charging lien will not attach to money in the hands of receivers²⁵¹. In the absence of constitutional or statutory provision to bind such funds, an attorney can have no charging lien on public funds recovered for the state²⁵². A statute that provides for an attorney's lien on his client's cause of action or on the judgment or fund realised for the client does not grant a lien on the proceeds of a judgment in favour of the state²⁵³. A statutory attorney's lien does not apply in suits on behalf of taxpayers to recover public funds misappropriated by public officials²⁵⁴. It is consequently doubtful whether in any case, an attorney's lien can be successfully asserted against money appropriated by a legislature to any person while it remains in the hands or under the control of an officer of the state²⁵⁵. An attorney or solicitor has a lien upon a judgment or decree obtained for a client, to the extent that the latter has agreed to apply him; or, if there has been no specific agreement for compensation, to the extent to which he is entitled to recover, viz, reasonable compensation for the services rendered²⁵⁶. An attorney who undertook to recover property with the understanding that he should be paid a reasonable fee from the property was held to be entitled to have an equitable lien declared on such property which he recovered for his client²⁵⁷; and an attorney has a lien for what is due to him in that capacity on the papers of his client in his hands²⁵⁸.

4. Protection and Enforcement of Lien

4.1 Protection against assignment by client

It is not necessary to give notice of the existence of a lien in order to protect the lien against assignment by the client or attachment by the clients' creditor. This is because an attorney is not required to give notice of a common-law retaining lien on papers in his possession before it becomes operative²⁵⁹. An assignment of a judgment will not defeat an attorney's lien which has already attached, even if the assignee is without notice of the lien²⁶⁰, and the lien of an attorney remains although the claim is barred by a statute of limitations²⁶¹. The assignee of a judgment takes it subject to a lien in favour of the attorney

²⁵⁰ *Texas v. White (re Paschal)*, 19 L Ed 992

²⁵¹ *Costigan v. Stewart*, 7 Am Jur 2d 350

²⁵² *Commonwealth v. Gerlach*, 7 Am Jur 2d 350

²⁵³ *State v. National Surety Co*, 2 A L R 251

²⁵⁴ *Stephens v. Holten*, 24 A L R 929

²⁵⁵ *Sayre v. Moore*, 7 Am Jur 2d 350

²⁵⁶ *Central R. & Banking Co. v. Pettus*, (supra)

²⁵⁷ *Scott v. Kirtley*, 93 A L R 661

²⁵⁸ *McPherson v. Cox*, 96 US 404, 24 L Ed 746

²⁵⁹ *Weed Sewing Machine Co v. Boutelle*, (supra)

²⁶⁰ *Bent v. Lipscomb*, (supra)

²⁶¹ *Re Broomhead* (1847), 16 L. J. Q. B. 355; *Re Carter, Carter v. Carter* (1885), 55 L. J. Ch. 230; 53 L. T. 630, the claim in respect of which the lien existed was barred by the Statute of Limitations, and it was held that the lien was not thereby affected.

through whose services it was secured²⁶²; similarly, the assignee of a cause of action or of the subject matter of the litigation takes subject to the attorney's lien thereon²⁶³. However, if the lien does not exist at the time of the judgment, if the plaintiff assigns his interest in the judgment before it is entered, the assignee will hold free of the attorney's lien²⁶⁴. An attorney may prevent or set aside assignments made in fraud of his lien, and may proceed against one who has accepted a pledge of certain paper to which the attorney's lien has attached²⁶⁵.

4.2 Protection against settlement between parties

The claims of solicitors cannot interfere with the equities between the parties, and the latter may compromise any matter wholly irrespective of them²⁶⁶. Accordingly, a client has an absolute right to settle his case without the consent of his attorney²⁶⁷, and a plaintiff may, without consulting his attorney, compromise an action with the defendant and take on himself the payment of the costs to the attorney, if there be no fraudulent conspiracy to cheat the attorney of his costs²⁶⁸. An attorney has a lien upon the judgment for his costs but not upon the action; and an arrangement between a plaintiff and the defendant to settle the action is binding upon them, unless either party has been imposed upon, or unless the arrangement is made with a view to prevent the attorney from obtaining his costs in that particular action²⁶⁹. The right of a litigant to compromise his case is not subject to the lien of his attorney for a fee, and until final determination of the litigation, the client may control the suit and settle the case even against the wishes of his attorney; but any compromise by the client against the wishes of the attorney must be in good faith and without the purpose to defeat the attorney's claim for compensation²⁷⁰. A plaintiff has the absolute right to make settlement of his claim directly with the defendant and without the knowledge or consent of his employed counsel, but, by so doing, he cannot deprive the attorney of his fee²⁷¹; and this competence of the client to settle his action behind the back of his solicitor subsists notwithstanding that the solicitor has given notice to the client and to the opposite party not to settle without his consent. Upon such settlement, unless where collusion between the parties to defraud the plaintiff's solicitor of his costs is clearly shown, a defendant will not be ordered to pay the costs of the plaintiff's solicitor²⁷². However, the court will exercise its equitable interference on behalf of a solicitor

²⁶² *Linder v. Lewis, Roca, Scoville & Beauchamp*, 7A CJS 7661

²⁶³ *In Re Leopold*, 7A CJS 761

²⁶⁴ *Potter v. Mayo*, 7 Am Jur 2d 347

²⁶⁵ *Edwards v. Dowdy*, 7A CJS 762

²⁶⁶ *Grand Trunk or Stafford & Peterborough Railway Official Manager v. Brodie*, Ex p. *Turquand*, (1853) 43 E. & E. D. 306

²⁶⁷ *Raabe v. Universe Tankships*, 4 F.P.D. 2d 790

²⁶⁸ *Chapman v. Haw*, (1808) 127 ER 865

²⁶⁹ *M'Pherson v. Allsop*, (1839) 8 L. J. Ex. 262

²⁷⁰ *Nichols v. Orr*, 2 A L R 449

²⁷¹ *Katopodis v. Liberian S/T Olympic Sun*, 4 F.P.D. 2d 790

²⁷² *Bellamy v. Conolly*, 43 E. & E. D. 308

to protect him from being deprived of his costs where he has given the opposite party or the latter's solicitor notice of his claim or where it is clearly made out that there has been collusion between the parties to cheat the solicitor of his costs²⁷³.

Where an attorney's fee is payable, out of the proceeds of the suit, the attorney has an inchoate lien upon the property for his fee as soon as the action is commenced, and the client cannot defeat such lien by dismissing the action before trial, over the attorney's objection, without first paying or securing the attorney's fees²⁷⁴; so that a release of all demands from the plaintiff to the defendant will not deprive the plaintiff's attorney of his lien upon the costs of an action awarded in favour of the plaintiff; nor can the defendant set off the costs of an action awarded in his favour against those awarded for the plaintiff until the attorney's claim be satisfied²⁷⁵.

However, an attorney's right of lien for his costs on a judgment recovered by his client is subject to the right of the parties to the action to make a bona fide compromise. The result of such compromise is that the lien is lost²⁷⁶. Accordingly, by dismissing, compromising, or settling his cause of action, a client may defeat his attorney's right to a lien which he would otherwise have had²⁷⁷. The solicitor's lien is normally subject to the compromise of the suit, and the Court will not interfere to preserve it if the compromise is bona fide²⁷⁸; but if the compromise is collusive, entered into for the purpose of depriving the solicitor of his lien, the Court will interfere to protect it²⁷⁹. Furthermore, even if the compromise is bona fide, and involves payment to the plaintiff, and the defendant has previously received notice from the plaintiff's solicitor of his lien for costs, he must not pay the plaintiff in disregard of it²⁸⁰. Thus, although, the court

²⁷³ *Terry v. MacDonald*, 43 E. & E. D. 308

²⁷⁴ *Grand Rapids, etc Rail Co v. Cheboygan Circuit Judge*, 7A CJS 766

²⁷⁵ *Gifford v. Gifford*, (1801) 145 ER 1128

²⁷⁶ *Brundson v. Allard*, (1859) 28 LJQB 306; 121 ER, here, the parties to cross-actions, plaintiff in each of which had obtained judgment, bona fide compromised the actions after notice to one of them, and his attorney from the attorney of the other not to do so in prejudice of the latter's lien on his client's judgment. It was held that the attorney had no ground for claiming the equitable interference of the court to enforce his lien.

²⁷⁷ *Jackson v. Stearns*, 7 Am Jur 2d 364

²⁷⁸ *M'Pherson v. Allsop* (1839) 8 L.J. Ex 262; *Ex p Morrison* (1868) L.R.4 Q.B. 153; *Moxon v. Sheppard* (1890) 24 Q. B. D. 627

²⁷⁹ *Reynolds v. Reynolds* (1909) 26 T.L.R. 104, C.A.

²⁸⁰ *Ross v. Boxton* (1889) 42 Ch. D 190; in *Ex p. Morrison*, (supra), the plaintiff recovered a verdict for £25 against the defendant for personal injuries caused by the negligence of the defendant's servants. The plaintiff's attorney informed the defendant's attorney that he had a large claim against the plaintiff for costs and had a lien upon the same for damages recovered in the action. Subsequently, a rule nisi for a new trial was granted on the ground that the verdict was against evidence. The plaintiff and the defendant, without the knowledge of their respective attorneys settled the action, the defendant paying £10 to the plaintiff who was in great poverty, in discharge of all the claims for damages and costs. On an application by the plaintiff's attorney that his costs should be paid by the defendant, the court stated that there is no doubt at all that where an attorney has by his labour and his money obtained a judgment for his client, he has a lien upon the proceeds of such judgment and is entitled to have its proceeds pass through his hands. It was however held that the plaintiff's attorney was not entitled to compel the defendant to pay his costs as the results of the proceedings was doubtful at the time of the settlement, and there was, therefore, no existing fund or security upon which any lien for the attorney's costs had attached, and as the settlement was not shown to be fraudulent.

will not interfere as against the defendants with a bona fide settlement of an action between a plaintiff and the defendant with a view to enforcing the plaintiff's attorney's lien for his costs of the action, they will nevertheless, while the sum agreed upon as a compromise between the plaintiff and the defendant remains unpaid, direct the defendants to pay to the plaintiff's attorney so much of the sum as is necessary to satisfy his charge²⁸¹.

Where the client settles the case through the application of mutual setoffs, prior to a judgment or decree and in the absence of a conspiracy to defeat the attorney's claim, the attorney may not establish a charging lien against the funds received by his client but must look to the client in a separate action for compensation²⁸². However, if the attorney's lien has already attached, either by the recovery of a judgment, or by a compliance with the provisions of a statute, the act of his client in either settling, compromising, or dismissing the suit without his consent will not defeat or prejudice his lien²⁸³. A charging lien held by an attorney on the client's claim is not disturbed by an order of substitution of attorney or by any settlement between the parties²⁸⁴. An attorney's charging lien cannot be defeated even by a stipulated dismissal by the parties, where the attorney is not given notice²⁸⁵. Accordingly, where judgment has been obtained for the client, and notice of the attorney's lien given where required, the lien cannot be affected by a payment or settlement of the judgment as between the parties²⁸⁶.

Under the canons of ethical practice, a lawyer shall not in any way communicate upon the subject of controversy or negotiate or compromise the matter with the other party who is represented by a lawyer, and shall deal only with the lawyer of that party in respect of the matter²⁸⁷. For this reason, while it is presumed that a settlement is made in good faith, yet a settlement made at the instigation of the attorneys for the defendant, without the knowledge of the attorneys for the plaintiff, and without making suitable and sure provision for their compensation, is viewed with suspicion²⁸⁸. Where a judgment has been obtained which has not become a finality, as where a motion for a new trial is pending and undisposed of, or where an appeal has been granted, a compromise settlement in which the plaintiff's attorney is ignored and to which he does not assent does not destroy his lien²⁸⁹.

²⁸¹ Slater v. Sunderland Corporation, (1863) 33 LJQB 37; 9 LT 422

²⁸² Lyman v. Campbell, 7 Am Jur 2d 346

²⁸³ Midland V R Co. v. Johnson, 7 A L R 1007

²⁸⁴ Paolillo v. American Export Isbrandtsen Lines, (supra)

²⁸⁵ US v. Transocean Air Lines Inc. (supra)

²⁸⁶ Andrews v. Morse, 7 Am Jur 2d 346

²⁸⁷ Article 19(5) of RPC, 2007

²⁸⁸ Falconio v. Larsen, 7A CJS 766

²⁸⁹ Jellico Coal Mining Co v. Pope, 7A CJS 766

Where the judgment debtor in good faith pays or satisfies the judgment before the notice of the attorney's lien, the attorney cannot enforce the judgment as against the debtor²⁹⁰. After an attorney's lien has attached, the party adverse to his client, with notice of the lien, cannot destroy it by a voluntary settlement of the claim, without the consent or knowledge of the attorney, without becoming personally liable for the value of the lien²⁹¹. A defendant, who makes settlement with a plaintiff behind the back of the plaintiff's counsel in bad faith or to prevent the attorney from collecting his fee, is liable therefore²⁹². The adverse party is not however, under any affirmative duty to protect the lien, as by a suit to litigate its existence and validity, where, before paying the amount agreed to in the settlement, he informs the attorney of the fact of the settlement and the judgment thereon and notifies him to take steps to protect his lien²⁹³. Moreover, a judgment debtor may pay the amount of the judgment into court, and if he notifies the attorney of that fact, the debtor has no further liability respecting the attorney's lien²⁹⁴.

Where the parties to a matter settle the proceeding in deliberate disregard of an attorney's lien, the attorney would be entitled to enforce the lien by means of such remedies as are available under the law and are appropriate under the circumstances. An attorney having a charging lien has the right to have the court interfere to prevent the payment by the judgment debtor of the entire judgement debt to the judgment creditor²⁹⁵. Where the attorney elects to proceed by way of a motion to set aside the satisfaction entered on the roll on the ground of collusion between the plaintiff and the defendant to deprive the attorney of his lien, the attorney has the duty to prove gross fraud, otherwise, the court will not interfere²⁹⁶; so that to warrant the court in setting aside the settlement of an action, even after final judgement has been signed, which has taken place between the plaintiff and the defendant behind the back of the attorney, it is not sufficient that the consequence of such settlement will be that the attorney will be deprived of his costs, but it must be clearly shown that such a settlement was fraudulent and collusive²⁹⁷. In the light of the provisions of the canons of ethical practice, which stipulate that a lawyer shall not in any way communicate upon the subject of controversy or negotiate or compromise the matter with the other party who is represented by a lawyer, and shall deal only with the lawyer of that party in respect of the matter²⁹⁸; where an attorney having a contract for a percentage of the proceeds of a client's

²⁹⁰ *Townsend v. Chamberlain*, 7 Am Jur 2d 352

²⁹¹ *Union Pacific Rail Co v. Laughlin*, 247 US 204, 62 L Ed 1073, 38 S Ct 436

²⁹² *Katopodis v. Liberian S/T Olympic Sun*, (supra), the tort here does not lie in the settlement; rather it lies in the deliberate mischief of excluding the party's counsel from the settlement process so as to deny him of the lawful economic benefit accruing to him. Consequently, an action in tort for malicious interference with economic benefit/relationship could properly lie.

²⁹³ *Noell v. Missouri*, 94 A L R 684

²⁹⁴ *Myers v. Miller*, (supra)

²⁹⁵ *Prichard v. Fulmer*, 2 A L R 474

²⁹⁶ *Perry v. Allen*, (1845) 43 E. & E. D. 308

²⁹⁷ *Moore v. Angell*, (1847) 43 E. & E. D. 308

²⁹⁸ Article 19(5) of RPC, 2007

cause of action notifies the adverse litigant of a lien claimed, surreptitious and collusive settlement of the claim gives the attorney a cause of action against the adverse litigant for the full measure of his fees²⁹⁹. Thus, where there has been a settlement of the case, the purpose or result of which was to destroy the attorney's lien, the court may require the attorney to proceed against the defendant in an independent action either legal or equitable³⁰⁰; so that an attorney in case of a settlement by his client, may pursue a remedy against the adverse party for the payment of the fees, or against the client or against both, on the attorney's one cause of action³⁰¹. Accordingly, where a plaintiff and the defendant compromise an action with the knowledge that they are so acting as to deprive the plaintiff's solicitor of his costs, such solicitor is entitled to an order for the payment of his taxed costs of the action by the defendant or for continuance of the action for the recovery of such costs³⁰².

4.3 Enforcement of retaining lien

Ordinarily, the solicitor of a party, to whom the conduct of a cause has been committed, is entitled to the use of the papers relating to the cause, which are in the possession of the solicitor of the party from whom the conduct of the cause has been taken³⁰³. However, upon substitution of attorneys, former attorneys were entitled to general lien on any papers in their possession as security for payment of fee³⁰⁴; and if an attorney is wrongfully discharged by the client, he need not surrender his papers in the case until he has been paid his fee for services rendered³⁰⁵; so that documents in the possession of a former solicitor of a plaintiff who claims a lien for costs upon them will not be ordered to be produced for the defendant's inspection³⁰⁶.

²⁹⁹ *Goldberg's Loan Office v. Evans*, 7A CJS 767

³⁰⁰ *Cuomo v. Pennsylvania Rail Co*, 7A CJS 767

³⁰¹ *Scott v. New York C & St Louis rail Co*, 7A CJS 767

³⁰² *Price v. Crouch*, (1891) 60 LJQB 767; in *Dunthorne v. Bunbury* (1888), 43 E&ED 136, it was held that where an arrangement is entered into for the compromise of an action by the plaintiff and the defendant, without the knowledge of the plaintiff's solicitor, by the payment of a certain sum to plaintiff in discharge of the claim and costs, the court has jurisdiction to give the plaintiff's solicitor liberty to continue the action for the recovery of his costs, on being satisfied that the purpose of the arrangement made by the parties included the purpose of depriving plaintiff's solicitor of his costs.

³⁰³ *Bennett v. Baxter*, 9 LJ Ch. 137, 59 ER 676, 43 E. & E. D. 59

³⁰⁴ *Klein v. Acco Products*, 6 FD 442; in *Merrewether v. Mellish*, (1806) 33 ER 255, it was held that a party changing his solicitor, the former solicitor has a lien for his costs upon papers in his hands; but cannot otherwise stop the progress of the cause, till he is paid.

³⁰⁵ *Midvale Motors Inc v. Saunders*, 7 Am Jur 2d 336; in *Twort v. Dayrell*, (1806) 33 ER 268, it was held that a party may discharge his solicitor, who has a lien for his costs upon papers in his possession, but cannot, except by retaining them, prevent the progress of the cause, until he is paid. In *Lord v. Wormleighton*, (1822) 37 ER 969, it was held that a solicitor discharged by his client or his representative is not bound to produce the papers in his possession for the purposes of the cause until he is paid.

³⁰⁶ *Kettlewell v. Barstow*, (1872) 7 Ch. App. 686; in *Pilcher v. Arden, Re Brook* (1877) 7 Ch. D. 318; 38 LT 111, by an order made in an administration suit, the costs were ordered to be taxed, and plaintiff's costs to be paid by his solicitor, B., out of a specified fund in court. Before the costs had been taxed, the plaintiff obtained an order to change his solicitor, and B no longer acted for any party in the suit. It was held that B had a right to retain the papers in the suit till his costs were paid.

In the absence of statutory provision, there is no well-established procedure for the enforcement of a retaining lien. The general lien of an attorney upon his client's papers is a passive one, and cannot ordinarily be actively enforced, either at law or in equity. It amounts to a mere right to retain the property of the client until the attorney is fully paid³⁰⁷. Furthermore, if a client by his conduct makes it impossible for his solicitor to continue the connection with him any longer, and the solicitor in consequence refuses to continue the connection, he will be considered as if discharged by his client, and will not be ordered to give up the client's deeds and papers until his costs are paid³⁰⁸. An attorney's general lien for the balance of his entire account, extending to all papers, documents, and vouchers in his possession, depends wholly upon possession, and is a right merely to retain such papers till his bill is paid, and cannot be otherwise actively enforced³⁰⁹, so that a solicitor's retaining lien over documents of title to land is merely a passive lien and gives the solicitor, no right to, or interest in, the land, and nothing can be done by the solicitor to convert it into a legal property in the property in the land³¹⁰. Consequently, the lien does not include the power to sell the subject thereof, despite even the existence of a general statute permitting lienors to sell the subject of their liens³¹¹; neither does it give the attorney any right of action on the debt represented by the papers he holds³¹², so that generally, the only advantage the attorney gains from his retaining lien is the possibility of forcing his client to settle because of the embarrassment, inconvenience, or worry caused by the attorney asserting the lien³¹³. In recognition of this advantage, the courts usually refuse to relieve a client by compelling the attorney to permit the inspection of, or to produce, the subject of the lien without settlement of the amount due him³¹⁴; so that when served with a *duces tecum*, an attorney who fails, at the instance of his former client, to produce in court papers in his possession under a retaining lien is not guilty of contempt of court³¹⁵; and in this respect, where an attorney's valid retaining lien comes into conflict with *bona fide subpoena duces tecum*, the court must reconcile the attorney's interest in the collection of his fee with the client's interest in being able to submit at collateral trial all available relevant evidence in his behalf, and the court should weigh the economic interest of the

³⁰⁷ *Hoxsey v. Hoffpauir*, 339 US 953, 94 L Ed 1366, 70 S Ct 841, in *Cooper v. McNair*, 6 F D 442, it was held that an attorney's retaining lien upon papers or other property of client in attorney's possession is mere passive right to hold and cannot be actively enforced by suit

³⁰⁸ *Steels v. Scott*, 43 E. & E. D. 336

³⁰⁹ *In Re Wilson*, 6 FD 42

³¹⁰ *McLeish v. Palmer* (1921), 43 E&ED 285

³¹¹ *Smyth v. Fidelity & Deposit Co.*, 111 A L R 481

³¹² *Cones v. Brooks*, 7 Am Jur 2d 336

³¹³ *Mahomet v. Hartford Insurance Co.*, 7 Am Jur 2d 336

³¹⁴ *The Flush; Bulk Oil Transports v. Thompson*, 257 US 657, 66 L Ed 421, 42 S Ct 184, it was held that an attorney has a lien on his client's papers, which have come into his possession in the course of his professional services; and that a client, who has discharged his attorney without cause and without paying him for the services rendered, has no right to inspect the papers held by the attorney under his attorney's lien, since to permit such inspection would be in effect to defeat the lien.

³¹⁵ *Davis v. Davis*, 7 Am Jur 2d 336, however, in *People v. Altwater*, (ibid), it was held that a defendant who was indicted for murder could obtain documents, including a psychiatric report, from his former attorney, who claimed retaining lien on the documents, in other that they could be copied. Nonetheless, the original documents were to be returned to the former attorney as evidence of lien.

community in having all just debts paid and the social interest of the community in having relevant material presented to the court engaged in the resolution of justiciable controversy³¹⁶. Therefore, premised on this, it is error, on a rule to show cause, to order an attorney to return forthwith to his client books and papers in the former's possession, where allegation in the answer to the rule, to the effect that the attorney has a retaining lien on the papers, is not denied³¹⁷. Thus, the solicitor of a company who acts in the issue of debentures is not debarred from setting up a retaining lien for costs due to him as solicitor of the company against the debenture holders in respect of documents which, if two solicitors had been employed, would not have been handed over to the solicitor acting for the debenture holders³¹⁸. However, such lien may be enforced as an incident to a proceeding brought for another purpose; so that the court may ascertain the extent of the lien and enforce it where the attorney is brought into court upon an application by the client to turn over money or papers upon which he claims a lien³¹⁹. Furthermore, the court will entertain a bill by a solicitor seeking to enforce a lien against certain title deeds in respect of his bills of costs, a decree for an account having been made in a suit instituted by the solicitor, but under which decree the master was not at liberty to take into the general account what was due to the solicitor in respect of his bills of costs³²⁰.

A retaining lien exists as part of the court's inherent power to oversee the relationship of attorneys as officers of the court, with their client. It provides a means of securing the legitimate interest of the attorney in payment for his services and expenses on behalf of the client. Nevertheless, it is subject to the court's control for the protection for the client and third parties. It is not a right intended to protect the client from his other creditors, or to permit the attorney to withhold indefinitely assets of the client exceeding in value, the claim for which the lien is asserted³²¹. Where an attorney and his client are at issue as to whether anything was due the attorney for services, if the attorney fails to bring suit for his services within time, or if he fails to prosecute any such suit diligently, he would be ordered to give up his asserted lien on the papers in his hands³²². Moreover, when the retention of the papers serves to embarrass the client, the attorney may be required to deliver the papers upon receiving proper security for

³¹⁶ Sorin v. Shahmoon Industries Inc, 7A CJS 779

³¹⁷ Pitts v. Newlin Haines Co., 6 FD 441

³¹⁸ Brunton v. Electrical Engineering Corporation, [1892] 1 Ch. 434; 61 L. J. Ch. 256; 65 L. T. 745; 8 T. L. R. 158, a corporation issued debentures charging all its property, present and future, by way of "*floating security, but so that the corporation is not to be at liberty to create any mortgage or charge in priority to the said debentures.*" Default having been made on the debentures, a debenture holder's action was commenced, in which the solicitor of the corporation claimed to have a retaining lien on papers and documents of the corporation for costs incurred by the corporation after the issue of the debentures, but before the commencement of the action. It was held that the lien was valid as against the debenture holders and their receiver.

³¹⁹ Morse v. Eight Judicial District Court in and for Clark County, 3 A L R 2d 136

³²⁰ Hector v. Jolliffe (1842), 43 E&ED 285

³²¹ Kysor Industrial Corp v. D. M. Liquidating Co., 7 Am Jur 2d 336

³²² Leszynsky v. Merritt, 7 Am Jur 2d 335

compensation, since insistence upon the lien under such circumstances is not consonant with the standard of conduct which the court may properly require of its officers. In this respect, the power of the court to compel a discharged attorney to deliver papers on which he has a retaining lien is a discretionary power and may be invoked only upon proof that the insistence by the attorney upon the retention of the papers would be unfair if security is otherwise given to the attorney³²³, and in any event, the court will not order an attorney to deliver up papers in his hands before his bill is taxed on the payment of money on account³²⁴. A solicitor has no right to set up a lien acquired in the cause against the rights of other parties in the cause to the production of the papers³²⁵; and the principle under which the court will compel a former solicitor to hand over his client's papers to his new solicitors upon an undertaking protecting his lien is that a solicitor though able to assert his lien to the full extent against his own client is not permitted to assert it so as to embarrass third parties³²⁶. Furthermore, where the matter is one in which there is overriding public interest in full investigation, or where the petitioner is not the lone person interested, the solicitor may be permitted to maintain only a qualified and not an absolute lien³²⁷; and the solicitors for the parties in an administration action will not on a change of solicitor, be allowed to assert his lien for costs on papers in his possession in such a way as to embarrass the proceedings in the action. On the contrary, he must produce the papers when they are required for carrying on of the proceedings³²⁸.

The right of a solicitor to assert a lien for his costs on his client's papers in his possession is adversely affected by the solicitors' deliberate and voluntary withdrawal from the employment, so that when a

³²³ *Leviten v. Sandbank*, 7A CJS 779; in *Shatzkin v. Shahmoon*, 7A CJS 780, it was stated that the court's power to compel an attorney to deliver to client papers upon which the attorney has a lien is based upon the control by the court of its own officers and upon its power to compel attorneys to act equitably and fairly towards clients. In *Scott v. Fenning* (1845), 15 L. J. Ch.88; *sub nom.* *Scott v. Fleming*, 43 E. & E. D. 59, P., solicitor for the plaintiff in a cause, agreed with the plaintiff not to sue him personally for costs, but to rely on the funds sought to be recovered. P. was also mortgagee of three-fourths of the fund. P. having been arrested and lying in prison, an order was made upon a petition presented by the plaintiff, that P. should deliver up the papers in the cause to the plaintiff's new solicitor, the new solicitor giving an undertaking to hold them, subject to the lien of P., and the new solicitor and the plaintiff undertaking to abide by any order of the court respecting it.

³²⁴ *Dyer v. Bowley* (1824), 43 E&ED 285

³²⁵ *Vale v. Oppert*, (1875) 44 LJ Ch. 579; 33 LT 41; in *Simmons v. Great Eastern Railway Co.* (1868) 38 L.J. Ch. 87; 19 LT 235, here, a plaintiff in a suit became bankrupt, and the suit was revived by his assignee, who employed a different solicitor. A decree was afterwards made. It was held that the solicitor of the original plaintiff must produce the documents in his possession which were necessary for drawing up the decree, notwithstanding his lien on them for costs, even though the documents were not strictly in evidence in the cause.

³²⁶ *Dessau v. Peters, Ruston & Co Ltd.*, [1922] 1 Ch. 1; [1921] 1 All ER Rep. 5; 91 L.J. Ch. 254; 126 LT 648, accordingly, here, in a partnership action, where a receiver had been appointed and creditors might be embarrassed if the former solicitor insisted on his lien to its full extent, the court made an order compelling the former solicitor to deliver up the papers upon having the usual undertaking protecting his lien.

³²⁷ *Hughes v. Hughes*, [1958] 2 All ER 366; [1958] 3 All ER 179, here it was held that a solicitor who while acting for a petitioner in a divorce suit, is discharged by his client has a qualified, not an absolute lien over such papers in the cause as are in the solicitor's possession; and this is because, a divorce petition is not a matter in which the petitioner alone is interested, but raises a question of status, and is a matter in which there is overriding public interest in there being a full investigation.

³²⁸ *Re Broughton, Broughton v. Broughton*, (1883), 23 Ch. D. 169; 48 LT 413; in *Belaney v. French*, (1873), 43 L. J. Ch. 312; 29 LT 706, it was held that solicitors for the trustees of an estate which is under the administration of the court have not, after their discharge, such a lien for costs and money advanced in the suit as will enable them to refuse production of documents which are required by the receiver for the management of the estate.

solicitor discharges himself from a suit, he must deliver to the new attorney all the papers, on an undertaking to return them at the end of the suit³²⁹, and accordingly a solicitor on declining to further act for his client, would have no lien for his costs upon a fund in court³³⁰; and a solicitor declining to be further concerned in a cause is not entitled to compel payment of his costs, by refusing to permit such inspection of the papers in his hands or such production of them before the court or the master as may be necessary in the conduct of the cause³³¹. Where a solicitor discharges himself from acting as solicitor to a party to a cause, and retains the papers for the purpose of having his bill of costs taxed, and his former client refuses to pay the bill of costs, the common order for delivery would be made subject to lien, and on the undertaking to return them³³²; and a solicitor who refuses to act any longer for a party in the cause, would be ordered to permit the party to inspect the papers in his possession at all reasonable times, without any undertaking on the part of the party to proceed to a taxation of his bill³³³; and a solicitor who has declined to proceed with a cause, will be ordered, though his bill of costs are not paid, to deliver up the papers to the present solicitor of the party, the latter undertaking to hold them subject to the further solicitor's lien, for what shall be found due to him on the taxation of his bills, and in this regard, an offer by the former solicitor, after the motion is made, to proceed with the cause, will not prevent the court from ordering him to deliver the papers on the terms aforementioned³³⁴. Where a solicitor has discharged himself of his retainer from acting further for his client, he will be compelled, if the client has resolved to further conduct his own case in person, to deposit the papers and documents in the cause which he has in his possession in the custody of the officer of the court for a certain period in order that the client may have access to them, although the solicitor still has a lien upon such papers and documents for his unpaid bill of costs³³⁵; and where a solicitor applies to his client for funds to carry on a suit under a special stipulation in the retainer that such funds should be supplied, and on the client refusing to pay, he declines to continue the suit or deliver up the papers until his taxed costs are paid, this would be held to

³²⁹ *Huntley v. Anglo-Californian Gold Mining Co.* 43 E. & E. D. 337

³³⁰ *Cresswell v. Byron*, (1807), 33 ER 525, LC

³³¹ *Commerell v. Poynton*, (1818) 36 ER 273 LC

³³² *Walker v. Beanlands, Beaanlands v. Walker*, (1866) 43 E. & E. D. 337, in *Wilson v. Emmett*, (1854) 52 ER 338, a dispute having arisen as to the mode and extent of a solicitor's remuneration, he refused to proceed in the cause until it had been settled. The solicitor was ordered to deliver up the papers in the cause to the new solicitor, upon his undertaking to proceed with due diligence and to hold them subject to the existing lien.

³³³ *Moir v. Mudie*, (1823) 57 ER 114

³³⁴ *Colegrave v. Manley*, (1823) 37 ER 1155; in *Heslop v. Metcalfe*, (1837) 7 L.J. Ch. 49; 40 ER 894 LC. An order was made on a solicitor, who withdrew from the conduct of the client's cause, that he should deliver up to plaintiff's new solicitor the briefs of the pleadings, counsel's opinions thereon, office copies of the several answers, and all such other papers and documents, connected with the cause, as upon inspection, such new solicitor might deem necessary for the hearing; without prejudice to any right of lien for costs, and upon an undertaking to return them undefaced within ten days after the hearing.

³³⁵ *Re Wontner & Sons, Ex p Scheyer*, (1888) 43 E. & E. D. 338; in *Gregory v. Cresswell*, (1845) 14 L.J. Ch. 300; 71 ER 655, upon motion that solicitors who had withdrawn themselves from the suit during its continuance should produce the deeds etc, and deposit them in the master's office, it was objected by the solicitors that there were certain costs due to their predecessors, prior to the commencement of the suit, which had already been taxed, and that the deeds etc had come into their possession prior to the suit; that they had consequently a lien upon them. The court nevertheless ordered production of the deeds etc.

constitute a discharge by the solicitor and he might be called upon to deliver to the new solicitors the papers relating to the matters in question in the suit³³⁶. Where a solicitor agrees to conduct the suit of a client without requiring to be supplied with funds till the hearing, this would be held to mean the original hearing, and the solicitor would not be bound to proceed on the appeal without being supplied with funds. However, and even at that, he has no power, upon an order for change of solicitors to withhold the papers from the new solicitor, although he would be entitled to a lien upon them³³⁷.

4.4 Enforcement of charging lien in general

Although, a charging lien, unlike a retaining lien is capable of active enforcement, generally speaking, in the absence of a specific statutory prescription, there is no well-settled procedure for its enforcement, so that the remedy for enforcing a charging lien is left to the court, and it is for the court to determine whether the method selected by the attorney is appropriate under all the facts and circumstances³³⁸. An attorney's lien on property recovered may, on application to the court, be enforced in the original action in which the services were rendered³³⁹. A charging lien is unlike a retaining lien which is dependent on possession, but is found on the equity of an attorney to be paid his fees and disbursements out of the judgment he has obtained³⁴⁰; accordingly, its existence entitles the attorney to apply to court for a disbursement of the proceeds realised by the enforcement of the judgment³⁴¹. An approved procedure, where a charging lien has attached to a judgment or where money has been paid into court, is for the attorney to file an intervening application and have the amount and extent of his lien judicially determined³⁴². For this purpose, an attorney's lien must be enforced in the amount fixed by the contract, unless inequitable³⁴³. Since an attorney ordinarily is regarded as an equitable assignee of the judgment to the extent of his lien, it is proper practice, in order to enforce such lien, for the attorney to proceed to the collection of the judgment to the extent of his lien³⁴⁴; and for this purpose, the attorney has the same power over the judgment and the execution that the client himself has³⁴⁵. However, an attorney's lien on a judgment being merely a claim to the equitable interference of the court to have the judgment held as a

³³⁶ *Bluck v. Lovering & Co.*, (1886) 43 E. & E. D. 338; in *Robins v. Goldingham*, (1872) L.R. 13 Eq. 440; 41 L.J. Ch. 813, a solicitor applied to his client for funds to carry on a suit, declining to continue the conduct of the litigation unless his costs, which were already considerable, were secured. The client neither furnished the funds nor gave the required security, but obtained an order appointing fresh solicitors. It was held that the solicitor had discharged himself, and was bound to hand over to the new solicitors, all the papers in his possession relating to the suit, on their undertaking to hold them without prejudice to his lien, and to return them to him within twelve days after the conclusion of the suit.

³³⁷ *Webster v. Le Hunt*, (1861) 43 E. & E. D. 337

³³⁸ *Anderson v. Roehrig*, 7A CJS 781

³³⁹ *Standidge v. Chicago Rail Co.*, 7 Am Jur 2d 351

³⁴⁰ *Kysor Industrial Corp v. D. M. Liquidating Co.*, (supra)

³⁴¹ *Nutt v. Knutt*, 200 US 12, 50 L Ed 348, 26 S Ct 216

³⁴² *Myers v. Miller*, (supra)

³⁴³ *Lehigh & N. E. R. Co. v. Finnerty*, 61 F.2d 289, certiorari denied 53 S.Ct. 292, 287 U.S. 668, 77 L.Ed. 576

³⁴⁴ *Falcone v. Hall*, 7A CJS 781

³⁴⁵ *White v. Aitken*, 7A CJS 781

security for his costs, he has no authority over the execution of a writ of ca. sa. so as to carry it into effect against the order of plaintiff, even though the plaintiff and defendant should collude to deprive him of his lien³⁴⁶. If money due to the client is in the solicitor's hands, he may pay himself out of it³⁴⁷; and in any case, where there is a probability of his client depriving him of his costs, the solicitor may apply to the court to intervene to protect his lien³⁴⁸, e.g. by granting him an injunction restraining the client from receiving payment without notice to him³⁴⁹, or, if there is a fund in Court, to which the client is entitled, by ordering payment of his costs out of it³⁵⁰.

The claim of discharged attorneys who are retained on a contingent fee basis, for the value of services rendered, are adequately protected by a charging lien which was not disturbed by an order of substitution; and a bond or deposit would therefore be unnecessary, although, because of a contingent fee arrangement, a special proceeding after litigation would be necessary to decide the amount of the money, if any, due to the discharged attorney³⁵¹. The lien of a counsel retained on a contingent fee basis is annexed to the judgment, and is enforceable in the court rendering the judgment, and that court may protect and enforce the lien so that the benefit of the attorney's services may not be obtained without payment for them³⁵². Until a judgment is fully executed, it is ordinarily held that the court retains jurisdiction of the subject matter and the parties for the purpose of hearing any motion affecting such judgment. Accordingly, if the attorney desires to have his lien established and declared against such judgment, he may apply to the court for such purpose³⁵³; and he may proceed by motion in the original case³⁵⁴. There is however authority that in the absence of special circumstances requiring a contrary holding to prevent injustice, counsel must bring a separate action against his client to determine the amount of his fee and to foreclose his charging lien if he has any³⁵⁵; so that in a proper case, an attorney may enforce his lien in a court other than that before which his services were rendered³⁵⁶.

4.5 Proceedings for enforcement of charging lien

The application for an order to enforce a charging lien may be made at any time where the requisite conditions exist and delay in applying is no ground for refusing an order unless other rights in respect of

³⁴⁶ *Barker v. St. Quintin* (1844), 13 L. J. Ex. 144; 152 E. R. 1270

³⁴⁷ *Watson v. Maskell*, *The Supreme Court Practice*, 1997, vol. 2, para 3889

³⁴⁸ *Mercer v. Graves* (1872) L.R. 7 Q.B. 499

³⁴⁹ *Lloyd v. Jones* (1879) 40 L.T. 514

³⁵⁰ *Moore v. Smith*, *The Supreme Court Practice*, 1997, vol. 2, para 3889

³⁵¹ *Gangwere v. Bernstein*, (supra)

³⁵² *US v. Transocean Air Lines Inc.*, (supra)

³⁵³ *Application of Kamerman*, 7A CJS 783; in *Re Podell*, 7A CJS 785, an injunction pendente lite was decreed on a motion by an attorney to restrain the transfer or disposition of a specific fund represented by a deposit, in order to await the disposition of the attorney's claim for services.

³⁵⁴ *Monsanto Chemical Co v. Grandbush*, 7A CJS 784

³⁵⁵ *Midvale Motors Inc v. Sauders*, (supra)

³⁵⁶ *Nickel Rim Mines Limited v. Universal Cyclops Steel Corp.*, 4 F.P.D. 2d 782

the property have arisen in the meantime³⁵⁷. Proceedings to enforce an attorney's charging lien are basically directed at the funds in respect of which the lien is asserted, and to that extent, possess the status of proceedings in rem. When an attorney claiming a charging lien for his services seeks to enforce his lien upon the funds in respect of which he asserts the lien, he has a duty to move with all speed and diligence before the funds are dissipated and while they are still in the custody and control of the court. Generally, the court in which a judgment was rendered in favour of the client has jurisdiction to enforce the attorney's charging lien, this however does not prevent another court other than the court in which the judgment was rendered from exercising jurisdiction to enforce the charging lien.

While it is not necessary to the existence of the lien that the amount due the attorney should be liquidated, yet the exact amount of the claim should be determined before the lien can be enforced.³⁵⁸ Where proceedings are brought by an attorney to enforce his lien, the court will determine the reasonable value of the services of the attorney and declare such amount a charge or lien upon any moneys which his client might recover in that particular action by way of judgment or settlement, and once the value of the attorney's services is thus determined, it is conclusive upon the parties in any subsequent proceedings or action for the enforcement or collection of the amount of such lien³⁵⁹. Moreover, where there is no express agreement between the attorney and the plaintiff as to the fee, the attorney's lien and the defendant's consequent liability to the attorney will ordinarily be in the amount of the fair value of the attorney's services³⁶⁰.

5. Conclusion

The recent public health lockdown precipitated a crisis in service delivery timelines, service delivery costs and solicitor/client relationships. With the continuing disruption in public services, traditional modes of dispute resolution and debt recovery remain severely challenged. This has compelled solicitors, in seeking new models of debt recovery for services rendered, to explore the rarely-used model of assertion of liens over client's assets as security for their fees. To most clients, this novelty suggested doubtful legitimacy, thus leading to complaints to law enforcement agencies on charges of wrongful or fraudulent detention of documents, etc. We have in this paper established that the right of a solicitor to maintain a lien against his client for unpaid fees is a right that enjoys a respectable common law provenance. Correspondingly, and very importantly, it is a right that is provided for and protected under the Rules of Professional Conduct for Legal Practitioners. From this perspective, the right of a solicitor to acquire a lien over his client's assets as security for payment of his fees is of such far-reaching

³⁵⁷ *Re Born* [1900] 2 Ch. 433

³⁵⁸ *McGowan v. Parish*, 35 S Ct 543, 237 US 285, 59 L Ed 955

³⁵⁹ *De La Paz v. Coastal Petroleum Transport Co*, 7A CJS 794

³⁶⁰ *Fuessel v. Cadillac Bar Corp*, 7A CJS 794

importance to the legal profession that it is one of the very few exceptions to the prohibition of a lawyer acquiring a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client.