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Miscellaneous—Creditor's Rights—Attorney's Lien

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to section 478. It would therefore seem inconsistent to invoke a section addressed to an ordinary cause of action in the case at hand. To do so would in effect give the estate a right which the decedent himself did not have at his death.

Creditors Rights—Attorney's Lien

The lien of an attorney is an equitable right to be paid for his services out of the proceeds of the judgment or other proceeding which has been obtained by his labor and skill. The lien exists from the commencement of an action and attaches to a verdict in his client's favor, including the proceeds thereof into whatever hands they may come. This lien cannot be affected by any settlement between the parties before or after the judgment.⁷⁴ In order to supersede an attorney's lien a claim must be a prior charge against the specific fund.⁷⁵

In *Industrial Comm'r. v. W. E. Hedger Transp. Corp.*,⁷⁶ the Court of Appeals dismissed a turnover order⁷⁷ directing the Aluminum Company of Canada to pay the commissioner \$2,100 out of an amount the company had agreed to pay appellant-attorney for his attorney's fee for Hedger in procuring a settlement of an action brought by Hedger against Aluminum. Hedger agreed to settle its claim if Aluminum would pay its attorney's fee to appellant. The commissioner moved for a turnover order directing payment of a part of the sum to satisfy the State's judgments for unpaid unemployment insurance payments from Hedger. The appellant opposed the issuance of such an order on the grounds that the settlement agreement between Hedger and Aluminum invested him with ownership of the sum and, therefore, that the fund was not the property of Hedger and thus could not be the subject of this third party proceeding. The Appellate Division affirmed a determination in favor of the commissioner.⁷⁸

The majority of the Court of Appeals held that the appellant was the *sole* beneficiary of the agreement between Aluminum and Hedger, in consideration of his procuring a release and discontinuance of the Hedger suit, and thus he had title to the whole amount. Alternatively, they held that he possessed his equitable attorney's lien from the time of the commencement of the suit upon the recovery therein, with priority over any later-attaching tax or other lien; further, his actions did not show a waiver nor amount to an estoppel.

The dissenting judges contended that the appellant had waived his lien by not asserting it in the third party proceeding and that he was relying solely upon his claim to title to the fund. They were of the opinion that he was a

74. N. Y. JUDICIARY LAW §475.

75. *Bacon v. Schlesinger*, 171 App. Div. 503, 157 N. Y. Supp. 649 (1st Dep't 1916).

76. 1 N. Y. 2d 503, 136 N. E. 2d 524 (1956).

77. N. Y. CIV. PRAC. ACT §794.

78. *Industrial Comm'r. v. W. E. Hedger Transp. Corp.*, 286 App. Div. 1009, 146 N. Y. S. 2d 662 (1st Dep't 1955).

third party beneficiary⁷⁹ of the agreement between Hedger and Aluminum and thus had merely a chose in action to enforce the agreement and not the title to the fund, which would cause the commissioner to prevail on the theory that the State has a common law priority to payment of its claims.

If the majority based its opinion on the attorney's lien theory coupled with no duty to assert and prove the value of the lien in the third party proceedings, there is no doubt that the appellant was entitled to the fund. However it is difficult to envision how the attorney could be considered the *sole* beneficiary of the agreement between Hedger and Aluminum—unless he had procured the settlement on behalf of Aluminum, despite the fact that he represented Hedger, for without the agreement, Hedger would still owe him for his attorney's fees. If the agreement was in fact a third party beneficiary contract, which it strongly resembled, the position of the dissent appears unassailable.

79. *Lawrence v. Fox*, 20 N. Y. 268 (1859).