

so as to stop the running of the statute of limitations, and that this court must determine the question in the absence of a statute.

Whenever a complainant has in good faith obtained process, or, it may be, whenever he has done *all* that is necessary for him to do to obtain process to bring a defendant before the court, then his suit is commenced as to that defendant, and then the running of the statute ceases, and not before.

In this case it was the duty of the complainant to obtain process under the provisions of this section, or at least to have filed an affidavit and moved for the proper order, and as he did not do this until after the expiration of the 15 years, the demurrer to the plea should be overruled. This view is sustained by *Pindell v. Maydwell*, 7 B. Mon. 314; *Lyle v. Bradford*, 7 Mon. 111; *Hayden v. Bucklin*, 9 Paige, 513; *Fitch v. Smith*, 10 Paige, 9; *Webb v. Pell*, 1 Paige, 564; *Ross v. Luther*, (4 Cow. 158,) 15 Amer. Dec. 341, and note.

PATRICK v. LEACH and others.

(Circuit Court, D. Nebraska. May, 1881.)

1. ATTORNEY LIEN FOR FEES—JUDGMENT—LACHES.

Where an attorney at law has obtained a judgment for his client, on which he is entitled by law to a lien for his fees, and has perfected his lien in accordance with the provisions of the law, he may enforce it, notwithstanding a compromise and settlement made by his client with the other party, although he has not made himself a party to the record.

2. SAME—ATTORNEY INTERVENING.

Where it is necessary, in a suit to set aside such a judgment, to protect the attorney's lien, that he be made a party to the suit, the court will allow him to intervene therein.

In Equity.

J. M. Woolworth, for plaintiff.

Cowin and Howe, pro se.

McCrary, J. These petitioners are the attorneys for the respondent Leach, and were his attorneys in the state court in which the judgment was rendered against complainant, which is sought to be enjoined. They claim a lien upon that judgment for attorney's fees. They filed their lien in the state court, but whether they gave the notice required by law is a matter of dispute; petitioners asserting that they did, and Patrick that they did not.

The petitioners say that they relied upon their lien, and did not anticipate that their client would undertake to settle and satisfy the judgment without their consent, and that, therefore, they did not deem it necessary for the protection of their rights to make themselves parties. Their client, Leach, did, however, prior to the announcement of a decision by the court in this case, enter into an agreement

of compromise and settlement with Patrick, whereby the judgment was to be satisfied and canceled. The case was subsequently decided by this court upon the merits, and without reference to the settlement in favor of Patrick, and a decree was prepared enjoining the collection of said judgment.

On the twenty-ninth of April last the petitioners presented the present application. The decree in this case had been previously prepared and approved by the judge; but, in view of the filing of this application, the decree, though signed on the first of April, was not filed, but held by the judge until a hearing upon this application could be had. The case is, therefore, not yet finally disposed of, and it is within the power of the court to modify or cancel altogether the decree which has been signed, but not filed or recorded. The court has not, up to the present moment, lost control of the case. The record has not been finally made up. The application may, therefore, be considered upon its merits. We conclude:

1. That petitioners were not guilty of laches in not making this application sooner. They were not bound to anticipate a settlement and cancellation of the judgment. They had a right to presume that their rights would be regarded by their client, and that it would not be necessary for them, as against him, to be made parties to this suit in order to preserve any right they had by virtue of their claim of lien upon the judgment.

2. That, under the peculiar circumstances, injustice may be done the petitioners if they are not made parties. If, for example, an appeal from the decree of this court shall be prosecuted in the name of the defendant Leach alone, it would probably be dismissed by the supreme court on the ground of the settlement. To this he could not object; but the petitioners, if parties, could, upon the ground that they are not bound by the settlement. If parties, the petitioners could appear and have a hearing in the supreme court upon the merits; and if, upon the merits, the decree of this court should be reversed, they would be entitled to the enforcement of their lien, if it shall prove to be valid, notwithstanding the settlement may be held binding upon Leach. On the other hand, if the present application be denied, and Leach's appeal should be dismissed on the ground of the settlement, the result would be that the petitioners would be concluded upon the question of their lien, and at the same time deprived of the benefit of an appeal; in other words, the decree of this court would be rendered, as to them, final.

3. As to the question whether Patrick had notice of the lien of petitioners, upon the present showing there is a conflict of testimony. The petitioners charge notice; Patrick denies it. There is an issue of fact, and a fair question to be litigated. We do not decide it either way at present, but hold that if the decree of this court upon the merits should be reversed, they ought upon a rehearing to be heard upon it.

4. As this court holds the judgment ought to be canceled and satisfied, it follows that we must also hold that the petitioners have no right under their claim of lien; but before rendering final decree we will make them parties in order to give them the benefit of an appeal. There need be no delay.

Let the petitioners be made defendants, and file their bill of intervention at the present term within a time certain to be fixed. They can only be heard upon the record as it stands. They cannot, because of the misconduct of their client, be permitted to reopen the case for taking further testimony. Final decree will, therefore, be entered at this term, and an appeal allowed.

HIBERNIA INS. CO. v. ST. LOUIS & NEW ORLEANS TRANSPORTATION Co. and others.¹

(Circuit Court, E. D. Missouri. July 3, 1883.)

1. COMMON CARRIER—BILL OF LADING—EXCEPTED PERILS—"DANGERS OF THE RIVER."

The phrase "dangers of the river," as used in bills of lading, includes dangers arising from unknown reefs which have suddenly formed in the channel, and are not discoverable by care and skill.

2. TOWAGE CONTRACT—EXCEPTED PERILS.

Where the owner of a tow-boat agrees to tow a barge containing a cargo from St. Louis to New Orleans, and to deliver the barge and cargo to a consignee at the latter place, "the dangers of navigation and other known or unknown obstacles excepted," and said tow-boat ran said barge against a tree, which had recently fallen into the channel, and was entirely submerged and hidden from view, and the presence of which in the channel was unknown, and not discoverable by care and skill on the pilot's part, and said barge and cargo were greatly damaged, *hæd*, that the accident arose from an excepted peril, and that the owner of the tow-boat was not liable.

In Equity.

The Babbage Transportation Company, a corporation doing business as common carrier on the Mississippi, and also engaged in towing barges for hire, contracted to transport a large amount of wheat, insured by plaintiff, from St. Louis to New Orleans,—“the dangers of the river, fire, and collision excepted.” The wheat was loaded for transportation upon said company's barge, the Sallie Pearce. The Babbage Transportation Company also contracted to tow the barge Colossal and cargo from St. Louis to New Orleans, and deliver them to a consignee at the latter place,—“the dangers of navigation and the dangers of * * * collision, * * * and other known or unknown obstacles, excepted.” Said barge and cargo were also insured by plaintiff. The steamer Means, belonging to said company, took the Sallie Pearce and several other barges in tow and proceeded down the

¹ Reported by B. F. Rex, Esq., of the St. Louis bar.