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New Jersey Court of Errors and Appeals

Affidavit and Reasons

(Filed June 28, 1915.)

NEW JERSEY SUPREME COURT

MAX LEVY, Defendant, vs. PUBLIC SERVICE RAILWAY COMPANY, Plaintiff.	On Certiorari.

State of New Jersey, County of Hudson. } ss:

Mark Townsend, of full age, being duly sworn according to law, on his oath, deposes and says that he is an attorney-at-law and counselor-at-law, of the State of New Jersey; that on the second day of December, nineteen hundred and fourteen, a summons was issued out of the District Court of the City of Bayonne in an action in tort in which Sam Persky was plaintiff and Public Service Railway Company was defendant; that deponent, at the request of Lefferts S.

Hoffman, General Attorney of Public Service Railway Company, represented the defendant Public Service Railway Company in the said action; that the state of demand of the said Sam Persky, plaintiff, was filed in the said action on the third day of December, nineteen hundred and fourteen, and that the said cause was never, to the best of the knowledge and belief of deponent, brought to trial by the said Sam Persky.

Deponent further says, on information and belief, that subsequent to the bringing of the said action by Sam Persky, the assistant adjuster of Public Service Railway Company, to wit, Mr. David Alberts, settled with said Sam Persky, his claim, paying to him the sum of thirty dollars as consideration for a release by the said Sam Persky, discharging his claim against the said Public Service Railway Company; that the said release of Persky provided that the payment of money for same was not an acknowledgment of liability of the defendant for the alleged accident, injury or damage for which the action was brought; that the said Sam Persky was represented by one Max Levy, an attorney and counselor-at-law of the State of New Jersey, and that the said David Alberts, representing the said Public Service Railway Company, offered to the said Max Levy twenty dollars as a fee to the said Levy for his services to the said Sam Persky; that the said Levy refused to accept the said twenty dollars, and instead thereupon filed in the Bayonne District Court a petition setting forth his alleged services to the said Sam Persky, stating that he had been informed of the said settlement with Persky for the sum of thirty dollars, stating that he him-

self had been offered the sum of twenty dollars as a fee by the said Alberts, and that the offer was refused, and praying the Bayonne District Court or the Honorable Peter Stillwell, Judge thereof, that he might be awarded for his services in the said cause of Sam Persky vs. Public Service Railway Company a reasonable sum, not to be less than one hundred dollars against the said Public Service Railway Company, "in accordance with the provisions of Chapter 211, P. L., 1914." Deponent assumes that the said Max Levy, petitioner, intended to refer to Chapter 201 of the laws of 1914, entitled "An Act to give any attorney, counselor or solicitor in Chancery a lien upon any cause of action, verdict, report, decision, decree, award or final judgment," approved April 15, 1914.

Deponent further says that a notice signed by the said Max Levy was served upon Public Service Railway Company, and was in the following words:

"Public Service Railway Company,
Jersey City, N. J.

Gentlemen:

PLEASE TAKE NOTICE that on Tuesday, the nineteenth day of January, nineteen hundred and fifteen, I shall move before the Honorable Peter Stillwell, Judge of the District Court of the City of Bayonne, for an allowance of a counsel fee to be fixed by said Court, for services rendered by me in the case of Sam Persky against the Public Service Railway Company, settled by said company without the consent of the counsel of the

plaintiff therein. Annexed hereto is a copy of the petition setting forth full facts upon which the application will be made.

(Signed) MAX LEVY."

DEPONENT FURTHER SAYS that on the nineteenth day of January, nineteen hundred and fifteen, this deponent, representing the Public Service Railway Company, appeared in the Bayonne District Court and moved to dismiss the petition; that such motion was denied; that the said Levy thereupon testified that the action between Sam Persky and the Public Service Railway Company had been settled by the Public Service Railway Company with the said Persky without the knowledge or consent of the said Levy. It was admitted by this deponent that Sam Persky signed a release for thirty ($30) dollars. Said Levy then offered in evidence an agreement between him and Sam Persky to the effect that said Levy should receive fifty (50%) per cent of all moneys received by him by way of legal proceedings, compromises, settlement or otherwise, a copy of which agreement is annexed to this affidavit and marked Exhibit A. Said Levy further testified that in his opinion the services which he had rendered in the action were reasonably worth the sum of one hundred dollars.

DEPONENT FURTHER SAYS that on information and belief, the said Sam Persky was not notified of the pendency of Levy's application to have his counsel fees fixed.

When the testimony was concluded this deponent renewed his motion to dismiss the petition on a number of grounds, among which were the following:

Affidavit and Reasons

1. Because the proceedings are improper in that the action amounts to, or is, a summary proceeding, and such a proceeding will not lie to enforce the attorney's lien, if any, against the Public Service Railway Company in this action.

2. Because the proceedings are summary, and the summary proceeding of settling the attorney's fees applies only between Levy and his client, Persky, and not the Public Service Railway Company.

3. Because there is no proof that the plaintiff had a cause of action against the Public Service Railway Company.

Deponent Further Says that the motion to dismiss was again denied, and no defense was put in by deponent for Public Service Railway Company; that the Court took the matter under advisement, and that later there was entered in the records of the said Bayonne District Court, and in the record of the case of Sam Persky, plaintiff, vs. Public Service Railway Company, defendant the following:

"Whereupon it is on this second day of June, 1915, by this Court considered and adjudged that said Max Levy, plaintiff, recover against the said Public Service Railway Company, defendant, the sum of $100.00."

Deponent Further Says that the petition of the said Max Levy is not entitled in the cause of Sam Persky vs. Public Service Railway Company, but is in a new and distinct cause, to wit, Bayonne District Court, Max Levy, plaintiff, vs. Public Service Railway Company, defendant. Deponent says that nevertheless the alleged judgment for one hundred dollars in favor of Max Levy, plain-

tiff, against Public Service Railway Company, defendant, is entered in the cause of Sam Persky, plaintiff, vs. Public Service Railway Company, defendant.

DEPONENT SAYS that the said Public Service Railway Company was injured by the said action of the District Court of the City of Bayonne for the following

REASONS.

1. Because no suit by petition can be begun in the District Court of the City of Bayonne.

2. Because the District Court of the City of Bayonne had no jurisdiction in the premises.

3. Because no judgment could be entered in the said Court in favor of the said Max Levy and against said Public Service Railway Company in a suit that in fact had been started by Sam Persky against Public Service Railway Company, and to which suit the said Max Levy was not a party.

4. Because the proceeding was a summary proceeding as a result of which the right of Public Service Railway Company to have its day in court and to exercise its right to assert any defense which it might have in the usual form and in the usual forum, and to have the issues tried by a jury, if it saw fit was denied to it.

5. Because the proceeding was summary, and a summary proceeding to settle the attorney's fees applied only, if at all, between the plaintiff and his attorney, and cannot be invoked by such attorney against the defendant.

6. Because no proof appeared in the cause that the plaintiff Persky had any cause of action against the defendant Public Service Railway Company.

7. Because, if a cause of action in fact existed by said Persky against said Public Service Railway Company, then the value of the said cause of action was the sum for which the same had been settled, which sum the said Max Levy averred in his petition was, he had been informed, the sum of thirty dollars; and the agreement for fifty per cent of the recovery or verdict made between the said Persky and the said Levy would only, at most entitle the said Levy to a claim of fifteen dollars against the client Persky, and, therefore, would only entitle him to assert against Public Service Railway Company a claim under his lien for that amount; and as he had been offered, according to the allegations of his own petition, by one Alberts, representing the said Public Service Railway Company, the sum of twenty dollars and had refused to accept the same he, the said Levy, had no standing in court.

8. Because if a lien arose in favor of the said Levy against the said Public Service Railway Company by virtue of Chapter 201 of the Laws of 1914, the said Public Service Railway Company may have become merely a surety for the payment to the said Levy by the said Persky of compensation for his services; under which theory the said Levy should exhaust the said Persky, or show that the said Persky was insolvent before proceedings to recover against the said Public Service Railway Company.

Deponent therefore prays that a writ of certiorari may be allowed the said Public Service Railway Company to have the said alleged judgment and proceedings against it set side and reversed.

MARK TOWNSEND, JR.

(COPY)

Sworn and subscribed to before me this
23d day of June, 1915.

CHARLES A. ROONEY,
Attorney-at-Law of New Jersey.

(COPY)
EXHIBIT A

Cor. No. 135.

I hereby retain Max Levy to prosecute my claim against the Public Service Railway Company for damages arising out of a collision which resulted in serious injuries to me on Thursday, November 26th, 1914, at about 10 p. m. near Avenue C and 18th Street, Bayonne, N. J., and for his promise of his services in this matter, I agree to pay him fifty (50) per cent, of all moneys received by him by way of legal proceedings, compromise, settlement or otherwise, and I am not to be responsible in anywise for the payment of any costs.

Dated, December 1st, 1914.

(Signed) SAM PERSKY.
(In Hebrew.)

Return to Writ

(Filed July 16, 1915)

To the Honorable, the Justices of the Supreme Court of Judicature of the State of New Jersey:

In obedience to the command of the annexed writ to us directed, we, Peter Stillwell, Judge of the District Court of the City of Bayonne, and Gustav Ruh, Clerk of the District Court of the City of Bayonne, do send under our hands and seals to you a certain summons, demand and record in a case in our court in which Sam Persky was plaintiff and Public Service Railway Company was defendant, and Max Levy was attorney for plaintiff, including a certain petition filed in our said Court in a cause entitled Max Levy plaintiff, vs. Public Service Railway Company, defendant, and a certain notice annexed to the said petition, and a record of proceedings taken upon the said petition, and of the judgment or order, and each and every judgment and order made thereon, or thereunder, and all things touching and concerning the same, as fully and entirely as they remain in our said District Court of the City of Bayonne, as appears in the schedule hereto annexed, as we are commanded.

In Witness Whereof, we have hereunto placed our hands and the seal of the said Court this fourteenth day of July, nineteen hundred and fifteen.

PETER STILLWELL,
Judge of the District Court
of the City of Bayonne.

Gustav Ruh,
Clerk, District Court of
the City of Bayonne.
(L. S.)

Writ

New Jersey, ss:

(L. S.)

The State of New Jersey to Honorable Peter Stillwell, Judge of the District Court of the City of Bayonne, and Gustav Ruh, Clerk of the District Court of the City of Bayonne, GREETING:

We being willing for certain reasons to be certified of a certain summons, demand, and record in a cause in your court in which Sam Persky was plaintiff and Public Service Railway Company was defendant, and Max Levy was attorney for plaintiff, in which cause a summons issued out of your Court on the second day of December, nineteen hundred and fourteen, including the complete record of the said cause as it now exists in your Court, and also a certain petition filed in your Court in a cause entitled Max Levy, plaintiff, vs. Public Service Railway Company, defendant, and a certain notice annexed to the said petition, which petition was presented to your Court on or about the nineteenth day of January, nineteen hundred and fifteen, and also any and all proceedings taken upon the said petition, and any judgment or order made thereon or thereunder, Do COMMAND YOU that you send under your seals to our Justices of our Supreme Court of Judicature, at Trenton, on the sixteenth day of July, next, all the matters aforesaid, and all proceedings in the said matters and all things touching and concerning the same, as fully and entirely as they remain in the said

Writ

District Court of the City of Bayonne by whatsoever names the parties may be called therein, together with this writ, that we may further cause to be done thereupon what of right we shall see fit to be done.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court at Trenton aforesaid, this 26th day of June, 1915.

WM. C. GEBHARDT,
Clerk.

LEFFERTS S. HOFFMAN,
Attorney.

(Endorsed: "Allocatur. Wm. S. Gummere, C. J.")

Court Record

DISTRICT COURT OF THE CITY OF BAYONNE, N. J.

State of New Jersey,
County of Hudson,
City of Bayonne. } In Tort.

MAX LEVY, Plaintiff's Attorney.
EDWARDS & SMITH, Defendant's Attorneys.

No. 15444.

SAM PERSKY,
Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COMPANY,
Defendant.

A summons was issued and tested Dec. 2d, A. D., 1914, returnable Dec. 8th, A. D. 1914, at ten o'clock in the forenoon. The Constable returned the summones, as follows, viz.: I served the within summons, December 2d, A. D. 1914, on Public Service Railway Co., the defendant, by serving on D. H. Alberts, Asst. Claim Agent, by reading the same to him and delivering to him a copy thereof.

CASPER KRUGER, Constable.

Plaintiff's demand was filed December 3d, A. D. 1914.

Court Record

This case called for trial Dec. 8th, A. D. 1914, at 10 o'clock in the forenoon. Adjournment was taken upon application of plaintiff unto December 15th, A. D. 1914, at ten o'clock in the forenoon.

Further adjournment was taken upon application of defendant unto Dec. 22, A. D. 1914, at ten o'clock in forenoon and various other adjournments unto Jan. 19th, 1915.

In Tort, Substitution of Attorneys filed Jan. 14th, 1915.

Suit started by Petition by Max Levy vs. Public Service Railway Co. on Notice and Petition to have Counsel Fees fixed as an allowance, for services rendered in the case of Sam Persky vs. Public Service Railway Co. under Chapter 211, Laws of 1914.

January 19, 1915, on part of the plaintiff, Max Levy sworn.

Reserved.

Whereupon it is on this Second day of June, 1915, by this Court considered and adjudged that the said Max Levy, plaintiff, recover against said Public Service Railway Co., defendant, the sum of One hundred dollars.

L. S. True copy.
Gustav Ruh,
Clerk.

Summons

DISTRICT COURT OF THE CITY OF BAYONNE—SUMMONS IN TORT.

County of Hudson, } ss:
State of New Jersey. }

TO ANY CONSTABLE OF SAID COUNTY

SUMMONS

Public Service R'way Co.

to appear before the DISTRICT COURT OF THE CITY OF BAYONNE, to be hold at the Court Room Munincipal Building, corner Avenue C and Twenty-Sixth Street, in said City, on the 8th day of December One Thousand Nine Hundred and fourteen at ten o'clock in the forenoon, to answer unto Sam Persky in an Action in Tort. Demand Five hundred Dollars. Hereof fail not.

Witness, PETER STILLWELL, Esquire, Judge of said District Court at Bayonne aforesaid, the 2d day of December, in the year One Thousand Nine Hundred and fourteen

(L. S.)

Gustav Ruh, Clerk

True Copy
Gustav Ruh
Clerk

State of Demand

BAYONNE DISTRICT COURT

SAM PERSKY, Plaintiff, vs. PUBLIC SERVICE RAILWAY COMPANY, a Corporation, Defendant.	In Tort

The Public Service Railway Company, a corporation, the defendant in this suit, is summoned to answer unto Sam Persky, the plaintiff herein, in an action in tort; and thereupon the said plaintiff, by Max Levy, his attorney, complains: For that whereas, the said defendant, before and at the time of committing the grievances hereinafter mentioned, was the owner and proprietor and by its servants had the control and management of a certain car which was propelled and run along a certain track of the said defendant, which said track extended along Avenue C, in the City of Bayonne, County of Hudson and State of New Jersey, for the carriage and conveyance of passengers along said streets aforesaid, for hire and reward to the said defendant in that behalf; that on the twenty-sixth day of November, nineteen hundred and fourteen, the said plaintiff was lawfully on said track riding in a baker wagon drawn by a horse and going in a Southerly direction on the Westerly track of Avenue C, and was riding between 20th and 19th Streets, in the City of Bayonne, Hudson County, New Jersey; and the said

defendant on that day and year aforesaid, carelessly, negligently, and improperly suffered and permitted said car to be propelled at such a high rate of speed and in such a careless and reckless manner so that said car collided with said bakery wagon which was then and there being driven by said plaintiff along the said Westerly track on said Avenue C, in a Southerly direction from 20th Street to 19th Street in said City, and upon which the said car was then and there being operated, propelled and run along with such great force as to throw the plaintiff who was on the seat of said wagon from his seat into the wagon, greatly bruising, wounding and injuring him about his body, arm, leg and head, and breaking several teeth of his mouth, by reason whereof, the said plaintiff was unable to move about or arise from the position in which he was thrown because of said collision, and became and was very dazed, sick, lame and disordered, and so remained and continued for a long space of time from thence hitherto, during all of which time the said plaintiff suffered and underwent great pain, and in the future will undergo and suffer great pain, and was hindered and prevented, and in the future will be hindered and prevented, from transacting and attending to his necessary and lawful office by him during all that time to be performed and transacted, and lost and deprived of, and in the future will lose and be deprived of great gains, profits and advantages which he might and otherwise would have derived and acquired, and thereby also the said plaintiff was forced and obliged to lay out and expend moneys in and about endeavoring to be cured of the said wounds, bruises and injuries; wherefore,

the said plaintiff says that he is injured and has sustained damages to the sum of Five Hundred Dollars.

MAX LEVY,
Attorney of Plaintiff.

True Copy
Gustav Ruh
Clerk.
L. S.

Substitution of Attorney

BAYONNE DISTRICT COURT

SAM PERSKY, Plaintiff, vs. PUBLIC SERVICE RAILWAY COMPANY, Defendant.	In Tort.

We hereby consent that George H. Blake be substituted in our place as attorney for the Public Service Railway Company, defendant to the above entitled action.

Dated, Dec. 30th, 1914.

EDWARDS & SMITH,
Attorneys of Defendant.

True Copy.
Gustav Ruh,
Clerk.
L. S.

Notice

Public Service Railway Company,
Jersey City, N. J.

Gentlemen:

PLEASE TAKE NOTICE that on Tuesday, the nineteenth day of January, nineteen hundred and fifteen, I shall move before the Honorable Peter Stillwell, Judge of the District Court of the City of Bayonne, for an allowance of a counsel fee to be fixed by said Court, for services rendered by me in the case of Sam Persky against the Public Service Railway Company settled by said company without the consent of the counsel of the plaintiff therein. Annexed hereto is a copy of the petition setting forth full facts upon which the application will be made.

(Signed) MAX LEVY.

True Copy.
Gustav Ruh,
Clerk.

L. S.

BAYONNE DISTRICT COURT

To the Honorable Peter Stillwell, Judge of the District Court of the City of Bayonne:

The petition of Max Levy respectfully shows:

1. That he is a counselor-at-law of the State of New Jersey, with law offices in the City of Bayonne, and in such capacity was, on December 1st, 1914, retained by one Sam Persky to prosecute a claim for damages against the Public Service Railway Company for negligence arising out of a collision between a car of said Company and the wagon in which said Persky was riding, which occurred on November 26th, 1914.

2. That the said Sam Persky was severely injured in and about the right side of his body, including his leg, arm and head, and had two of his

teeth broken; that he was taken to the Bayonne Hospital immediately after said accident, and remained there from Thursday, November 26th, 1914, to Saturday, November 28th, 1914, and after being discharged had the attendance of Dr. D. I. Nalitt.

3. That your petitioner instituted suit in the District Court of the City of Bayonne against the Public Service Railway Company on behalf of the said Sam Persky in action at law for Five Hundred ($500) Dollars damages, and a summons was issued therefrom on December 2d, 1914, which was returnable on December 8th, 1914, and from week to week adjourned by consent of counsel of the respective parties until January 12th, 1915.

4. That your petitioner and Mr. David Alberts, assistant adjuster of the Public Service Railway Company, were negotiating an amicable settlement of the matter pending the legal proceedings without definite result; that your petitioner was informed by the plaintiff that he had been to see said adjuster personally about making settlement and that he was offered only Twenty ($20) Dollars which he refused; that thereafter the plaintiff asked your petitioner what was his fee and was told that no fixed sum could be mentioned as yet as no actual settlement had been effected; that subsequently your petitioner was requested by said Alberts to accept Twenty ($20) Dollars as a fee as he was able to deal directly with the plaintiff; that this offer was refused with the statement that he had done considerable work in the preparation of the case, drawing the pleadings, issuing summons, investigating the witnesses, preparing statements of witnesses and paying summons charges, and performing other work in connection

therewith as in looking up the law of negligence.

5. That your petitioner was informed on January 10th, 1915, by the plaintiff that he had settled his claim with the Public Service Railway Company by accepting Thirty ($30) Dollars, and executed a release discharging every claim of his against the Company by reason of said collision; although your petitioner was uninformed thereof by him or by any representative of the defendant, and against the express instructions of your petitioner.

6. Your petitioner alleges that he has done considerable service in this cause and was prepared and is now prepared to try said cause of action, but by reason of said settlement is unable to proceed therewith; that the plaintiff had a good cause of action and was in a position to successfully corroborate his claim by several eye witnesses; that his injuries were serious, and that he could reasonably expect a verdict of not less than Five Hundred ($500) Dollars; that the said plaintiff is poor and was indigent and was in need of money and was therefore taken at a disadvantage by the representative of the defendant company, and that the said sum of Thirty ($30) Dollars given in full settlement was incomparably small and an insufficient compensation for said injuries.

7. Your petitioner prays that he may be awarded for his services herein a reasonable sum, not to be less than One Hundred ($100) Dollars, against the said Public Service Railway Company, in accordance with the provisions of Chapter 211, P. L. 1914.

(Signed) MAX LEVY,
Petitioner.

Proof of Service

I served the within Petition and Notice upon the Public Service R'way Co., Jan. 13th, 1915, by serving T. E. Sullivan, Claim Adjuster, who accepted service for said Public Service R'way Co., and whom I informed of the contents thereof.

JOSEPH FEDORKO,
Sergt.-at-Arms.

Exhibit of Max Levy, Petitioner

I hereby retain Max Levy to prosecute my claim against the Public Service Railway Company for damages arising out of a collision which resulted in serious injuries to me on Thursday, November 26th, 1914, at about 10 p. m., near Avenue C and 18th Street, Bayonne, N. J., and for his promise of his services in this matter, I agree to pay him fifty (50) per cent of all moneys received by him by way of legal proceedings, compromise, settlement or otherwise, and I am not to be responsible in anywise for the payment of any costs.

Dated, December 1st, 1914.

Signed SAM PERSKY.

Exhibit of Max Levy Pet.

True Copy,
Gustav Ruh,
Clerk.

L. S.

Stipulation

BAYONNE DISTRICT COURT

In the matter of Petition of MAX LEVY for the award of counsel fees for services rendered in the case of Samuel Persky vs. Public Service Railway Company, under Chapter 211 of the Pamphlet Laws of 1914.	On Petition. Stipulation.

It is hereby stipulated by and between MAX LEVY, attorney *pro se*, and LEFFERTS S. HOFFMAN, attorney for and counsel with the PUBLIC SERVICE RAILWAY COMPANY, that for the purpose of prosecuting the writ of certiorari heretofore issued out of the Supreme Court to review the judgment of the Bayonne District Court in the above entitled matter, the following facts shall be held to be state of the case under said writ of certiorari:

1. That a copy of the original notice and petition in the above case shall be printed in the state of the case.

2. That a copy of the summons and state of demand in the suit of Samuel Persky vs. Public Service Railway Company in the Bayonne District Court, shall be printed in the state of the case.

Stipulation

3. That the hearing on the above petition was held in the above Court before Judge Stillwell on January 19, 1915. Max Levy was sworn on his own behalf and Mark Townsend, Jr., attorney for the Public Service Railway Company, had the opportunity of cross-examining Max Levy. Samuel Persky was neither subpoenaed as a witness, nor was he present at the hearing. Max Levy testified that the action pending in the Bayonne District Court by Samuel Persky against the Public Service Railway Company was one for damages to Samuel Persky, arising out of a collision on November 26, 1914, between a trolley car of the Public Service Railway Company and a wagon driven by Samuel Persky, which accident occurred on Avenue C between 19th and 20th Streets, Bayonne, N. J. Max Levy then offered in evidence the agreement entered into between him and Samuel Persky, as follows:

"I hereby retain Max Levy to prosecute my claim against the Public Service Railway Company for damages arising out of a collision which resulted in serious injuries to me on Thursday, November 26th, 1914, at about 10 p. m., near Avenue C and 18th Street, Bayonne, N. J., and for his promise of his services in this matter, I agree to pay him fifty (50) per cent of all moneys received by him by way of legal proceedings, compromise, settlement or otherwise, and I am not to be responsible in any wise for the payment of any costs.

Dated, December 1, 1914.

(Signed) Samuel Persky (in Hebrew)."

4. Max Levy further testified that Samuel Persky was poor, without funds and unable to pay

him his fee; that the Public Service Railway Company settled with Persky for Thirty Dollars ($30.00) after having notice that he was Persky's attorney, and they offered him Twenty Dollars ($20.00) as his fee, which he refused, demanding Twenty-five Dollars ($25.00) and Court costs, which Public Service Railway Company declined to give; that he had drawn the necessary papers for the institution of the suit of Samuel Persky vs. Public Service Railway Company, and consulted with his client (plaintiff) several times, and examined several witnesses and investigated the law pertaining to the accident, and, in his opinion, his services were reasonably worth One Hundred Dollars ($100.00); that if the case of Samuel Persky vs. Public Service Railway Company had been tried and he had established liability upon the part of the defendant, the plaintiff, in his opinion, would have received a large verdict, and his fee would have been correspondingly larger.

5. There was no evidence offered at said hearing showing either the amount of Samuel Persky's damages or the details of the collision between Persky's wagon and the trolley car of the Public Service Railway Company or that the responsibility for the occurrence of the said collision was upon the Public Service Railway Company.

6. It was stipulated between counsel for the respective parties that the original suit of Samuel Persky vs. Public Service Railway Company was still pending in this Court, at the time of the hearing of said petition, but that a general release had been executed and delivered by Persky to the Company acknowledging the receipt of Thirty ($30) Dollars, and releasing and discharging the

company from any claim held by him for the injuries received by him by reason of said collision. The Company was notified by Levy that they were settling with Persky at their peril.

Dated, Oct. 25th, 1915.

MAX LEVY,
Attorney *Pro Se.*
LEFFERTS S. HOFFMAN,
Attorney of Public Service
Railway Company.

Reasons

(Filed July 15, 1915)

NEW JERSEY SUPREME COURT

MAX LEVY, Defendant. vs. PUBLIC SERVICE RAILWAY COMPANY, Plaintiff,	On Certiorari.

The said plaintiff, by Lefferts S. Hoffman, its attorney, comes and prays that the alleged judgment made against it, and in favor of the said Max Levy, in the District Court of the City of Bayonne, by Peter Stillwell, Judge of the said District Court of the City of Bayonne, on or about

the second day of June, nineteen hundred and fifteen, may be set aside, reversed and for nothing holden, for the following

REASONS

1. Because no suit by petition can be begun in the District Court of the City of Bayonne.

2. Because the District Court of the City of Bayonne had no jurisdiction in the premises.

3. Because no judgment could be entered in the said Court in favor of the said Max Levy and against said Public Service Railway Company in a suit that in fact had been started by Sam Persky against Public Service Railway Company, and to which suit the said Max Levy was not a party.

4. Because the proceeding was a summary proceeding, as a result of which the right of Public Service Railway Company to have its day in Court, and to exercise its right to assert any defense which it might have in the usual form and in the usual forum, and to have the issues tried by a jury, if it saw fit, was denied to it.

5. Because the proceeding was summary, and a summary proceeding to settle the attorney's fees applied only, if at all, between the plaintiff and his attorney, and cannot be invoked by such attorney against the defendant.

6. Because no proof appeared in the cause that the plaintiff Persky had any cause of action against the defendant Public Service Railway Company.

7. Because, if a cause of action in fact existed by said Persky against said Public Service Railway Company, then the value of the said cause of

action was the sum for which the same had been settled, which sum the said Max Levy averred in his petition was, he had been informed, the sum of thirty dollars; and the agreement for fifty per cent of the recovery or verdict made between the said Persky and the said Levy would only, at most, entitled the said Levy to a claim of fifteen dollars against the client Persky, and, therefore, would only entitle him to assert against Public Service Railway Company a claim under his lien for that amount, and as he had been offered, according to the allegations of his own petition, by one Alberts, representing the said Public Service Railway Company, the sum of twenty dollars and had refused to accept the same, he, the said Levy, had no standing in Court.

8. Because if a lien arose in favor of the said Levy against the said Public Service Railway Company by virtue of Chapter 201 of the Laws of 1914, the said Public Service Railway Company may have become merely a surety for the payment to the said Levy by the said Persky of compensation for his services; under which theory the said Levy should exhaust the said Persky, or show that the said Persky was insolvent before proceeding to recover against the said Public Service Railway Company.

9. Because the alleged judgment, order and proceedings are in divers other respects irregular, illegal and unjust to the said plaintiff in certiorari.

LEFFERTS S. HOFFMAN,
Attorney of Plaintiff in Certiorari.

(Acknowledgment of service endorsed on above July 12, 1915.)

Notice of Appeal and Reasons

(Filed April 6, 1917)

NEW JERSEY COURT OF ERRORS AND APPEALS

MAX LEVY, Appellant, Defendant in Certiorari, vs. PUBLIC SERVICE RAILWAY COMPANY, Respondent, Plaintiff in Certiorari.	Appeal from New Jersey Supreme Court.

To: Messrs. Hoffman & Tynan,
Attorneys of Respondent.

TAKE NOTICE that the defendant in certiorari appeals from the whole of the judgment entered in this cause on the following grounds:

1. Because the Supreme Court erred in finding that "there was no warrant for the Trial Court's trying the original cause against the defendant company in the absence of the client." There was no justification for this finding by the Appellate Court because the original action was not being tried in the District Court. An entirely new cause of action was being heard between the attorney of the client as plaintiff, and the defendant company as defendant, in which the client had no interest whatever, and he was, therefore, neither a proper nor a necessary party to that proceeding.

2. Because the Supreme Court erred in finding that "there was no warrant for the Trial Court's awarding to the attorney as a fee over three times the amount his principal received upon the settlement in the face of a written contract between the two which limited the attorney's claim to one-half of the settlement." There was no justification for this finding by the Appellate Court because the agreement between the attorney and his client did not assume a fifty (50%) per cent compensation based on a settlement which the client might effect. The agreement was only based on an adjustment which the attorney would make. Since the attorney did not effect a settlement for any reason whatsoever, the agreement could not be used as a basis for the attorney's compensation. His services could then be only measured by what they were reasonably worth in order that the District Court might adjudge a reasonable compensation therefor. This the District Court found to be $100.00, and awarded that sum to the attorney.

3. Because the judgment of the Supreme Court was contrary to the evidence.

4. Because the judgment of the Supreme Court was contrary to law.

MAX LEVY,
Attorney of Appellant *pro se.*

Service of a copy hereof acknowledged this 3d day of April, 1917.

LEFFERTS S. HOFFMAN,
Attorney of Respondent.

Decision of Court Vacating Judgment of District Court

(Filed June 10th, 1916)

NEW JERSEY SUPREME COURT

MAX LEVY, Defendant, vs. PUBLIC SERVICE RAILWAY COMPANY, Plaintiff.	On Certiorari to District Court of the City of Bayonne.

Action by Sam Persky against the Public Service Railway Company, wherein Max Levy petitioned to have counsel fees fixed for services rendered by him. To review a judgment for petitioner, defendant brings certiorari. Judgment vacated.

Argued February term, 1916, before Parker, Minturn and Kalisch, JJ.

Max Levy, of Bayonne, *pro se*. Lefferts S. Hoffman and Leonard J. Tynan, both of Newark, for prosecutor.

PER CURIAM. Under the provisions of Chapter 201 of the Laws of 1914, the plaintiff, an attorney of this Court, filed a petition in the District Court of Bayonne to have counsel fees fixed for services rendered by him in the suit of Sam Persky against the Public Service Railway Company. The attorney had brought suit for Persky for damages, but while the suit was pending his client settled the claim with the defendant for $30.

Decision of Court Vacating Judgment of District Court

This plaintiff, Levy, held a contract with his client by which the client agreed to pay his attorney fifty per cent of moneys received by way of settlement or otherwise. This situation brings the parties within the language of the act of 1914, which seems to be aimed at such a posture of affairs. The present plaintiff gave notice of his claim to the defendant company, and a hearing took place before the District Court, as a result of which that Court rendered a judgment in favor of Levy for $100, which the defendant company seeks to review by this writ of certiorari.

Various reasons are urged against the legality of the judgment, the procedure under which it was rendered, and the act upon which it is based. At common law the lien conceded in such a case was not enforceable. *Weller vs. N. J. Street Ry. Co.*, 68 N. J. Eq., 659, 61 Atl., 459, 6 Ann. Cas., 442. The act in question was obviously intended to cure such a lapsus, and give a remedy to the attorney. The act, while conceding to the client the right to settle, provides a summary method of procedure for the settlement of the attorney's legal claim.

We do not find it necessary to determine the correctness of the procedure here, for, conceding its correctness we find no warrant for the Trial Court's trying the original case against the defendant in the absence of the client, and awarding to the attorney as a fee over three times the amount his principal received upon the settlement, in the face of a written contract between the two which limited the attorney's claim to one-half of the settlement.

Decision of Court Vacating Judgment of District Court

We do not, however, view the defendant's tender of $20.00 to the plaintiff as conclusive of his rights. In any event he was entitled to receive fifty per cent of the settlement, besides costs, the amount of which latter item the record does not present.

The result is that the judgment in question, based as it is upon a procedure entirely at variance with the common law, or the statutory procedure governing district Courts, is subject to review by means of this writ, and, being unwarranted by the facts or the law, must be vacated.

New Jersey Court of Errors and Appeals

MAX LEVY, Appellant, Defendant in Certiorari, vs. PUBLIC SERVICE RAILWAY COMPANY, Respondent, Plaintiff in Certiorari.	On Appeal from New Jersey Supreme Court.

BRIEF FOR APPELLANT

Statement of Facts

On November 26th, 1914, Sam Persky was injured while driving a wagon when it collided with a trolley car of the Public Service Railway Company at Avenue C between Nineteenth and Twentieth Streets, Bayonne, New Jersey. Suit was begun by him December 2d, 1914, through his attorney, Max Levy (Case, Exhibit A, p. 8), against the Public Service Railway Company for $500.00 damages. While this action was pending a settlement was effected between the said Persky and the Public Service Railway Company without

the knowledge or consent of Persky's attorney, Max Levy, whereby $30.00 was paid to Persky and a general release under seal delivered to the company. Thereafter, Max Levy petitioned the said District Court of the City of Bayonne for an allowance of a counsel fee for services rendered by him to Persky in his suit against the defendant company. This proceeding was instituted under Chapter 201, Laws of 1914. The Court rendered a judgment for $100.00 in favor of said Max Levy and against the Public Service Railway Company (Case, p. 13). On a writ of certiorari, the judgment of the District Court was vacated by the Supreme Court (Case, p. 30), and this appeal is brought to review the judgment of the Supreme Court.

Argument

Several reasons were advanced by the respondent in its application for a writ of certiorari (Case, pp. 26-27), but the Supreme Court in its opinion virtually upheld the claim because of reasons 3, 6 and 7 (Case, p. 31).

The appellant is aware of no New Jersey decision construing the act in question, and for this reason deems it appropriate to discuss all the reasons urged by the respondent.

REASONS RAISED BY PLAINTIFF IN CERTIORARI

1. Because no suit by petition can be begun in the District Court of the City of Bayonne.

2. Because the District Court of the City of Bayonne had no jurisdiction in the premises.

Chapter 201, Laws of 1914, under which the allowance was recovered in this case reads as follows:

> "After the service of a summons and complaint in any action at law, or the filing of a bill of complaint or petition in the Court of Chancery, or the service of an answer containing a counter-claim in any action at law, the attorney, solicitor or counsellor-at-law who shall appear in said cause for such party instituting the action at law, or suit, or filing the petition or counter-claim shall have a lien for compensation, upon his client's cause of action, suit, claim or counter-claim, which shall contain and attach to a verdict, report, decision, decree, award, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come; and the lien shall not be affected by any settlement between the parties before or after judgment or final order or decree. The Court in which such action, suit or other proceeding is pending, upon the petition of the attorney, solicitor or counsellor-at-law, may determine and enforce the lien."

The concluding sentence of this act, "The Court in which such action, suit or other proceeding is pending, upon the petition of the attorney, solicitor or counsellor-at-law, may determine and enforce the lien," is a complete answer to the foregoing reasons.

Counsel for the company may improperly contend that the remedy of the attorney is to begin a suit in the Court of Chancery to foreclose his lien.

Zimmer vs. Met. St. Ry. Co., 65 N. Y. Supp., 977;
Fischer-Hansen vs. Bklyn. Hgts. R. R. Co., 66 N. E., 395.

These cases do not raise directly the question presented by the first two reasons. But they are brought under Section 66 of the New York Code of Civil Procedure which is somewhat similar to our own act. It reads as follows:

> "The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained at law. From the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for the party has a lien upon his client's cause of action, claim or counter-claim, which attaches to a report, verdict, decision, judgment, or final order in his client's favor, and the proceeds thereof in whosoever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment or final order. The Court upon petition of the client or attorney may determine and enforce the lien."

It will be observed that the New York Act differs from the New Jersey Act in this: The New York Act declares merely that "The Court upon petition of the client or attorney may determine and enforce the lien"; while the New Jersey Act provides, "The Court in which such action, suit or other proceeding is pending, upon the petition of the attorney, solicitor or counsellor-at-law, may determine and enforce the lien."

In the *Zimmer* case, *supra,* it was "a request by the attorney to have the satisfaction of judg-

ment set aside for the purpose of enforcing his lien against the defendant'' (not his client). Justice Gaynor, delivering the opinion of the Court, held that the attorney had mistaken his remedy, stating that where the facts disclosed a sufficient fund in the hands of the client from which the attorney could enforce his compensation, the attorney could not then maintain an action against the defendant to make him liable under his lien. And since the New York Act omits to specify which Court has immediate jurisdiction in this class of cases, it was HELD ''on the well settled principles and rules of practice in analogous cases, that the attorney should proceed by a suit in equity.''

In the *Fischer-Hansen* case, *supra,* Justice Vann says, ''The remedy provided by the Code by means of petition is not exclusive but cumulative for a Court of Equity has always had power to ascertain and enforce liens.'' * * * This decision is certainly consistent with the view that the remedy may be otherwise than in the Chancery Court, particularly where jurisdiction is given as in the New Jersey Act.

> A Court of Equity has general jurisdiction of liens, and in the absence of statutory provisions will foreclose them in obedience to the well settled rule of equitable jurisprudence. Unless the law has provided another mode of enforcement, a Court of Equity is the only proper tribunal for enforcing an equitable lien, regardless of what rights the lienor may have in a Court of Law. A Court of Equity is also the proper tribunal in which to enforce statutory liens where the statutes provide no method of enforcement, except where the lien is in the nature of a pledge and possession accom-

panies the lien. But as a general rule a Court of Equity has no jurisdiction to enforce payment of common-law liens or of statutory liens for which a method of enforcement is provided, unless jurisdiction has been acquired for other purposes; nor will equity interfere to foreclose a lien when there is a full and complete remedy at law.

28 Cyc., 681.

The District Courts of New Jersey have jurisdiction over "every suit of civil nature at law, or to recover any penalty imposed or authorized by any law of this State where the debt, balance, penalty, damage or other matter in dispute does not exceed, exclusive of costs, the sum or value of $500.00 * * *; and in such other cases as are now or may hereafter be provided by law."

Section 30 of the District Court Act.
McDevitt vs. Connell, 63 Atl., 504.
Funck vs. Smith, 46 N. J. L., 484.

REASONS 3, 6 and 7

The Supreme Court in holding that "We find no warrant for the Trial Court's trying the original case against the defendant (Company), in the absence of the client" (Case, p. 31), practically sustains the respondent's contentions in Reasons 3 and 6 which follow:

REASON 3

Because no judgment could be entered in the said Court in favor of the said Max Levy and against said Public Service Railway Company in a suit that in fact had been started by Sam Persky against Public Service Railway Company, and to which suit the said Max Levy was not a party (Case, p. 26).

The attorney's petition for an allowance is no part of the proceeding started by his client, but is clearly a distinct action having a separate state of facts for its maintenance, and a judgment may, therefore, be rendered as if no other action was pending.

The Trial Court was not trying the original case against the defendant company. If it was, the Supreme Court would be justified in its conclusion that it could not be done in the absence of the client. But the record (Case, pp. 18-19-20), discloses that an entirely new proceeding had been commenced by the attorney under Chapter 201, Laws 1914, by petition and notice in which the client was not interested. The original case was a mere incident to this proceeding and would only be material to prove the fact that a cause of action had been brought through the attorney who was the petitioner in the new proceeding.

The case of *Peri vs. N. Y. C. R. R. Co.*, 152 N. Y., 521, is directly in point. Justice Bartlett rendering the opinion:

> "We are of the opinion that this (a proceeding instituted by attorneys to enforce their lien), is a special proceeding and can-

not be regarded in a proper sense as a motion in the action. * * * We have here a proceeding by third parties against the defendant upon other issues than those framed in the action and relating to a lien arising out of a state of facts wholly distinct from those passed upon at the trial. * * * It would be an anomaly to hold that a proceeding of this nature is a motion in the action.''

REASON 6

Because no proof appeared in the cause that the Plaintiff Persky had any cause of action against the defendant Public Service Railway Company.

No proof of the original suit is required by the act Only the facts of the attorney's petition need be shown, and part of these facts is the element of the pendency of the original action. The act merely declares that ''the attorney, solicitor or counsellor-at-law who shall appear in said cause for such party instituting the action at law, or suit, or filing the petition, or counterclaim, shall have a lien for compensation upon his client's cause of action, suit or counter-claim,'' etc.

A cause of action, suit or claim has been defined to be a right which a party has to institute and carry through a proceeding; a right to bring an action; a right of action; the ground on which an action may be sustained; the fact which gives rise to a right of action.

6 Cyc., 705.
Anderson Law Dictionary.
Bouvier Law Dictionary.
Black Law Dictionary.

There was proof, however, that the plaintiff Persky had a cause of action against the defendant company (Case, p. 22, par. 2 in which state of demand in original suit shall be printed in the state of case).

Counsel may argue that the attorney must prove that his client had a provable cause of action, *i. e.*, establish a liability on the part of the defendant to respond to his client in damage, citing the case of *Cassucci vs. Alleghany R. R. Co.*, 20 N. Y. Supp., 343, as in point. The facts are these:

> Action by *Cassucci vs. R. R. Co.*, for personal injuries. After issue was joined, the plaintiff and the defendant settled the action and the plaintiff's attorney continued the prosecution of the case in the name of the plaintiff to recover the amount of an alleged lien on the claim for damages for his services.
>
> MACOMBER, J. * * * It appears, however, that the plaintiff's attorney had a contract with his client by which he was to receive one-third of the amount of recovery or one-third of any amount for which the defendant should settle the action. * * *
>
> Upon the trial, the learned counsel for the appellant (the plaintiff's attorney), assumed the position that by showing a settlement between the plaintiff and the defendant for the sum of $250.00, he, the attorney, had a right to recover in this action in the name of the plaintiff, but for the benefit of the attorney, one-third of that amount without entering upon the merits of the question presented by the pleading which put in issue every question raised by the plaintiff. * * *

In this *Cassucci* case, the attorney proceeded with the original cause of action in which his client

was plaintiff and in which the defendant made full denial by his pleading. Of course, it was absolutely necessary for him to prove his client's cause of action under his procedure. This he failed to do. The Court correctly held that under the plaintiff's contention it would have to hold that a settlement amounted in fact to an admission of liability which would be preposterous under the law. In other words, the attorney had mistaken his remedy. Instead of proceeding with the original cause of action he should have brought a separate suit for his own services. This *Cassucci* case in no way stands for the proposition which might be urged by the respondent that the attorney must prove a liability on the part of the defendant.

The petitioner has not proceeded on any such claim as the *Cassucci* case. He has merely petitioned for an allowance for services rendered his client who has settled without his consent. This petition has been proved by proper testimony at a regular hearing. The original Persky suit was not being continued for this purpose. If the attorney had asked for leave to continue the Persky action with the prime object of attaching his lien to a judgment to be recovered thereunder, then the *Cassucci* case might apply and the client would be a necessary party thereto.

REASON 7

The Supreme Court in holding that "We find no warrant for the Trial Court's awarding to the attorney as a fee over three times the amount his principal received upon the settlement, in the face of a written contract between the two which limited the attorney's claim to one-half of the settlement" (Case, p. 31), practically sustains the re-

spondent's contention in Reason 7 which reads as follows:

Because, if a cause of action in fact existed by said Persky against said Public Service Railway Company, then the value of the said cause of action was the sum for which the same had been settled, which sum the said Max Levy averred in his petition was, he had been informed, the sum of Thirty Dollars; and the agreement for fifty per cent of the recovery or verdict made between the said Persky and the said Levy would only at most, entitle the said Levy to a claim of Fifteen Dollars against the client Persky, and, therefore, would only entitle him to assert against Public Service Railway Company a claim under his lien for that amount, and as he had been offered, according to the allegations of his own petition, by one Alberts, representing the said Public Service Railway Company, the sum of Twenty Dollars and had refused to accept the same, he, the said Levy, had no standing in Court.

The defendant company never offered or tendered the proper fee. It is conceded that the sum of $25.00 and costs demanded by the attorney for his services and disbursements were not paid (Case, pp. 23-24). The only remaining question then is, was the offer of $20.00 a legal tender? The answer is No. The retainer (Case, p. 21), reads as follows:

> I hereby retain Max Levy to prosecute my claim against the Public Service Railroad Company for damages arising out of a collision which resulted in serious injuries

to me on Thursday, November 26th, 1914, at about 10 p. m., near Avenue C and 18th Street, Bayonne, N. J., and for his promise of his services in this matter, I agree to pay him fifty (50) per cent of all moneys received by him by way of legal proceedings, compromise, settlement or otherwise, and I am not to be responsible in anywise for the payment of any costs.

Dated, December 1st, 1914.

SAM PERSKY.

It will be observed that this agreement calls for the payment of 50% of all moneys received by him (the attorney), by way of legal proceedings, compromise, settlement or otherwise; and not 50% obtained by a settlement effected by the client. It would be absurd to hold that the attorney under this retainer could be compelled to take in payment of his services a percentage of an amount fixed between his client and the company. Although settlements are looked on with favor by the Courts, yet the facts surrounding them cannot be overlooked when effected to the prejudice of the client's attorney. The negotiations between an experienced attorney of the company or claim adjuster and a client ignorant generally of his rights and position is a matter not to be ignored. And yet, if a settlement is made, he is bound by it. And this is just, because he has no one to blame but himself. But when the defendant company attempts to jeopardize by such a settlement the rights of the client's attorney, then the law through Chapter 201, Laws of 1914, steps in and says, "We are aware that such things have happened before, and have now legislated to prevent their recurrence." If this were not so, the attorney would always be at the mercy of the defendant. If a settlement could be made for $30.00, it

could be made for $5.00. See then the position of the attorney if his client is irresponsible. This situation could arise even in those cases where the client's damages might be in the thousands of dollars and the attorney's services valued in the hundreds.

At common-law, the client could compromise or settle his cause of action before judgment regardless of the rights of the attorney unless effected for the purpose of depriving him of his fees. Thus, the attorney's sole claim was against his client unless there was a fraudulent or collusive settlement, in which event, he could have it set aside.

Heister vs. Mount, 17 N. J. L., 438.
Gregory vs. Gregory, 32 N. J. Eq., 424.
Barden vs. Ward, 42 N. J. L., 518.

If the compromise is a collusive one entered into between the plaintiff and defendant specifically for the purpose of depriving the solicitor of his lien, the Court interferes for the solicitor's protection. In this case, he may apply summarily for the payment of his costs by either of the parties to the collusive scheme.

3 H. & C. 294.
1 Cr. & J., 415.
2 Dowl., 119.
2 Ch., 314-21.
L. R.—Q. B., 153.
60 L. J., (Q. B.) 767.

Chapter 201, Laws of 1914, however, extends the attorney's privilege for the collection of his fees. It secures for him even in those cases where fraud or collusion does not exist, a protection against a settlement made in good faith to the extent of his fees theretofore entirely unprovided. The defendant is now making settlement at his

peril even in those cases where no express retainer is held by the attorney.

Peri vs. N. Y. C. R. R., *supra.*

Fisher-Hansen vs. Bklyn. Hgts. R. R. Co., *supra.*

In the *Fisher-Hansen* case, the plaintiff brought an action against the defendant demanding that the defendant be adjudged to pay him an amount claimed based upon a settlement made between the defendant and plaintiff's client. A written agreement was entered into between the plaintiff and his client whereby the latter agreed that the former, in consideration of the professional services to be rendered and the disbursements to be made in said action, should have fifty per cent of the verdict rendered therein.

> Justice Vann says * * * If the claim is prosecuted to judgment or to a decision upon which judgment may be entered, the lien reaches forward and attaches to that also. When the claim is thus extinguished by merger in a higher security, the statute makes express provision for the transfer and continuance of the lien. When, however, the claim is extinguished by a settlement, the statute does not expressly provide that the lien shall extend to the proceeds, and the precise question before us is whether in view of the history and object of the act, this is impliedly commanded * * *
>
> It (the defendant) had both actual and constructive notice of the lien, and while it does not appear that it knew the share of the fund that the plaintiff was entitled to receive, its duty was to ascertain the amount and retain it for him. * * *

It would appear from the above case that the petitioner may only be compelled to go after the

proceeds when such proceeds are the result of a verdict, report, decision, decree, award, judgment or final order; that the words, "the proceeds thereof" relate back to the merger of the cause of action into such a verdict judgment or other final disposition, and not to a settlement made between the parties; and that when a settlement is made, the question then only is may the attorney follow the proceeds or may he rely upon his agreement with his client in order to secure compensation under the act.

In the case before this Court, there was no verdict, judgment or final order rendered, and, therefore, there were no proceeds which the attorney was bound to follow.

The contention of counsel for the company that the petitioner is bound to follow the proceeds of $30.00 in the hands of Persky paid in settlement is untenable and unsound and certainly not a proper or reasonable interpretation of the act. The attorney might be compelled to follow the proceeds if his compensation was based on an agreement with Persky that he was to get for his services a percentage of the amount Persky was to settle for; but this was not the agreement that the petitioner had with Persky. The agreement was that he was to receive 50% of all money that he, the petitioner, would settle for. And since no settlement was made by the petitioner there is no sum which he can be compelled to follow. However, if Persky received an amount in settlement sufficient to pay his attorney for the services rendered, then possibly, the Court might compel the attorney to proceed, 1st, against Persky in order to reach that fund; and then, 2d, if unsuccessful, against the Public Service Railway Company. This point has not been directly decided by any

of the cases, but some of them hold that the procedure would be proper if the fund was sufficient to pay the attorney and could be reached.

Dolliver vs. American Swan Boat Co., *supra.*

Zimmer vs. Met. St. Ry. Co., 65 N. Y. Supp., 977.

But in this case there is nothing in the facts to show that such a procedure on the part of the attorney is required. There are no proceeds under a judgment or final decision; there is no sufficient fund, and the agreement between the petitioner and Persky is one not contemplated by the reason raised on behalf of the Public Service Railway Company.

The *Fischer-Hansen* case further establishes the principle that when a defendant has both actual and constructive notice of the lien and does not know the share of the funds that the attorney is entiteld to receive, it is his duty to ascertain the amount and retain it for him.

In our case, the company could not know the amount that was due the attorney except upon request of him for the amount that he considered due for his services. The only other way that they could have ascertained the amount, was to know of the agreement between the petitioner and Persky which would only disclose the fact that the attorney was entitled to 50% of whatever amount he, the attorney, would have settled for. Since there was no settlement made by the attorney, the company was compelled under the act to ascertain what the attorney was entitled to as a reasonable compensation for his services. This they failed to do and the Trial Court found it to be the sum of $100.00.

REASON 4

Because the proceeding was a summary proceeding, as a result of which the right of Public Service Railway Company to have its day in Court, and to exercise its right to assert any defense which it might have in the usual form and in the usual forum, and to have the issues tried by a jury, if it saw fit, was denied to it.

Nature of a Summary Proceeding

Proceedings have been classified as regular or summary. When a Court acts or professes to act upon common-law principles, its proceedings are called regular, and not summary, however expeditiously it may act; but when a Court of Common-law jurisdiction is by some law authorized to act different from the common-law mode it is called a summary proceeding, a summary proceeding being defined to be a form of trial in which the ancient established course of a legal proceeding is disregarded, especially in the matter of the trial by jury, and in the case of heavier crimes, presentment by a grand jury. Summary proceedings are not, however, as might be inferred from this definition, exclusively criminal in their nature but are more often available to enforce civil rights. They are generally held to be cumulative in their nature.

Philips vs. Philips, 8 N. J. L., 122 at 124.

37 Cyc., 528.

Statutes Authorizing Summary Proceedings are Constitutional

The question of the constitutionality of statutes authorizing summary proceedings arises more particularly in regard to infringement of the right to trial by jury guaranted by the federal and state constitutions, and the due process of law clause. But these constitutions have been uniformly construed as not conferring a right to trial by jury in all cases and as not extending the right to cases in which it was not allowed at common law, but simply as guaranteeing that right unchanged as it existed at common law or by statute in the particular state at the time of the adoption of the constitution, and since at common law the right to trial by jury did not exist in summary proceedings these proceedings are still triable without a jury, and are not within the constitutional guaranty.

37 Cyc., 529.
The State vs. Doty, 32 N. J. L., 403.
Carter vs. Camden Dt. Ct., 49 N. J. L., 600.

The act under which this suit was brought provides a remedy unknown to the common law; and thus does not prejudice the respondent for the act is in nowise depriving it of anything heretofore possessed and protected by the constitution.

The act concerning attorneys and counsellors, Section 611, Chapter 12, Laws of 1909 of the State of Illinois, is a statute somewhat similar to the New Jersey Act, but worded differently. This Illinois Act was elaborately construed in the case of *Standidge vs. Chicago Rys. Co.*, 254-524, main taining the following propositions:

1. This statute does not violate the constitution as depriving defendants of their rights to make contracts of settlement.

2. It was the legislative intention to give attorneys a lien from and after service of notice which would protect them against settlements regardless of whether the suit had been commenced, was pending, or had finally been determined.

3. The legislature may provide for the enforcement of attorneys' lien without a jury trial. The petition may be filed in any Court of competent jurisdiction.

4. The Statute is not limited to any particular Court or class of cases and does not violate the constitution as to uniform procedure.

5. In view of the language of the last sentence in this section, (On petition filed by attorneys, * * * any Court of competent jurisdiction shall * * * adjudicate the rights of the parties to enforce such lien. * * *), jurisdiction to enforce liens is conferred on Law Courts as well as Courts of Equity.

A copy of the petition setting forth all the facts upon which the application for allowance was based together with notice of said application returnable January 19th, 1915, was served on the defendant company. A trial was had under said petition and notice at which the appellant was sworn as a witness and proved all the allegations in his said petition. Counsel for the company was present and had the opportunity of cross-examination (Case, p. 23 ll. 5-6). Thus, it cannot be disputed that counsel for the defendant company was given every privilege to assert any defense that he might have interposed.

> "While the statute gives a lien, the plaintiff must show that he comes within the statute by establishing the facts alleged in his complaint; and the action is open to any defense tending to show that no lien ever existed, or that if it once existed it was discharged with the consent of the plaintiff or was waived or forfeited by his misconduct or neglect."

Fisher-Hansen vs. Bklyn. Co., *supra.*

If the defendant company was entitled to a trial by jury, this right was waived; and where a party goes to trial before the Court without a jury and without objection, he cannot afterwards complain.

Joy & Seliger vs. Blum, 55 N. J. L., 518.

Raphael vs. Lane, 56 N. J. L., 108.

REASON 5

Because the proceeding was summary, and a summary proceeding to settle the attorney's fees applied only if at all between the plaintiff and his attorney, and cannot be invoked by such attorney against the defendant.

This point partly assumes that a summary proceeding may exist in favor of the attorney against his client but cannot constitutionally be asserted against the defendant company.

The power of a state to enact laws within its constitutional limits is supreme. The only test of the validity of an act regularly passed by a State Legislature is whether or not it violates the State or Federal constitutions in express terms or by

clear implication. These principles have never been questioned.

There is nothing in either the Federal or State constitutions to which the act in issue is in conflict. Thus, this law is a proper legislative act, and the Courts are not at liberty to question its wisdom or policy.

Summary proceedings have been allowed in innumerable instances both at the common law and by statutory enactment. Enumeration of cases under these proceedings are fully set forth in 37 Cyc., 531.

> Except in those rare instances in which summary procedure was allowed at common law, such as punishment for contempt, and suspension or disbarment of attorney, express authority is essential to the validity of a summary proceeding, and such proceedings being in derogation of common law must very closely conform to the statutes authorizing them, which are strictly construed and which are not extended by implication or intendment, and the mode of procedure indicated in the statute must be closely followed.
>
> 37 Cyc., 528-529.

It is not a matter between attorney and client, or attorney and defendant, but purely a question whether the legislature may provide a summary proceeding under certain circumstances. If it can in the one case, it can in the other; the only limitation being a strict compliance with the procedure under the statute.

REASON 8

Because if a lien arose in favor of the said Levy against the said Public Service Railway Company by virtue of Chapter 201 of the Laws of 1914, the said Public Service Railway Company may have become merely a surety for the payment to the said Levy by the said Persky of compensation for his services; under which theory the said Levy should exhaust the said Persky, or show that the said Persky was insolvent before proceeding to recover against the said Public Service Railway Company.

The proceedings in the District Court being regular and legal by virtue of the new act, then the defendant company is bound by the evidence submitted at the trial. It was disclosed that Persky was poor, without funds and unable to pay the attorney his fee (Case, p. 23, par. 4). This testimony was not excepted to and though it might have been disallowed under the rules of evidence under objection, yet must now be regarded as evidence.

Smith vs. Del. Co., 63 N. J. E., 93.
28 Cyc., 1395.

Hence, the fact is that the client is irresponsible and so to prevent a multiplicity of suits, the proceedings against the company directly is not only proper, but what the act necessarily recomends.

> The statute is remedial in character and hence should be construed liberally in aid of the object sought by the Legislature which was to furnish security to attorneys by giving them a lien upon the subject of the action. * * *

The case of *Zimmer vs. Met. St. Ry. Co.,* might improperly be cited by the counsel of defendant company for the proposition that the company became a mere surety for Persky and that both of them should be parties defendant in this suit. The facts and opinion of this case are as follows:

Gaynor, J.:

> "The plaintiff, an infant obtained through the services of this petitioner, as her attorney and counsel, a judgment against the defendant for $10,000.00 and costs. * * * The guardian, *ad litem,* her father, was appointed and qualified as general guardian, and the judgment was paid to him, he giving a satisfaction thereof. The general guardian still has the bulk of the judgment amounting to $10,103.00.
>
> "The attorney petitions to have the satisfaction set aside and for the enforcement of his attorney's lien against the defendant.
>
> "The attorney had mistaken his remedy. There is no reason why the judgment should be restored or why he should look to the defendant in the enforcement of his lien. It seems to be quite lost sight of nowadays that a plaintiff's attorney can hold the defendant liable under his lien on the cause of action or on the judgment only when his client is irresponsible, and he cannot get the amount due to him. A defendant stands only as a surety in relation to the plaintiff's attorney under his lien. When his client is sufficiently solvent to be able to pay him, or when, if there be a fund as a result of the litigation, he can enforce his compensation therefrom, the plaintiff's attorney cannot maintain an action or proceeding against the defendant to make him

> liable under his lien. It is only where the judgment is paid to the client without the attorney's consent, or if the action is settled before judgment, where the consideration agreed upon is paid to the client without the attorney's consent, and the money is got away with and cannot be impounded and the client is irresponsible that the attorney may proceed to enforce his lien against the defendant. *Schriever vs. R. R. Co.*, 30 Misc., 145, 61 N. Y. Supp., 644, 890; *Lee vs. Oil Co.*, 126 N. Y., 579; *Poole vs. Belcha*, 131 N. Y., 200; *Peri vs. R. R. Co.*, 152 N. Y., 521. * * *''

This *Zimmer* case only demonstrates that where the fund is intact and reachable, is sufficient to pay the attorney for his services, and there is no question as to the responsibility of the client, that the attorney cannot have the satisfaction of judgment set aside and his lien enforced by the petition in the original cause against the defendant.

The opinion of Justice Gaynor is entirely consistent with the *Peri* and *Fisher-Hansen* cases *supra*. Here the sum of $10,103 was in the hands of the general guardian which could be reached by the attorney and which, undoubtedly, would satisfy the attorney's compensation for services. Further, the action had been reduced to a judgment. The attorney attempted in the original suit to have the satisfaction of the judgment for which this $10,103 was paid set aside, and the Court properly denied the application. But in the case here the proceeding is not a continuation of the original cause of action, but a separate proceeding; it is not a demand for the enforcement of a lien upon a judgment, because there is no judgment. It certainly cannot be insisted that the funds are sufficient and reachable because they are not. And it certainly is proven by the petitioner

that his client is not only poor but is an irresponsible party. From these facts, the Court could compatibily hold with Justice Gaynor that the petitioner's proceeding is proper and may be brought against the defendant alone.

It is contended that the company became surety for Persky and that Persky should first be exhausted. This point is inapplicable to the facts in this case, and was partly discussed under the preceding reason. Such action was made not only unnecessary but impossible by the settlement for $30.00. For the purpose of adjusting his claim, irrespective of the real sum to which he was entitled, the attorney demanded $25.00 and costs and when refused claimed the real amount which was taxed by the District Court at $100.00. Manifestly, it would be the height of folly to bring suit against the client who had only received the sum of $30.00.

Justice Bartlett in the *Peri* case, *supra,* discussing the lien of an attorney under this act declares:

> "The lien operates as a security, and if the settlement entered into by the parties is in disregard of it and to the prejudice of the plaintiff's attorney by reason of the insolvency of his client, or for other sufficient causes, the Court will interfere and protect its officers by vacating the satisfaction of judgment and permitting execution to issue for the enforcement of the judgment to the extent of the lien or by following the proceeds in the hands of the third parties who received them before or after judgment impressed with the lien. *Poole vs. Belcha,* 133 N. Y., 200; *Bailey vs. Murphy,* 136 N. Y., 50; *Lee vs. V. O. Co.,* 126 N. Y., at 587.
>
> "There is no injustice or hardship in this rule.

> "The settlement of a litigation ought, in fairness, to be made with full knowledge of the plaintiff's attorney and under conditions protecting his lawful lien. If he seeks to take an unfair advantage of a desire to settle, he is, as an officer of the Court, under its constant scrutiny and control, and will be confined in his lien to his taxable costs, and such additional amounts as he might be able to duly establish by agreement, express or implied."

It is obvious from this *Peri* case that the Court will protect the attorney in his lien where the defendant enters into a settlement with the client to the prejudice of the attorney by the reason of the insolvency of the client or for other sufficient causes. The petitioner shows from his application and testimony that not only is the client poor and irresponsible but that he is not in possession of a fund sufficient to pay for the services of his attorney.

This *Peri* case goes further and maintains that the attorney is not only entitled to his taxable costs, but to such additional amount as he may be able to duly establish by agreement, express or implied. The petitioner has been able to prove that his agreement for compensation for services cannot be used as a basis for the measurement of the amount due because of no settlement being made thereunder and that the reasonable amount of $100.00 proved at the trial for his services in the action is recoverable under an implied agreement.

REASON 9

Because the alleged judgment, order and proceedings are in divers other respects irregular, illegal and unjust to the said plaintiff in certiorari.

The judgment, order and proceedings in the District Court were regular, legal and just. The stipulation of facts (Case, pp. 22-23-24-25), upon which the writ of certiorari is based clearly establishes that every requirement of the statute's procedure was strictly complied with.

CONCLUSION

The appellant maintains that the foregoing reasons are ineffective and inapplicable to the facts here, and that all the cases and text-books hold consistently with his contentions:

1. That a suit by petition can be commenced in the District Courts of this State.

2. That the District Courts of New Jersey have jurisdiction over proceedings begun by an attorney to determine and enforce his lien.

3. That the attorney's proceeding to enforce his lien is a separate and distinct action and no part of the one begun by the client, and is based on an entirely different state of facts.

4. That a summary proceeding does not deprive the defendant to his day in Court and to exercise any proper defense; and that the right to a jury trial is not a constitutional privilegt in such a proceeding, if it were, it was not disallowed in this case.

5. That a summary proceeding may be legislated in favor of attorneys to protect their liens as against their clients or defendants, provided the procedure in such an action is complied with.

6. That no proof of liability against the defendant company in the original action is necessary unless the attorney continues that action for the purpose of enforcing his lien.

7. That the pendency of the Persky action was notice to the company of the attorney's rights to a lien. The retainer provided only for a settlement by the attorney and a compensation based thereunder, and did not contemplate an adjustment by the client. Thus, there was no express agreement for the attorney's compensation based on the client's settlement. The attorney was entitled to a reasonable sum for his services, adjudicated at $100.00. The company settled at their peril, their only right being to dispute the reasonableness of the allowance of $100.00.

8. That Persky was irresponsible, that the $30.00 paid in settlement was an insufficient fund, that the settlement was made to deprive the attorney of his fees, and that it was unnecessary to exhaust first against Persky and look to the company as surety—the client is not a necessary, although he may be a proper, party in such proceedings.

9. That the judgment, order and proceedings in the District Court were regular and just. The petition and notice were served on the company, a day was set for trial, a hearing was had, witnesses were sworn, cross-examination and defense were permitted. The attorney proved every allegation of his petition.

The judgment of the Supreme Court should be reversed.

Respectfully submitted,

MAX LEVY,

Attorney for Appellant, *Pro se.*

New Jersey Court of Errors and Appeals.

MAX LEVY, *Appellant,* *Defendant in Certiorari,* VS. PUBLIC SERVICE RAILWAY COMPANY, *Respondent,* *Plaintiff in Certiorari.*	On Appeal from New Jersey Supreme Court.

Brief of Public Service Railway Company the Respondent.

We are concerned, in this matter, with Chapter 201 of the Laws of 1914, found on page 410 of the Pamphlet Laws of that year, and which reads as follows:

> "AN ACT to give any attorney, counsellor-at-law or solicitor in chancery a lien upon any cause of action, verdict, report, decision, decree, award or final judgment.
>
> BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:
>
> 1. After the service of a summons and complaint in any action at law, or the filing of a bill of complaint or petition in the Court of Chancery, or the service of an answer containing a counter-claim in any action at law, the attorney, solicitor or counsellor-at-law who shall appear in said cause

for such party instituting the action at law, or suit, or filing the petition, or counter-claim, shall have a lien for compensation, upon his client's cause of action, suit, claim or counter-claim, which shall contain and attach to a verdict, report, decision, decree, award, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come; and the lien shall not be affected by any settlement between the parties before or after judgment or final order or decree. The court in which such action, suit or other proceeding is pending, upon the petition of the attorney, solicitor or counsellor-at-law, may determine and enforce the lien.

2. This act shall take effect immediately.

Approved April 15, 1914."

We know of no New Jersey decision except the Supreme Court decision in the present case which attempts any construction of the foregoing statute. There is, however, such a close similarity between it and the New York statute that some one or more of the divers and differing decisions under the New York statute probably set out the conclusions to which this court in considering the New Jersey statute will come. While, in the absence of decisions in our own State, decisions of other states concerning the *construction* of similar statutes probably have some force as precedents, we assume that the question of the *constitutionality* of a given provision is one which our courts will consider without treating the decisions of other states as precedents.

Like the appellant in his brief, we will argue generally all the questions advanced in the Supreme Court, for although that court's opinion

does not treat of them all, they are all arguable, and before this court, upon this appeal.

The important questions are: (1) Whether a cause of action that has been settled between plaintiff and defendant becomes liquidated so that the lien of the attorney can only attach to the amount for which the settlement was agreed upon; (2) whether the concluding words of the statute, which provide for a proceeding by petition, is constitutional despite the fact that it deprives the parties of a right of trial by jury, and (3) whether, if the proceeding by petition is proper, it was properly carried out in this cause, the plaintiff Persky having been no party to the proceeding by petition.

In the case at bar, Max Levy, the defendant in certiorari, is an attorney and counsellor-at-law of the State of New Jersey. He brought (p. 12) an action for one Sam Persky in the District Court of the City of Bayonne against Public Service Railway Company. Before starting the action Levy entered into a written agreement with Persky for compensation on a contingent basis (p. 21), the agreement being for "fifty (50) per cent. of all moneys received by him by way of legal proceedings, compromise, settlement or otherwise, and I am not to be responsible in anywise for the payment of any costs."

The last thing done in the suit of *Sam Persky* vs. *Public Service Railway Company* (p. 13, l. 13) was a substitution of attorney. The case (p. 13, l. 9) stood adjourned to January nineteenth, nineteen hundred and fifteen.

Before that date, however, (p. 13, l. 14) an alleged suit was started *by petition* by *Max Levy* vs. *Public Service Railway Company,* on notice and petition to have counsel fees fixed as an allowance for services rendered in the case of *Sam Persky*

vs. *Public Service Railway Company* under Chapter 211, Laws of 1914, (see page 18 for notice and petition). As a result of this procedure, which the District Court Act in no sense provides for, and which is entirely novel to our procedure except so far as the Attorney's Lien Law of 1914 provides for same, a hearing was had January nineteen, nineteen hundred and fifteen, *on the petition.* Max Levy was sworn, decision was reserved, and (p. 13, l. 20 to 30) on June second, nineteen hundred and fifteen, the said District Court "considered and adjudged that the said Max Levy, plaintiff, recover against said Public Service Railway Company, defendant, the sum of one hundred dollars ($100)."

Here we have a district court judgment which is not based upon a summons. Neither is it based upon an entry of the cause as a district suit on the court docket. It is, in fact, a judgment entered in favor of Max Levy in a suit in which the true plaintiff is Sam Persky. The suit of Sam Persky was a tort action (p. 15). He alleged that he was riding in a bakery wagon drawn by a horse and that the defendant negligently permitted the car to be propelled at such a high rate of speed and in such a careless and reckless manner that the car collided with the bakery wagon "which was then and there being driven by said plaintiff," throwing the plaintiff, who was on the seat of said wagon, from his seat into the wagon, greatly bruising, wounding and injuring him.

The issue in the suit brought by Sam Persky has never been tried (see stipulation p. 22 at 5th paragraph thereof on p. 24), which stipulation was made for the purpose of this certiorari proceeding. The said 5th paragraph of the stipulation reads as follows:

> "5. There was no evidence offered at said hearing showing either the amount of Samuel Persky's damages or the details of the collision between Persky's wagon and the trolley car of the Public Service Railway Company or that the responsibility for the occurrence of the said collision was upon the Public Service Railway Company."

The 6th paragraph of the above mentioned stipulation (p. 24) reads as follows:

> "6. It was stipulated between counsel for the respective parties that the original suit of *Samuel Persky* vs. *Public Service Railway Company* was still pending in this court (Bayonne District Court) at the time of the hearing of said petition, but that a general release had been executed and delivered by Persky to the Company, acknowledging the receipt of thirty dollars ($30) and releasing and discharging the Company from any claim held by him for the injuries received by him by reason of said collision. The Company was notified by Levy that they would settle with Persky at their peril."

The stipulation on page 22 really contains most of the facts in the case. As one of our contentions is that the amount for which the plaintiff settled his case with the defendant fixed the amount to which the attorney's lien may attach, and as the agreement between Persky and Levy (p. 21) provided for a fifty per cent. (50%) contingent fee, it becomes of interest to quote from the stipulation (paragraph 4 on p. 23) as follows:

"4. Max Levy further testified that Samuel Persky was poor, without funds and unable to pay him his fee; that the Public Service Railway Company settled with Persky for Thirty Dollars ($30.00) after having notice that he was Persky's attorney, and they offered him Twenty Dollars ($20.00) as his fee, which he refused, demanding Twenty-five Dollars ($25.00) and Court costs, which Public Service Railway Company declined to give; that he had drawn the necessary papers for the institution of the suit of *Samuel Persky* vs. *Public Service Railway Company,* and consulted with his client (plaintiff) several times, and examined several witnesses and investigated the law pertaining to the accident, and, in his opinion, his services were reasonably worth One Hundred Dollars ($100.00); that if the case of *Samuel Persky* vs. *Public Service Railway Company* had been tried and he had established liability upon the part of the defendant, the plaintiff, in his opinion, would have received a large verdict, and his fee would have been correspondingly larger."

It will be noted that in the foregoing quotation from the stipulation there is no allegation of fraud in the settlement between Persky and the Railway Company, but only the opinion of Max Levy "that if the case * * * * * had been tried and he had established liability upon the part of the defendant, the plaintiff in his opinion would have received a large verdict and his fee would have been correspondingly larger." This is quite possibly true. The settlement with Persky for thirty dollars ($30) was a compromise, as all such set-

tlements are. It was a compromise not alone of the question of damage but of the question of liability as well. It will be recalled that the State of Demand (p. 16 l. 9) says: "—— so that said car collided with said bakery wagon *which was then and there being driven by said plaintiff.*" It is obvious, therefore, that the question of contributory negligence was right at the heels of the plaintiff. If the best that Max Levy could testify to was his opinion that if the plaintiff "had established liability upon the part of the defendant" the plaintiff would have got a large verdict, then we submit that no taint whatever was cast upon the settlement made by Public Service Railway Company with Samuel Persky.

We believe that the settlement aforesaid made thirty dollars ($30) the measure of Samuel Persky's recovery under the suit brought by him, and that the payment of thirty dollars ($30) to Persky and the taking of Persky's release therefor ended our liability except so far as concerned any lien which the Attorney's Lien Law may have created in favor of Max Levy, which lien should attach to the said thirty dollars ($30) under the agreement between Levy and Persky. The amount of Levy's lien should therefore have been fifteen dollars ($15). It will be noticed (p. 21) that the 50% agreement between Levy and Persky ends up with these words: "and I am not to be responsible in any wise for the payment of any costs." This meant that Max Levy was to pay the costs out of his 50% or out of his pocket unless by virtue of a judgment he could get these costs taxed against Public Service Railway Company. Such costs are not at present taxable; therefore (see paragraph 4 of stipulation, p. 23) when Public Service Railway Company, after settling with Persky for thirty dollars ($30) offered Max Levy twenty

dollars ($20) as his fee, the offer was not alone sufficient to satisfy Mr. Levy's lien, but was in excess of the requirements for that purpose. And even though Max Levy were entitled to the court costs, the amount that twenty dollars exceeded fifteen was enough to cover his actual disbursements for court costs. The Supreme Court (p. 32 of book) did not consider our tender of twenty dollars to the appellant as sufficient. But it must be remembered that the costs in the District Court are statutory, and therefore a matter of judicial knowledge. According to Paragraph 212 of the District Court Act (Erwin, 1913) a summons for one defendant is $2.10; listing cause for trial, $1.50; there were two adjournments, but we believe that there is no charge for adjournments. The costs, therefore, of which we know, amount to $3.60. The unknown factor is that the constable is entitled to four cents a mile for service of summons after the first mile. Up to that first mile he is paid out of the $2.10 charged for the summons. We do not know from the record how many miles the constable had to travel, but above the $3.60, of which we know, there is $1.40 left for mileage, which at four cents a mile would cover more mileage than he could run up, because he had to serve the process in the county in which the court was located. So, $5 covers the disbursements, and $15 covers appellant's 50 per cent, so that if the 50 per cent agreement is controlling, we submit that the tender of $20 was sufficient, as the appellant could hardly claim to be entitled to the five per cent commission which would have been taxed with his costs if the case had gone to judgment. The appellant's effort to differentiate between what *he* would settle for, and what *his client* would settle for, is unsound, for he could not take away from his client the power to settle. He

thinks that the 50 per cent agreement applies to the first proposition, but not to the second. If the appellant wants to insist on the literal construction of his agreement with Persky, then he has no bill whatever against Persky, because he was only to be reimbursed *if he settled the case.* And this he has not done. If he has no bill against Persky, he certainly can have no bill against us, for the only possible basis of a bill against us is that Persky owes him money for services. Appellant says (p. 15 of his brief):

> "The agreement was that he was to receive 50% of all money that he, the petitioner, would settle for. And since no settlement was made by the petitioner there is no sum which he can be compelled to follow."

It would also seem possible that "since no settlement was made by the petitioner there is no sum" due to the petitioner, now the appellant.

We note that the appellant, on page 14, quotes from Fischer-Hansen vs. Brooklyn Heights Railway Co., 66 Northeastern Reporter, 395. He quotes it in an abortive attempt to show that where there is a settlement, as opposed to a verdict, etc., he need not follow the fund. In this, our brief, pages 12 and 13, we quote from the same case (Fischer-Hansen) to sustain our proposition that when there is a settlement his proper procedure *is to follow the fund.* That case says: "The right of the parties to thus settle is absolute, and the settlement determines the cause of action and liquidates the claim. This necessarily involves the reciprocal right of the attorney to follow the proceeds of the settlement," etc.

The appellant in his brief (p. 16) says:

> "The Fischer-Hansen case further establishes the principle that when a defendant has both actual and constructive notice of the lien and does not know the *share of the funds* that the attorney is entitled to receive, it is his duty to ascertain the amount and retain it for him."

Well, we offered him $20. It would have been physically and mathematically impossible for us to retain for him the $100, which he now claims as his "share of the fund," out of the $30 which we were paying to Persky. The stipulation (p. 24, l. 4) says: "And they offered him twenty dollars ($20.00) as his fee, which he refused, demanding twenty-five dollars ($25.00) and court costs." Can we take this sum of $25 and costs as notice to us of the "share of the funds" which he claimed? If so, then the alleged judgment in his favor for $100 is entirely unjustified. He says (bottom of page 16 of his brief) that we failed to ascertain the amount which he claimed to be due to him. But he overlooks the fact that the stipulation, as above quoted, shows that he had, before bringing his alleged proceeding by petition, informed us as to what he considered due to him, the amount being very much less than what he afterwards claimed and obtained a so-called judgment for.

In New Jersey the right of a plaintiff to settle direct with a defendant without regard to his attorneys is well settled. The Attorney's Lien Law of 1914 cannot affect this right. When settlement has ended a cause of action the lien given by the statute can necessarily only attach to the amount agreed upon in settlement, unless distinct circumstances establishing fraud in the settlement are shown.

The case of *Gregory* vs. *Gregory,* 5 Stewart's Equity 424, contains in the syllabus the following: "Thereupon the wife with her friends employed a solicitor to obtain alimony for her, giving him a written promise that she would be governed by his advice and not accept any proposition of settlement or sign any paper in the matter without his consent. *Held,* that notwithstanding such agreement she had a right to make a bona fide settlement with her husband without her solicitor's co-operation, and that in the absence of proof of collusion her solicitor had no professional claim to prevent a subsequent dismissal of the proceedings instituted by him for alimony."

In the above case, "The defendant, the respondent in the petition," moved to dismiss it on the ground that the claim for alimony on which it was filed had been settled between the parties. The petitioner's counsel resisted the motion. The petition was dismissed, but without costs. The Court said: "In *Jones* vs. *Bonner,* 2 Exch. 230, a pauper plaintiff settled an action for damages without his attorney's knowledge or consent, by executing a release. It appeared that the plaintiff sought a settlement and that the arrangement was fair and reasonable. The plaintiff's attorney applied to the court to set aside the release and the plea of *puis darrein* continuance based thereon, but the Court denied the application."

Heister vs. *Mount,* 17 N. J. L. 438: "Parties to a suit may compromise or terminate it without consulting their attorneys, provided they do it in good faith, and the attorneys must look to their clients for their costs. But when the parties collusively agree to practise a fraud upon their attorneys or either of them, this Court will not aid them to consummate their unjust designs."

The appellant, in arguing our "Reason 7" claims that the Thirty Dollars for which the case was settled had no relation to appellant's claim against us, and that he was not obliged to follow that money, because it was not the proceeds of "a verdict, report, decision, decree, award, judgment or final order in his client's favor." It is true that the statute says, "and the lien shall not be affected by any settlement between the parties." The expression, however, refers to the lien, and not to the amount of the lien. The *amount* can only be fixed either by judgment for plantiff in the original cause, or by the size of the sum paid in settlement. According to the appellant's contention, he might do one hundred dollars' worth of work on a ten-dollar case, and thereby acquire a lien of $100 on the $10 case, which lien could be enforced without any proof that the $10 case, if it were tried out, could be won.

The appellant's argument that his 50 per cent agreement with his client (p. 21 of book) related to what *appellant* should settle for, and not what *Persky* should settle for, if effective at all, can only have the effect of taking the 50 per cent agreement out of the case, except as evidence of a retainer. Then, the question of what it is worth to start a suit in the District Court. with a summons and state of demand such as appear on pages 14 and 15 of the book, would be for a jury to decide, in a properly brought action by appellant against his client and ourselves, for reasonable compensation for work performed, the claim against ourselves, of course, being limited by the amount of the fund ($30) into which the cause of action had been converted.

In the case of *Weibezahl* vs. *Huber,* 39 New Jersey Law Journal, page 334, there is a quotation from Thornton on Attorneys, as follows:

> "Every attorney enters into the service of his client subject to the rule that his client may so dismiss or supersede him, and, if he makes a contract for future services to his client, it is necessarily subject to such rule, and made with full knowledge that he may never perform such service, for the reason that his client may not keep him, and, in that event, that he will not be paid therefor, but will be entitled to compensation only for the service he has actually rendered."

In the above-named case, *Weibezahl* vs. *Huber*, the matter at issue was the substitution of one attorney for another. Judge Adams said:

> "The question as to what is now due to the attorney has not been *submitted to the court*. The notice of motion does not ask the court to fix the amount of compensation. In such a case the Court may leave the attorney to his ordinary remedy. *Where the question is submitted for decision* the court sometimes decides it in a summary way and sometimes sends it to a reference. If the parties desire the court to take jurisdiction of this question that course will be taken."

The above-named decision was by Judge Adams in the Essex Circuit Court in May, 1916, over two years after the enactment of the statute which we are discussing. Evidently Judge Adams felt that the amount due to the attorney for his labor up to that time could not be fixed by the Judge unless the question was submitted to him; and otherwise the Judge was apparently of the opinion that he

should "leave the attorney to his ordinary remedy." It is true that the Judge says that the notice of motion does not ask him to fix the amount; but the underlying idea clearly is that his jurisdiction to fix the amount could only arise if the submission of the question to him was by both of the parties to the controversy.

Our first and second reasons in the Supreme Court were, respectively, (1) because no suit by petition can be begun in the District Court of the City of Bayonne, and (2) because the District Court of the City of Bayonne had no jurisdiction in the premises. The appellant avers that these two reasons are sufficiently answered by the concluding words of the statute: "The Court in which such action, suit or other proceeding is pending, upon the petition of the attorney, solicitor or counsellor at law, may determine and enforce the lien." Counsel forgets that here only the *Legislature* speaks. The *Constitution* remains to be considered. On page 6 of his brief the Appellant speaks of District Court jurisdiction; but that jurisdiction, under the District Court Act, is only obtained by the service of process, a summons, a warrant, an attachment, or other writ. The question is whether the statutory expression now under consideration allows of a suit being brought in the District Court by *petition.* The statute fails to outline any method of procedure under the petition. We can conceive that a fully-developed procedure by petition, as in Workmen's Compensation cases, where it is provided that the petition, and the order made thereon, be served, and an answer filed, might (if jury trial were provided for or legally dispensed with) be due process of law; but a procedure by petition, which makes no provision for return days, or service, or answer, is hardly formal enough to be classed as a new form

of jurisdiction conferred upon District Courts. Indeed, the expression under consideration bears upon its face the interpretation that it is *not a new suit, but a continuation of the old suit,* that the statute contemplates. *"The court in which such action, suit or other proceeding is pending* * * * may determine and enforce the lien."

But how can a new issue, an issue between new parties, to wit., the defendant on the one hand, and the attorney of the plaintiff on the other, be tried in the old action?

This subject is pertinent for several reasons. One of the reasons is the position taken by the appellant when he says in his brief (p. 7, l. 29): "The trial court was not trying the original case against the defendant company. If it was, the Supreme Court would be justified in its conclusion that it could not be done in the absence of the client. But the record * * * discloses that an entirely new proceeding had been commenced by the attorney," etc.

It is worth noting (p. 18 of book) that the new "suit" was begun by a notice from claimant, and service therewith of a copy of the petition. The return day of the notice was apparently fixed by the claimant. The Judge of the Court issued no order for Public Service Railway Company to appear. As the notice in the printed book is marked by the clerk of the court as a true copy, it is possible that it was filed before it was served, but as to this we do not know. The same certification of the clerk may relate to the petition. But the fact remains that Public Service Railway Company was claimed to have been brought into court to defend a suit *without any court order,* and without any summons or other usually recognized process, merely on a "notice" from an attorney. The elementary feature of a proceeding by petition is that

the court shall make an order, or rule to show cause, fix a return day, and direct the service of the order or rule upon the opposite party.

The Constitution of the State of New Jersey, Article I, paragraph 7, provides in part as follows:

"The right of a trial by jury shall remain inviolate;—"

The appellant desired the District Court to decide that Public Service Railway Company *owed money to him* without making that company a defendant in a formal suit in which its right of jury trial would be preserved to it. We are aware that in proceedings by petition in the Common Pleas, in Workmen's Compensation cases, the right of trial by jury is taken away; but our courts have held that to be because of the contractual character of the Workmen's Compensation relationship, and it can have no bearing on the present matter. In the statute under consideration there is no room for a jury. "The court * * * may determine and enforce the lien."

Our "Reason 4" reads:

> "Because the proceeding was a summary proceeding, as a result of which the right of Public Service Railway Company to have its day in court, and to exercise its right to assert any defense which it might have in the usual form and in the usual forum, and to have the issues tried by a jury, if it saw fit, was denied to it."

The appellant, in arguing this reason, refers to the case of *Standidge* vs. *Chicago Railways Co.*, 254 Ill., 524, wwhich can be found in 98 Northeas-

tern Reporter, 963, and which, to quote a paragraph of the syllabus, holds as follows:

> "The provision of the Constitution that the right to jury trial shall remain inviolate means that the right shall continue in all cases where it existed at common law when the Constitution was adopted, but does not prohibit the Legislature from creating new rights unknown to the common law, and to provide for their determination without a jury, and hence the attorney's lien law (Laws 1909, page 97) is not objectionable in providing for the enforcement of a lien without a jury trial."

We note also that in re King et al, Court of Appeals of New York, July 10, 1901, 60 Northeastern Reporter, 1054, the court took the position contended for by the appellant, saying: "We do not understand the clause to be violative of the provisions of the constitution, or that the parties were entitled to a jury trial. In this case the petitioners had a lien created by statute. The proceedings provided for by the Code are instituted by a petition, and are in the nature of the foreclosure of a lien. * * * The remedy given is equitable in character, and we think the equity side of the court has jurisdiction. It is, in some respects, analogous to the foreclosure of mechanics' liens, in which it has been held to be an action in equity, triable by the court without a jury."

We doubt if our New Jersey court will follow either of the foregoing decisions. The theory adopted in the Illinois case, that the attorney's lien law is a new right unknown to the common law, and therefore not necessarily subject to jury

trial, is untenable, because the main element of an attorney's claim is not the lien, but the *debt*. Attorneys had a right at common law to contract for and to sue for remuneration for their services. *Schomp* vs. *Schenck*, 11 Vroom, 195. Paragraph 9 of the Practice Act of 1903 recognizes the pre-existing right. Laws of 1911, page 412, so far as it was an enactment of such a right, was unnecessary. The *debt*, therefore, is not a creation of the present statute. It only creates a *lien*. And just as, at common law, in a suit on the debt, a jury could be required by either party, so now, under the attorney's lien law, the same principle should apply. Certainly, the creation of the *lien* has not changed the character of the *debt*. And it is only after proof of the *debt* against his client that an attorney can enforce a *lien* against the fund; and the lien must necessarily be limited to the amount of such proven debt. As to this feature of the case it is worth noting that the notice (p. 18) is addressed only to Public Service Railway Co., and the proof of service (p. 21) shows only service on that company. The appellant's client, Samuel Persky, does not appear to have been made a party. Therefore, as to Persky, no debt could be proved; and in the absence of such proof, no recovery could be had against this respondent.

We submit that the error made by those cases above cited that consider that the jury trial might be dispensed with, is that they consider that the attorney's lien law creates a new *right*, wherein, essentially, it is a new *remedy* for an old right, to wit, the right of the attorney to collect for his services. The extension of the *remedy*, by creation of a lien, should not deprive the client when sued by his attorney, of the right of trial by jury.

And if the client is to have that right, we will also claim it for ourselves, as we stand in the client's shoes, and can be called on to pay only if the client owes the money.

The King case, hereinbefore quoted, was decided by the New York Court of Appeals in 1901. We think that this court will be interested in, and will be more inclined to follow, some of the earlier New York decisions.

In our statute (Laws of 1914, p. 410) the concluding words are: "The court in which such action, suit or other proceeding is pending, upon the petition of the attorney, solicitor or counsellor-at-law, may determine and enforce the lien."

Section 66 of the New York Code of Civil procedure ends as follows: "The Court upon the petition of the client or attorney may determine and enforce the lien." This is as the matter appears in the Code of 1903.

The case of *Dolliver* vs. *American Swan Boat Company,* 65 N. Y. Supplement 978, decided in 1900 is a case that was settled by the parties before judgment. The attorney of the plaintiff petitioned the court for leave to continue for his benefit to judgment against defendant. The petition was denied, and the Court referred to the case of *Pilkington* vs. *Brooklyn Heights Railroad Co.,* 63 N. Y. Supplement 211, in which at the time of the settlement the defendant agreed in writing to pay the attorney of the plaintiff "any claim for costs and compensation for which he might have a lien."

"The Court at special term on motion of the attorney summarily fixed the amount, and ordered that it be paid by the defendant. The appellate division held that this could not be done; that the defendant was entitled to a trial of the

matter; that the summary method provided for by the last sentence in section 66 of the Code applied only between attorney and client; and that the attorney should have brought a suit instead of a motion."

In the case of *Pilkington* vs. *Brooklyn Heights R. Co.*, 63 N. Y. Supplement 211, decided in March, 1900, in which case the defendant, at the time of settlement with the plaintiff, had made an agreement to pay the attorney of the plaintiff, the following utterances appear:

> "No authority has been cited in support of the proposition that performance of a stipulation to settle and adjust a law suit can be enforced by order, disobedience of which can be punished as for a contempt. The fact that the subject matter of the application is the claim or lien of the attorney of one of the parties to the action does not affect the right in any respect. * * * it is a proceeding against the defendant to compel the performance of a contract made in the action with a view of adjusting it, and which it now refuses to carry out, * * * The amendment of 1899 to section 66 of the Code of Civil Procedure does not affect the question. Among other amendments relating to the lien of attorneys, this sentence has been added: 'The Court upon petition of the client or attorney may determine and enforce the lien.' It is not necessary now to consider and decide the full scope and purport of this section, nor how far it may have extended the power of the court to apply summary remedies in aid or settlement of the dealings and transactions between attorney

> and client. It is sufficient to say that it does not confer power to determine and enforce a stipulation in the action not between attorney and client, although relating to the former's lien. * * * The right of a client to his day in court, and before a jury, on the question of his attorney's compensation for services rendered under contract, is scarcely to be disputed; and, if the amendment of 1899 was intended to deprive him of that right, its constitutionality may well be doubted. But the question is not presented here. In this case the attempt is to enforce the payment of an attorney's claim against one who is not his client, but who has assumed the client's obligation; and the party so sought to be charged is entitled to assert any defenses he may have in the usual form, and in the usual forum, and even to assert that he has actually made payment in accordance with the terms of his obligation, and to have the issues tried by jury."

The case of *Schriever* vs. *Brooklyn Heights Railway Company,* 63 N. Y. Supplement 217, decided in March, 1900, is the same in principle as the Pilkington case.

Fischer-Hansen vs. *Brooklyn Heights Railway Company,* 66 Northeastern Reporter, 395, a New York case decided in 1903 was a direct action by Fischer-Hansen's attorney against the tortfeasor. The Court in the said Fischer-Hansen case held that the suit was proper, and, commenting generally upon the situation created by the Attorney's Lien Statute, said:

> A cause of action is not the property of the attorney, but of the client. The attorney owns no part of it, for a lien does not give a right to property, but a charge upon it. As it is merely incidental, and for the purpose of security only, it would not be reasonable to hold that the legislature intended it should be the means of blocking an honest and genuine adjustment of controversies. We think the lien is subject to the right of the client to settle in good faith, without regard to the wish of the attorney; and we so held in the Peri Case, where we declared that 'the existence of the lien does not permit the plaintiff's attorney to stand in the way of a settlement.' *The right of the parties to thus settle is absolute,* and the settlement determines the cause of action and liquidates the claim. This necessarily involves the reciprocal right of the attorney to follow the proceeds of the settlement, and, if they have been paid over to the client, to insist that his share be ascertained and paid to him, for the defendant is estopped from saying that with notice of the lien he parted with the entire fund. * * * The legislature did not intend to make the lien the chief thing, nor to compel the cient to abdicate his position as principal in favor of the agent or attorney whom he employed in order to secure his rights."

The case of *Dolliver* vs. *American Swan Boat Company,* 65 N. Y. Supplement, 978, which is quoted above, also contains the following:

"This statute giving the attorney a lien on the cause of action itself (which he never had before) and providing that such lien 'cannot be affected by any settlement between the parties before or after judgment,' has not the effect claimed, i. e., it does not prevent the parties from making a complete settlement of the action without the consent of their attorneys. * * * To say that the client may settle, and that 'the ien does not permit the plaintiff's attorney to stand in the way of a settlement' by the client, and then to say that the attorney may repudiate the settlement, and go on harassing the defendant with the action as a speculation for his own benefit, would be a contradiction both in substance and in terms; and would besides seem to reduce the profession to the condition of common barrators The rule is now, as it always has been under the dictate of a wise policy, i. e., that the parties to an action not only have the absolute right to make an 'honest' settlement of the action without regard to their attorneys, but are encouraged by the law to do so. The lien on the cause of action does not prevent a settlement, but it still continues in force and is not affected as a lien, and is carried along by the settlement to the sum or value agreed upon in settlement, the same as it is carried to the judgment if there be one. This is all that is meant by the provision that the lien cannot be affected by a settlement."

The remedy of the appellant is to begin a suit to foreclose his lien just as thouugh it were a mechanic's lien or any other lien, making his client and ourselves party defendants. We do not mean, as he from his brief appears to think, that his best remedy is in equity. We believe that (assuming that our tender of Twenty Dollars does not destroy his claim), he should sue his client and ourselves at law by proper process. We will all then be in court. The amount of the settlement can be established. If he had a contract with his client, it can be proved. The client will have a chance to prove whether or not he paid him. His client will be liable to him if he recovers, and so will we. Perhaps his client will be liable before us, as there is some reason to believe that the money, if it can be found, should be subjected to the lien before recovery is had against one through whose hands the money had passed. On this general subject, see the following from the case of *Dolliver* vs. *American Swan Boat Co.*, 65 N. Y. Supplement, 978:

> "Their settlement did not destroy his lien. It continued upon the amount or value of the settlement. That is the meaning of the provision in section 66 of the Code already quoted, that such lien 'cannot be affected by any settlement between the parties before or after judgment or final order.' * * * In such suit he will get *an absolute judgment against his client* for the amount he is entitled to, and *an alternative judgment against the other defendant* that it pay the amount covered by the lien if such amount be not collectible out of the client. Nor is there any practical

> difficulty beyond what is encountered in other suits every day, about fixing such amount covered by the lien. The attorney had a lien on the cause of action; the cause of action was honestly settled by the parties; by such settlement the cause of action merged or terminated in the amount or value of the consideration agreed upon in settlement, and thus became determined and fixed; and to that amount or value the lien now attaches. *If there were no such amount or value, but a settlement for nothing the lien would be extinct.*"

The New Jersey statute of 1914 contains language closely resembling that set forth in the foregoing case, the language of the New Jersey statute being, "and the lien shall not be affected by any settlement between the parties before or after judgment or final order or decree."

We are aware that the case of *Zimmer* vs. *Metropolitan Street Ry. Co.*, 65 N. Y. Supp. 977 considers that the remedy of the attorney shoud be in equity, and that therefore a jury trial was not necessary. We ourselves are not of this opinion. The foreclosure of an attorney's lien is not like a proceeding in rem. We believe that a demand by a plaintiff's attorney, after a settlement, upon the plaintiff and the defendant for an amount juustly due to such attorney because of the litigation in question, and a refusal to pay such amount, turns the lien into a debt. It already was a debt so far as the relation of the attorney to his client was concerned, but the demand and refusal, in our opinion, make it a debt between the attorney

and the defendant, although it is only a debt of a surety. The Zimmer case, above referred to, is interesting. It was decided in August, 1900. We quote both paragraphs of the syllabus:

> "1. Where an attorney files a lien on the judgment obtained for his client, an infant, and on motion of defendant, and after notice to the attorney, an order is made that the judgment be paid to the infant's guardian, which is done accordingly, and the guardian still has the bulk of the recovery in his hands, the attorney cannot have the guardian's satisfaction of the judgment set aside, and his lien enforced by a petition in the original cause against the defendant, since the attorney can only enforce his lien against the opposite party when his client is irresponsible and the fund realized from the judgment is beyond reach, and then only by suit in equity.
>
> "2. Code Civ. Proc. section 66, giving a summary method for the determination and enforcement of an attorney's lien on petition of either attorney or client, applies only between the attorney and his client, and has no relation to the enforcement of the lien against the opposite party, the latter being entitled to a trial in such a case."

Another method of procedure was adopted in the case of *Schriever* vs. *Brooklyn Heights Railway Company,* 63 N. Y. Supplement, 217. "A summary proceeding will not lie to enforce an agreement whereby a defendant, as part of a com-

promise, promised to pay the plaintiff's attorney his costs and fee." Here the express terms of the agreement were that the defendant would pay the plaintiff's attorney his costs and fee, and the Court made an order that the defendant pay the same. On appeal the Court said: "We think the Court is without authority to enforce in a summary manner the agreement of the defendant's representative to pay the costs and fee of the plaintiff's attorney. Unless the defendant voluntarily makes such payment, the proper course is to permit the action to be continued by the plaintiff's attorney, as was held in the case cited." (Citing *Pilkington* vs. *Railroad Company,* 63 N. Y. Supp. 211.)

It will be noted that in this Schriever case the plaintiff and defendant settled the cause of action for *three hundred and fifty dollars and the bill of the physician.* The plaintiff had agreed to give his attorney *forty per cent.* of any verdict or settlement secured in the said action or claim. The amount which the defendant was ordered to pay to the plaintiff's attorney was the sum of *One hundred and seventy-five dollars,* "his costs and lien herein on the amount of the settlement of this action between the parties." On appeal, the amount was still fixed at *One hundred and seventy-five dollars,* it being directed that unless the defendant pay the same to the plaintiff's attorney the attorney was granted leave to prosecute the action for the collection of his compensation. *Forty per cent. of Three hundred and fifty dollars is One hundred and forty dollars.* The remaining thirty-five dollars was probably forty per cent of the bill of the physician.

If the plan of enforcement set forth in the Schriever case be adopted, then in the case at bar the tender of twenty dollars was an abundant tender, as the excess of five dollars over the requisite fifteen dollars more than covers such District Court costs as accrue before judgment. The Schriever case is in 63 New York Supplement. The Dolliver case, above referred to, is in 65 New York Supplement, and being the later case of the two, is probaby worthy of being followed when it says that:

> "The remedy of the plaintiff's attorney here is to begin a suit to foreclose his lien, just as though it were a mechanic's lien, or any other lien; making the plaintiff and the defendant parties defendant. * * * In such suit he will get an absolute judgment against his client for the amount he is entitled to, and an alternative judgment against the other defendant that it pay the amount covered by the lien if such amount be not collectible out of the client."

There is no objection to such a form of judgment. The Practice Act (1912) of New Jersey, par. 21, says: "Judgment may be entered in such form as may be required by the nature of the case and by the recovery or relief awarded."

The appellant takes issue with us as to our "Reason 6," which reads:

> "Because no proof appeared in the cause that the plaintiff Persky had any cause of action against the defendant Public Service Railway Company," if we fix on Thirty Dollars, the amount paid in settlement, as

> the value of the cause of action (as, indeed, in the absence of fraud, we should) then "Reason 6" is unimportant. On any other theory, however, Reason 6 is important, and is so shown to be under *Casucci* vs. *Alleghany & K. R. Co.* 20 N. Y. Supp. 343, quoted later in this brief, and referred to by the appellant, (but with a different part quoted) on page 9 of his brief. Certainly, if the amount *agreed on in settlement is* not to represent the lawsuit, and be the fund to which the lien attaches, then the liability of the defendant must be proved, for, as the Casucci case points out, the compromising of the claim is in itself no evidence of the defendant's liability. As the Casucci case says, "Common experience shows that parties often deem it for their best interests, without acknowledging liability, to pay something rather than to litigate a contested claim."

We might add, although it is not a part of the case, but just by way of illustration, that the form of release used by this company contains the following: "The payment of money for this release is not an acknowledgment of liability of said corporation for the alleged accident, injury or damage aforesaid."

Paragraphs 5 and 6 of the stipulation on page 24 of the case, show absolute lack of proof either as to liability or damage.

One would judge, from pages 9 and 10 of the appellant's brief, that he felt that *the liability of the defendant* was not an element, so far as the attorney's right to recover against us was con-

cerned. He apparently admits that if the same action had been continued, liability would have had to be proved; but he contends that as his was (as he thinks) a new action, no proof of liability of the defendant was necessary.

If the statute gives a lien upon a cause of action, it can only refer to such causes of action as can be turned into money by successful prosecution or by settlement. Successful prosecution can only exist where liability has been proved. Settlement, which is no admission of liability, can do no more than liquidate the cause of action, reducing it to a fund, to wit, the amount it is settled for. The appellant's notion that if he can prove that his client had an *alleged* cause of action, that appellant had done some work on it, and that his client had released it to the defendant, such facts give him a claim against the defendant that has no relation to the amount paid for the release, is absurd.

Casucci vs. *Alleghany & K. R. Co.*, 20 N. Y. Supp. 343, is hardly pertinent, because it now seems perfectly clear that, in the absence of fraud, the settling of a case by plaintiff and defendant for thirty dollars creates a fund of thirty dollars to which the attorney's lien will attach; *but if this be not so,* that is, if thirty dollars is not the exact amount, then there is no fund to which the lien attaches, and the lien being upon a cause of action, *the latter must be proved.* In this connection the Casucci case is of interest. It is as follows:

> "In an action for personal injuries, against a railroad company, it appeared that plaintiff's attorney had a lien on the

claim for damages for one-third of any amount for which defendant should settle the action; that, after issue was joined, plaintiff released all claims for damages against defendant on the payment by it of a certain sum; and that the settlement was so far set aside as to permit the attorney to prosecute the action, and recover the amount of his lien. *Held,* that the attorney was not entitled to recover without establishing the liability of the defendant on the issues joined, since compromising the claim was not an admission by defendant of its liability.

"MACOMBER, J. * * * We are unable to hold, under this section of the Code, that in case of a settlement by a defendant with the plaintiff in a negligence case the plaintiff's lien may be thus easily worked out. * * * To hold otherwise would be tantamount to deciding that the defendant in such an action could not safely compromise or settle a claim for personal injuries, caused through its alleged negligence, without being conclusively held to have admitted its legal liability. But compromises and settlements of actions never proceed upon any such hypothesis. Common experience shows that parties often deem it for their best interests, without acknowledging liability, to pay something rather than to litigate a contested claim. In any view that we may regard this case we think the trial judge was correct in non-suiting the plaintiff upon the trial, in

the absence of any evidence charging the defendant with liability for the injuries sustained by the plaintiff.

Respectfully submitted,

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