

defendant's agent and attorneys. The New York Code of Civil Procedure, as amended in 1879, provides as follows:

Section 66. The compensation of an attorney or counsellor for his services, is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision, or judgment in his client's favor and the proceeds thereof in whosoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment.

Herman H. Shook, for plaintiff.

Foster & Thomson, for defendant.

LACOMBE, Circuit Judge. Plaintiff's attorney had no lien at common law on the cause of action. *Randall v. Van Wagenen*, 115 N. Y. 527, 22 N. E. 361; *Swanston v. Mining Co.*, 13 Fed. 215. His sole reliance is on the amendment passed in 1879 to section 66 of the Code of Civil Procedure, an act which relates to state courts, officers of justice, and civil proceedings. Section 914 of the United States Revised Statutes does not operate to import this act in its entirety into the federal system of jurisprudence. It simply undertakes to conform the federal practice, pleadings, and forms and modes of proceeding in civil causes to the state model, only "as near as may be," not as near as may be possible, nor as near as may be practicable. It remains still with the judges of the federal courts to construe, and in a proper case reject, any subordinate provision in such state statute as would unwisely incumber the administration of the law, or tend to defeat the ends of justice in their tribunals. *Railroad Co. v. Horst*, 93 U. S. 300. Without expressing any opinion generally as to the character of such legislation as finds expression in the amendment referred to, it is sufficient to say that any such construction of it as would require this court to go on and try a cause after the defendant had adjusted the plaintiff's claim to plaintiff's satisfaction, and paid him the same, in ignorance, and with no notice of any agreement between plaintiff and his attorney, would unwisely incumber the administration of the law. Whatever rights the state statute may give the attorney against his client or his adversary he may prosecute in the state court, but such statute cannot operate to constrain this court to incumber its calendar with a case all controversy in which has been finally settled between the parties.

SOBRIO v. MANHATTAN LIFE INS. CO.

(Circuit Court, S. D. California. February 24, 1896.)

No. 665.

SERVICE OF PROCESS—MANAGING AGENT—CALIFORNIA STATUTE.

The statute of California relative to service of process (Code Civ. Proc. § 411, subd. 2) provides that service upon a foreign corporation "doing

business and having a managing or business agent, cashier, or secretary within the state" shall be made by delivering a copy of the process to such agent, cashier, or secretary. The marshal made return upon a subpoena that he had served it upon "H., agent for" a foreign corporation, defendant. An uncontroverted affidavit, presented upon a motion to quash the service, stated that one L. was the managing agent of the defendant in the state. *Held*, that the service was bad.

Joseph M. Kinley, for complainant.
Finlayson & Finlayson, for defendant.

WELLBORN, District Judge. This is a motion to quash and set aside service of subpoena on the ground that the writ was not served upon the managing or business agent, cashier, or secretary of the defendant. Defendant is a corporation formed under the laws of the state of New York, and doing business in the state of California. The law of the latter state regulating the service of process upon foreign corporations is as follows:

"Sec. 411. The summons must be served by delivering a copy thereof as follows: * * * 2. If the suit is against a foreign corporation, or a nonresident joint stock company or association, doing business and having a managing or business agent, cashier, or secretary, within this state: to such agent, cashier, or secretary." Code Civ. Proc. Cal. § 411, subd. 2.

The return of the marshal on the subpoena states that he served the same upon "L. A. Hitchcock, agent for the Manhattan Life Insurance Company at Los Angeles, California." It appears from an affidavit offered by defendant in support of its motion, and made by one John Landers, and which is uncontroverted, that said Landers is the managing agent, or, as he styles himself in the affidavit, "the resident manager," of the defendant in California, with his office in the city and county of San Francisco; and, further, that said Hitchcock is not, and never has been, the managing or business agent of defendant. Upon these facts, and under the law above quoted, I am of opinion that the subpoena has not been legally served, and an order will be accordingly entered, allowing defendant's motion, and quashing and setting aside the service evidenced by the above-mentioned return of the marshal.

RITTER v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Circuit Court of Appeals, Third Circuit. March 9, 1896.)

No. 2.

APPEAL FROM CIRCUIT COURT OF APPEALS TO SUPREME COURT.

After the affirmance by the circuit court of appeals of a judgment for defendant, and the going down of the mandate, the plaintiff in error filed a petition in that court, stating that he desired to take an appeal to the supreme court of the United States, and praying that "the said mandate be recalled, and that the said record be directed to be returned to this court," and for "such further order as may be necessary to enable him to perfect his appeal." *Held*, that the recall of the mandate was unnecessary to the taking of an appeal, and that as the transcript of the record is never remitted to the court below, but remains in the appellate court, the prayer of the petition must be denied.