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1928.

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**CASES ON PROCEDURE
ANNOTATED**

**'TRIAL AND APPELLATE
PRACTICE**

**By EDSON R. SUNDERLAND
PROFESSOR OF LAW IN THE LAW SCHOOL
OF THE UNIVERSITY OF MICHIGAN**

**CHICAGO
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1924**

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PREFACE

A dozen years ago the present editor published a case-book for law school use on Trial Practice. It was then a subject unknown in the law school curriculum, and the presumptions were perhaps, for that reason, generally thought to be against its usefulness and practicability. But in the years that have passed the teaching of trial practice has become a common feature in American legal education. The once prevalent idea that the subject was primarily local has been quite generally dispelled, and the principles of trial practice are now seen to be of wide application. Variations found in different jurisdictions are mostly on minor points. The major problems, involving the elements of jurisdiction and the correlation of functions between judge, jury, attorney and witness, have been solved by the different American courts along almost identical lines. The result has been the development of a systematic and well-ordered body of principles suited to the needs of modern American courts of justice. Such a subject is obviously of the highest importance to those who are being trained to enter the practice of law, and its place in the law school course has become secure.

It now seems desirable to take a further step in the same direction, and to bring the subject of Appellate Practice into the law school field. Every argument made against the teaching of trial practice may be equally employed against extending the course into the realm of appellate review. But the arguments in favor of one are equally cogent in behalf of the other. There is the same mass of litigation over points of practice, and the same uniformity in the fundamental principles involved. As a matter of statistics, the subject of Appeal and Error fills a larger section in the current digests than Trials. And while local statutes play an important part in determining the minor technical requisites for review, there is a striking uniformity in those underlying principles according to which appellate proceedings are instituted and conducted in American courts. In making a general study

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of the subject with material gathered from many jurisdictions, the essential elements necessarily become emphasized and clarified among the incidental details and the diverse nomenclature, resulting in a sounder appreciation of fundamental principles than could well be obtained from a study of the practice of a single jurisdiction.

The editor's earlier volume on Trial Practice has not been incorporated in the present book, but that subject has been entirely reorganized and rewritten. The material on Jurisdiction has been greatly extended. Legal Ethics in connection with trial work has been treated more adequately, new sections on the Verdict and Judgment have been added, certain topics, such as Instructing the Jury and New Trials, have been considerably condensed, new cases have been freely used whenever experience indicated the advisability of such changes, and the whole subject has been annotated more liberally than before.

Appellate Practice, which fills substantially half the present volume, is doubtless more technical than the practice relating to trials, and there is more variety and complexity in the application of the rules. It seemed desirable, however, to restrict the case material to the main principles involved, and to exhibit subordinate variations and special applications in the form of notes. This has required rather heavy annotation, but the notes merely amplify the scope of the text or show its implications and limitations, without undertaking to present exhaustive lists of authorities.

The two topics, Trial and Review, are in fact but two aspects of a single subject. Every trial must be conducted with a view to a possible appeal, and every appeal is based upon the proceedings below. Reviewing cases in appellate courts has become such common practice that lawyers must always be prepared to carry their cases through to the highest courts. This has greatly increased the need for teaching the principles of appellate review, and the fact that every step taken in either court relates immediately and vitally to the procedure in the other, makes it almost indispensable that the two stages of litigation be studied as counterparts of one another. The present book is designed to develop the subject in this way as an organic whole.

Since procedural questions are likely to accompany every kind of case as incidental to problems of liability, it is par-

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ticularly necessary in dealing with material of this kind to freely omit portions of the opinions when irrelevant to the subject matter in hand. Such omissions have in all cases been indicated. But it has been the constant aim of the editor to preserve in every case a full statement of all facts bearing upon the procedural problem involved. These are frequently given in the form of condensed statements by the editor, and such statements will always be found marked by inclosing brackets.

EDSON R. SUNDERLAND.

Law School,
University of Michigan,
Ann Arbor,
January, 1924.

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PART I.
TRIAL PRACTICE.
CHAPTER I.
JURISDICTION.

SECTION 1. JUDICIAL POWER.

SHOULTZ v. MCPHEETERS.

Supreme Court of Indiana. 1881.

79 Indiana, 373.

ELLIOTT, C. J. The civil code of 1881 provides for the appointment of master commissioners by the judges of the circuit courts of the State, and invests them with various powers and imposes upon them important duties. Section 419 is as follows: "Whenever the office of judge shall become vacant, or, in case of the absence of all the judges competent to act, or whenever such judge or judges, by reason of interest, is or are incompetent to act, or unable by reason of sickness, such master commissioner shall have all the power of any judge in vacation, to grant restraining orders, injunctions, writs of *habeas corpus*, and writs of *ne exeat*, and to appoint receivers, and hear and determine all motions and matters, and make all orders concerning the same." R. S. 1881, section 1404.

This section is in direct conflict with the letter and spirit of the Constitution of the State, and is utterly void.

* * * * *

By the express provision of the paramount law, the whole judicial power of the State is vested in courts. Blackstone, following Lord Coke, says: "A court is defined to be a place where justice is judicially administered." 3 Com. 24. Of

this statement it was well observed by the court, in *Hobart v. Hobart*, 45 Iowa, 501: "But this definition obviously wants fulness. * * * In addition to the place, there must be the presence of the officers constituting a court, the judge or judges certainly." In legal contemplation there can not be a court without a judge or judges. Bouvier says: "The one common and essential feature in all courts is a judge or judges, so essential, indeed, that they are even called *the court*." An English book says: "In these courts the sovereign is supposed in contemplation of law to be always present; or at least is there represented by the judges, whose power is but an emanation of the prerogative." 2 Broom & H. Com. 21. In *The Michigan, etc., R. R. Co. v. The Northern, etc., R. R. Co.*, 3 Ind. 239, it was said that the terms court and judge are generally synonymous. The predominant idea in all the definitions of the courts and the text writers is, that a court is a tribunal organized for the purpose of administering justice, and presided over by a judge or judges. Webster's definition is: "An official assembly, legally met together for the transaction of judicial business; a judge or judges sitting for the hearing or trial of causes." Our Constitution means by the term *court* judicial tribunals presided over by a judge or judges. Section 2, of article 7, provides that the Supreme Court shall not consist of less than three nor more than five judges. Section 8 directs that the circuit courts shall each consist of one judge. Section 10 declares that the General Assembly may provide by law that the judge of one circuit may hold the courts of another circuit, and section 14 makes provision for justices of the peace. Throughout all the constitutional provisions runs the controlling idea that a court cannot exist without a judge. The Legislature may establish courts, but can not vest the judicial power in any other tribunals.

A master commissioner is not a court, and judicial duties which courts only can exercise, can not be conferred upon him. This seems so plain upon principle that the support of authority is not needed. But authorities are not wanting. In *Hall v. Marks*, 34 Ill. 358, a statute was held to be unconstitutional which attempted to confer authority upon the clerk to enter judgment in actions upon written contracts where the amount of the recovery was fixed by the contract, and in cases where the defendant failed to appear and suf-

ferred default. The court there said: "The consideration of the facts, and the application of the law to those facts, and the conclusion deduced by the court from the law and the facts constitute a judgment. The power to announce and have enforced this conclusion has been confided exclusively to the judiciary of our State government." In *Chandler v. Nash*, 5 Mich. 409, it was held that a statute, assuming to confer judicial powers upon a notary public, was unconstitutional and void. The court said: "This presents the naked question whether the legislature possessed the constitutional power to confer such jurisdiction upon the notary. The proceeding authorized by the statute first cited, for dissolving attachments, is as clearly a judicial proceeding as the trial of a cause in any court of the State; and the power 'to hear and determine' such application under the statute, is as clearly a judicial power as that exercised by a justice of the peace or a judge upon the bench. It is not like a mere reference to take proof or compute amounts to be reported to a court of record for their judicial action, but it is, 'to hear and determine,' questions both of law and fact. Section 1, art. vi, of the constitution, declares: 'The judicial power is vested in one Supreme Court, in Circuit Courts, in Probate Courts, and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the legislature, in cities.' This, beyond all controversy, vests the *whole* judicial power of the State in the courts and officers named in this section, unless there be some further provision in the same constitution, conferring upon some other court or officer a part of such judicial power, or authorizing the legislature to confer it; and in the latter case, it can only be possessed or conferred by such further provision expressly, or by necessary implication, which would have the effect to take the case out of the general provision above quoted. This must be so upon principle, or the constitution itself must be subject to legislative repeal. It is also well supported by authority. See 2 Story on Const., secs. 1590 to 1592; *State v. City of Rockford*, 14 Ill. 420; *Gibson v. Emerson*, 2 Eng. 173." The views expressed in the cases cited are in harmony with the rule long since declared by this court. In *Flournoy v. The City of Jeffersonville*, 17 Ind. 169, it was said: "Judicial acts, within the meaning of the Constitution of Indiana, are such as are performed in the exer-

cise of judicial powers. But the judicial power of this State is vested in courts. A judicial act, then, must be an act performed by a court, touching the rights of parties, or property, brought before it by voluntary appearance, or by the prior action of ministerial officers, in short, by ministerial acts. See *Waldo v. Wallace*, 12 Ind. 569, where the constitutional provisions are quoted. The acts done out of court, in bringing parties into court, are, as a general proposition, ministerial acts; those done by the court in session, in adjudicating between parties, or upon the rights of one in court *ex parte*, are judicial acts. 3 Black. Comm., p. 25."

* * * * *

It is undoubtedly true, that there are many cases in which powers in their nature judicial, may be conferred upon officers and inferior tribunals. Quasi judicial powers may be conferred upon tribunals which are not courts in the strict sense of the term. This is well illustrated in the case of *The United States v. Ferreira*, 13 How. 40. But the section of the statute here under examination does much more than this; for it assumes to confer authority to exercise functions and powers, which are purely and strictly judicial. These can only be possessed and exercised by the courts.

* * * * *

BERGMAN v. KEARNEY.

United States District Court for the District of Nevada.
1917.

241 Federal Reporter, 884.

In Equity. Suit by W. C. Bergman, H. B. Alfree, and John G. Taylor, Incorporated, against W. M. Kearney, as State Engineer. On final hearing. Decree for defendant.

This is a suit brought by plaintiffs, for themselves and in behalf of other appropriators of water from the Humboldt river system, whose rights thereto were acquired prior to the approval of the present water law of Nevada. The purpose of the suit is to procure a permanent injunction, restraining defendant as state engineer of Nevada, from proceeding to hear and determine any of the rights or appropriations of

plaintiffs, or of any other claimant in and to the waters of Humboldt river and its tributaries, including the Little Humboldt, which were initiated and perfected prior to the passage of the Nevada Water Law, approved March 22, 1913. In detail, the court is asked to restrain defendant from hearing and determining, or from entering any order determining, such rights, from issuing to any one claiming waters of said stream a certificate of determination, from making any order requiring proofs of appropriation to be filed within any fixed time, and from refusing to receive and file proofs of appropriation from the Humboldt river, when such proof is offered during office hours of the engineer, and accompanied by the proper fees.

* * * * *

FARRINGTON, District Judge (after stating the facts as above). Plaintiffs take the position that they are possessed of certain property rights in the waters of Humboldt river, which were perfected prior to the passage of the Nevada Water Law of 1913, and prior to 1902, when the office of state engineer was created; that there never has been any general adjudication of the rights, or relative rights, of plaintiffs, or other appropriators, to the waters of that stream; consequently the proposed determination by defendant, being an exercise of something more than administrative authority, will impair plaintiffs' vested rights, and is therefore unconstitutional. The three main contentions are as follows:

* * * * *

Third, that the statute, beginning with section 18, and concluding with section 58, both inclusive, and section 75, and sections 88a and 88b, is invalid, because thereby it sought to confer upon a nonjudicial officer judicial powers.

* * * * *

In the recent case of *Ormsby County v. Kearney*, 37 Nev. 314, 142 Pac. 803, on appeal from the district court for Humboldt county, the Supreme Court of this state had under consideration the Water Law as enacted in 1913. The purpose of the action was to restrain the state engineer from proceeding under that statute, and the result was an order directing the district court to modify the temporary injunction, "so as to only restrain the state engineer from making determinations which would in any way impair vested rights"; but what acts of determination would impair vested water rights

was not indicated, otherwise than as the court held that the act was unconstitutional in so far as it authorized the engineer to make decrees which were final and conclusive. The majority of the court were of the opinion that the state, in the exercise of its police power to prescribe laws for the general welfare, could provide for inspection and regulation of the waters and water courses of the state, and exercise a superintending control over them; that the Water Law of 1913, giving the state engineer the right to institute proceedings to determine water rights, if construed as administrative only, and not to impair vested rights, was valid; and that the state engineer could lawfully take evidence and determine water rights for administrative purposes.

In order to understand how and to what extent the court declared the law of 1913 unconstitutional, it will be necessary to examine the decision and the statute. Section 44 of the act of 1913 in terms declares that:

"The final orders or decrees of the state engineer, in the proceedings provided by law for the adjudication and determination of rights to the use of the waters in this state, shall be conclusive as to all prior appropriations, and the rights of all existing claimants upon the stream or body of water lawfully embraced in the adjudication, subject, however, to the provisions of law for appeals, rehearings and for the reopening of the orders or decrees therein."

If the proceedings were reopened, the rehearings could be had only before the state engineer. The only appeal granted was to the district court; but as that court, under the Constitution, had and could exercise no such appellate jurisdiction, the act had the effect of making the determination of an administrative officer a final adjudication of property rights, from which there could be no appeal. The court very properly held the act unconstitutional in this respect. *Ormsby County v. Kearney, supra*, 37 Nev. 356, 379, 384, 385, 142 Pac. 803.

* * * In the amended act, the determination is permitted to have no efficiency until it is filed in the district court; thereafter the division of water must be made in accordance therewith, but this division "may be stayed in whole or in part by any party upon filing a bond in the court wherein such determination is pending." After the stay bond, the order of determination seems to be shorn of all

efficiency, except that it operates as a pleading, and may be affirmed by the court, without trial, if no exceptions are filed.

* * * There is no appeal from the determination of the engineer to the district court, but rather a continuation in that court of proceedings commenced by and before the state engineer. When he has made his determination, he must file it, together with the original evidence and transcripts, in the district court; he must then apply to the court to have the matter set for hearing; he must notify each interested party, and file proof of service. The order of determination, the statements or claims of claimants, and the exceptions to the order will constitute the only permissible pleadings, and all the proceedings thereunder are had as nearly as may be in accordance with the rules governing civil actions. If necessary, the court may employ experts to investigate and report, or it may refer the case, or any part of it, to the state engineer for further evidence or determination. The proceedings culminate in a decree affirming or modifying the determination. The only appeal involving the order of determination provided for in the amended act is from the decree of the district court to the Supreme Court. There is no provision in the act of 1915 which declares that the determination of the state engineer shall at any time be in force and effect, save that, pending proceedings in court, the water may be distributed in accordance therewith, unless such distribution is prevented by a stay bond.

The insistence that the proceedings provided in the statute as amended, are tantamount to an appeal to the district court, as authorized in the act of 1913, is not well founded. At no stage does the determination possess any of the characteristics of finality; it cannot be regarded as terminating between the parties litigation on the merits of the case. It contemplates and provides for further information and testimony in the district court, before a final decree can be entered. It operates, not as a judgment, but as a pleading, or the findings of a referee. True, it may be affirmed without additional testimony, if no exceptions are filed. This is equivalent to the taking of a decree *pro confesso* when the allegations of the bill are sufficient to support the decree asked. Simkins, Federal Equity Suit, p. 388. A similar proceeding occurs when judgment by default is taken against a

defendant who fails to answer in an action upon contract for the recovery of money or damages only. Rev. Laws Nev. § 5236.

It is insisted that the amendments of 1915 have failed to accomplish their purpose and that the act as amended is still bad, in that it vests judicial power in a nonjudicial officer. It must be admitted that the amended act imposes duties on the state engineer which in their nature are judicial, but whether they come within the constitutional inhibition is the question.

Section 1, art. 3, of the Nevada Constitution, reads thus:

"The powers of the government of the state of Nevada shall be divided into three separate departments—the legislative, the executive and the judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted."

Section 1, art. 6, is as follows:

"The judicial power of this state shall be vested in a Supreme Court, district courts, and in justices of the peace. The Legislature may also establish courts, for municipal purposes only, in incorporated cities and towns."

It is argued that the judicial power of the state is thus completely distributed to the courts mentioned, and consequently the Legislature is powerless to create new courts, except for municipal purposes in incorporated cities and towns, and has no reserve of judicial power to confer on an executive officer.

It will be noted that a complete and perfect separation of powers is not made by the Constitution itself. The veto power gives the Governor a qualified negative on all laws proposed by the Legislature. The Lieutenant Governor presides over the Senate, and has a casting vote. Each house of the Legislature is the judge of the qualifications, election, and returns of its own members; and the Senate is a high court for the trial of impeachments. Thus the Governor and Lieutenant Governor exercise legislative power, and the Legislature exercises judicial power.

Again, it is only those functions appertaining either to the judicial or legislative departments, which an executive officer is prohibited from exercising. Apparently it is not the exer-

cise of all judicial authority, but the exercise of that portion of the judicial authority pertaining or belonging to the judicial department, which is forbidden. Apt and appropriate language certainly could have been employed to express complete and absolute segregation, if such had been the design of the men who framed and adopted the Constitution. It was this thought which led our Supreme Court to say in *Sawyer v. Dooley*, 21 Nev. 390, 396, 32 Pac. 437, 439:

"It is the state government as created by the Constitution which is divided into departments. These departments are each charged by other parts of the Constitution with certain duties and functions, and it is to these that the prohibition just quoted refers. * * * It would be impossible to administer the state government, were the officers not permitted and required, in many instances, to discharge duties in their nature judicial."

Hence it was held that executive officers might be charged with the duty of assessing property, and required to act as a board of equalization; for, notwithstanding the fact that such a board may act in a judicial capacity, the Constitution nowhere contemplates that the judicial department, as organized by article 6, shall discharge that duty.

It is impossible to say that all acts judicial in their nature are within the exclusive province of the judicial department of the government. Numerous instances may be cited in which nonjudicial officers have been required to exercise functions which in a sense are judicial, and yet statutes imposing such duties have been held to be constitutional. For instance, we have a railroad commission, an industrial commission, a public service commission, a tax commission, boards of equalization, and boards of county commissioners. Not one of these bodies is a court, and yet under certain circumstances each is authorized to require the presence of witnesses, to listen to evidence, to hear argument, to ascertain facts, to apply existing law thereto, and to enter decisions seriously affecting the rights of individuals. Such judicial power exercised by nonjudicial officers is termed *quasi* judicial, to distinguish it from the judicial power which devolves upon, and may be exercised only by, the courts.

The ultimate purpose for which the adversary proceedings are had is a most important factor in determining their

character. At the close of the chapter on Separation of Powers, section 753, in his work on the Constitution, Willoughby says:

"There is no constitutional objection to vesting the performance of acts essentially judicial in character in the hands of the executive or administrative agents, provided the performance of these functions is properly incidental to the execution by the department in question of functions peculiarly its own."

In *Landowners v. People*, 113 Ill. 296, 309, it is said:

"Judicial power has never been held to apply to those cases where judgment is exercised as incident to the execution of a ministerial power, nor has it ever been held the exercise of ministerial power by the courts, within the meaning of this article, where they have been compelled to exercise a ministerial act as an incident to the exercise of judicial power."

If a judicial hearing is had before a legislative body to ascertain facts upon which to base legislation, the hearing will be *quasi* judicial, even though it may have been conducted in strict accordance with the practice in civil cases; it is merely preliminary and incidental to the legislative act. It is in no sense a function properly appertaining to the judicial department of the state government.

Again, an aggrieved shipper lodges with the Railroad Commission a complaint, alleging that certain charges are extortionate, unjust, and discriminatory; interested parties are notified; they appear; witnesses are summoned, examined, and cross-examined; there are arguments by the adverse parties; but the Commission—and this is significant—must determine that the allegations are true, that the prevailing rates are extortionate, unjust, or discriminatory, before it may by order establish and fix, in lieu thereof, rates which shall thereafter prevail. In all this there is no encroaching on the judicial power. The authority to determine what is a reasonable rate to be charged by a common carrier, or a public utility, is legislative, and not judicial, in the constitutional sense. The Constitution nowhere imposes on the courts the duty of making such investigations and determinations preparatory to and in aid of legislative acts. Hence they cannot be regarded as functions appertaining to the judicial department. *Southern Pacific Co. v. Bartine* (C. C.) 170 Fed.

725, 773; *Idaho Power, etc., Co. v. Blomquist*, 26 Idaho, 222, 141 Pac. 1083, Ann. Cas. 1916E, 282.

Similarly, the Industrial Commission has been invested with authority, and charged with the duty of hearing evidence and determining the facts which must be found to exist before any claim for compensation of injured workmen may be allowed. It is held that such a commission is not a court, but an administrative body, which in the course of its duties may decide questions of law and fact. In so doing, it acts *quasi* judicially, but is not vested with judicial power in the constitutional sense. *Borgnis v. Falk Co.*, 147 Wis. 327, 358, 133 N. W. 209, 37 L. R. A. (N. S.) 489.

Judicial power, in the constitutional sense, is something more than authority to hear and determine; it includes the power to decide finally and conclusively, and also power to carry its determination into effect. Judicial power is defined by Mr. Justice Miller as the—

“power of a court to decide and pronounce a judgment and carry it into effect between persons who bring a case before it for decision.”

See *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 412, 156 Pac. 491, 493; *Muskrat v. United States*, 219 U. S. 346, 356, 31 Sup. Ct. 250, 55 L. Ed. 246; *District of Columbia v. Eslin*, 183 U. S. 62, 65, 22 Sup. Ct. 17, 46 L. Ed. 85; *Gordon v. United States*, 117 U. S. 697; *Interstate Commerce Com. v. Brimson*, 154 U. S. 447, 481, 14 Sup. Ct. 1125, 38 L. Ed. 1047.

In *Underwood v. McDuffee*, 15 Mich. 361, 368, 93 Am. Dec. 194, 196, the court said:

“No action which is merely preparatory to an order or judgment to be rendered by some different body can be properly termed judicial. A master in chancery often has occasion to consider questions of law and of fact, but no one ever supposed him to possess judicial power. A jury in a court of record determines all the facts in a case, but the judicial power is in the court which enforces the verdict by judgment. This view is very clearly explained by Kent, C. J., in *Tillotson v. Cheetham*, 2 Johns. [N. Y.] 63 (3 Am. Dec. 459), where it was held that the sheriff himself, when presiding over a jury of inquest, acted ministerially, because he had no power to give judgment. * * * It is the inherent author-

ity, not only to decide, but to make binding orders or judgments, which constitutes judicial power; and the instrumentalities used to inform the tribunal, whether left to its own choice or fixed by law, are merely auxiliary to that power, and operate on persons or things only through its action, and by virtue of it."

In *McKnight v. Grant*, 13 Idaho, 629, 637, 92 Pac. 989, 990, 121 Am. St. Rep. 287, 290, the Supreme Court of Idaho says:

"On the other hand, section 13 of article 5 of the Constitution was never intended to prohibit other departments of the state government than the judicial from exercising some judicial or quasi judicial functions. We think by this provision it was rather intended to preserve to the judicial department of the state government the right and power to finally determine controversies between parties involving their rights and upon whose claims some decision or judgment must be rendered or determination made."

It was held, in *People ex rel. Morgan v. Hayne*, 83 Cal. 111, 23 Pac. 1, 7 L. R. A. 348, 17 Am. St. Rep. 211, that the Supreme Court Commissioners of that state in reporting facts and conclusions of law, are not exercising judicial power.

In 1792 Congress passed an act requiring the Circuit Courts of the United States to examine into the pension claims of disabled veterans of the Revolutionary War, to determine what amount of pay would be equivalent to the disability incurred, and to certify the same to the Secretary of War, who was to place the names on the pension list in conformity thereto, unless he had cause to suspect imposition or mistake, in which event he might withhold the pension and report the case to Congress. The judges were of the opinion that, inasmuch as their determination would not be final, but could be suspended by an executive officer, the duties imposed could not be deemed judicial. *Hayburn's Case*, 2 Dall. (Pa.) 409, 1 L. Ed. 436.

In *United States v. Ferreira*, 13 How. 40, 14 L. Ed. 42, the District Judge of Florida was authorized by an Act of Congress to receive and adjudicate certain claims against the United States. His decisions allowing claims, together with the evidence on which he acted, were to be transmitted to the Secretary of War, and, if he was satisfied that the same were

legal and just, he was authorized to pay them. The Supreme Court declared:

"The powers conferred by these acts of Congress upon the judge, as well as the Secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands or money under a treaty, or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a Secretary as well as on a commissioner, but is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States."

* * * * *

Under our law, * * * the proceeding for the adjudication of water rights is integral; it is one; its preparatory and initial stages are before the state engineer; the final steps are in the district court. It is initiated by an order of the state engineer, without waiting for controversies to arise. He seeks no legal or equitable relief, either for himself or for the state which he represents. No recovery of the whole or any part of the rights to be investigated is demanded. He sets up no title to be established or quieted in himself or in the state; he alleges no rights which have been infringed or violated. The purpose of the proceeding is to promote the public welfare by regulating the use and preventing the waste of the waters of the state. His determination, though obtained judicially, has none of the elements of finality and conclusiveness which are the *sine qua non* of judicial power. As an ascertainment of relative rights, it is not effective for the administrative purpose of regulating and controlling distribution and diversion, until it is filed in court. Thereafter, pending the decree, the distribution must be had in accordance with the determination; but this may be prevented in whole or in part by any one who files in the court a stay bond, the amount of which is discretionary with the judge. The proceedings reach the court as a matter of course. No aggrieved claimant, nor all the claimants acting in unison, have any option in this regard. It is as much the duty of the engineer to file his determination with the original evidence, and a

certified copy of all testimony on which it was based, in the court, as it was to make investigations, measurements, and maps, to gather evidence, or to prepare his determination. Until it is so filed, it has no more force than the findings of a referee. It is not a decree or judgment, in the sense that it terminates the litigation on the merits between parties; therefore there is nothing to appeal from. When it reaches the court, there is no necessity for an appeal; there its principal function is to serve as one of the pleadings. If no exceptions are filed, the court is justified in assuming that it reasonably satisfies all parties, and a decree will be entered affirming the order of determination. If any exceptions are filed, there must be a trial in the district court. At the hearing the court is not confined to a mere re-examination of the record and evidence as heard by the engineer, but will in all its proceedings follow as near as may be the rules governing civil actions. It may require further evidence or determination from the state engineer, or a report from such experts as it may employ to make investigations.

I am therefore of the opinion that the act of 1913, as amended in 1915, in so far as it authorizes the state engineer to take evidence and determine water rights for administrative purposes, is not unconstitutional. The power exercised in the ascertainment of water rights for administrative purposes only is not judicial power in the constitutional sense; nor, in so far as the engineer is authorized to take evidence and determine water rights for the final adjudication of the titles of various claimants among themselves, is he vested with judicial power. What he does is merely preliminary, the initial step in a proceeding which culminates in a final decree by the district court; thus it is not the engineer, but the court, which exercises the judicial power of the state of Nevada. * * *¹

¹ See L. R. A. 1916A, p. 425, and L. R. A. 1917D, p. 55, for notes on the delegation of judicial power under workmen's compensation acts.

WILLIAMS v. REUTZEL.

Take Supreme Court of Arkansas. 1895.

60 Arkansas, 155.

BATTLE, J. On the 11th day of February, 1892, Casper Reutzel filed a petition in the Sebastian circuit court for the Ft. Smith district, by which he sought to compel John F. Williams, as collector of Sebastian county, to receive certain county warrants in payment of the county taxes assessed against his property for the year 1881. He stated, among other things, that he was a resident and taxpayer of the Ft. Smith district, and the owner of certain warrants upon the treasurer of Sebastian county. * * *

We infer from the petition, evidence, and the findings of the court that the warrants in question were issued upon orders or judgments of the Sebastian county court rendered while it was sitting at Ft. Smith. The beginning of each warrant with the name of the court, the term thereof, and the time when allowed, indicates this. * * * County warrants are not allowed by the clerk, but by the county court. Hence the date of the allowance must have been made to show the date of the order or judgment upon which they were issued. * * *

In every county of this state there is and must be a county seat. At it the county court is required to erect a good and sufficient courthouse and jail. The county, circuit, and other courts held for the county must sit there. There is no other place designated by law for that purpose. The name "county seat" indicates the object of its creation. It is, as defined by the Century Dictionary, "the seat of government of a county; the town in which the county and other courts are held, and where the county officers perform their functions." When the county seat of a county is removed, and the needful public buildings are made ready for the several courts holden at the county seat and the respective officers, the next and succeeding terms of the county court and the circuit court and all the other courts for said county of superior or general jurisdiction are required to be held at the new county seat.

It has often been held by this court that "the meeting together of the judge and officers of a court at the place, but

not at the time fixed by law for holding the court, was not a court, under our constitution and law, but was a mere collection of officers, whose acts must be regarded as *coram non judice* and void." *Dunn v. State*, 2 Ark. 252; *Brumley v. State*, 20 Ark. 77; *Scott v. State*, 22 Ark. 369; *Ex parte Jones*, 27 Ark. 319; *Chaplin v. Holmes*, Id. 414; *Graham v. Parham*, 32 Ark. 687; *Grimmett v. Askew*, 48 Ark. 155, 2 S. W. 707; *Neal v. Shinn*, 49 Ark. 227, 4 S. W. 771. This rule is applicable to the proceedings of a court held at a place not authorized by law. The object of the law in both cases is the same. That object is certainty, and to prevent a failure of justice by reason of parties concerned or affected not knowing the time or place of holding courts. The effect, therefore, of the failure to comply with the rule, in each case, is the same. *State v. Roberts*, 8 Nev. 239; *Dalton v. Libby*, 9 Nev. 192; *Cooper v. Insurance Co.*, 3 Colo. 318; *Wicks v. Ludwig*, 9 Cal. 173; *Witt v. Henze*, 58 Wis. 244, 16 N. W. 609.

* * * Here an election had been ordered by the Sebastian county court to determine whether the county seat of Sebastian county should be removed to Ft. Smith. The election was held, and it was thereby decided in the negative, according to the law then in force. The county court so held and adjudged. About one year after this, and after the term at which the order was made had expired, the court attempted to set aside its final order made at a previous term, and declared that the county seat was removed from Greenwood to Ft. Smith. It had no power or authority to do so, and the order by which it attempted to exercise such jurisdiction was null and void; and it was so held by this court in *Patterson v. Temple*, 27 Ark. 202.

At the time the orders under which the clerk issued the warrants in question were made, Greenwood was the county seat of Sebastian county. There was no law authorizing the holding of a county court at Ft. Smith. The warrants are consequently void.

The judgment of the circuit court is therefore reversed, and the petition denied.²

² See *Mahon v. Harkreader* (1877), 18 Kan. 383, where the judge, other officers and parties moved from the court room to a law office in the same city and tried the case; *Sevier v. Teal* (1856), 16 Tex. 311, where the court left the county seat because of an incursion of the public enemy; *Selleck v. City of Janesville* (1898), 100 Wis. 157, where the judge, jury, sheriff and attorneys went to the home of a sick witness 15

miles away to take testimony;—in all of which the change was held to have no effect on the jurisdiction. *Funk v. Carroll County* (1895), 96 Ia. 158, holds *contra* to last case above cited.

In *re Terrill* (1893), 52 Kan. 29, holds that where the judge is not present on the first day of the term, there is no officer present capable of exercising the judicial power to adjourn to a later day of the term, and therefore the entire term is lost, and a session held on a later day is without legal validity. A judgment rendered in vacation (*Gamble v. Buffalo County* (1898), 57 Neb. 163) or on a legal holiday (*Hemmens v. Bently* (1875), 32 Mich. 89) is void.

⁴ Take MUSKRAT v. UNITED STATES.

Supreme Court of the United States. 1910.

219 United States, 346.

DAY, J. These cases arise under an act of Congress undertaking to confer jurisdiction upon the court of claims, and upon this court, on appeal, to determine the validity of certain acts of Congress hereinafter referred to.

~~The first question in these cases, as in others, involves the jurisdiction of this court to entertain the proceeding, and that depends upon whether the jurisdiction conferred is within the power of Congress, having in view the limitations of the judicial power, as established by the Constitution of the United States.~~ H 1

Section 1 of article III of the Constitution provides:

“The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish.”

Section 2 of the same article provides:

“The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between

a state, or the citizens thereof, and foreign states, citizens, or subjects."

* * * * *

It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and, with the aid of appropriate legislation, upon the inferior courts of the United States. "Judicial power," says Mr. Justice Miller, in his work on the Constitution, "is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." Miller, Const. 314.

As we have already seen, by the express terms of the Constitution, the exercise of the judicial power is limited to "cases" and "controversies." Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.

What, then, does the Constitution mean in conferring this judicial power with the right to determine "cases" and "controversies." A "case" was defined by Mr. Chief Justice Marshall as early as the leading case of *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term "controversy?" That question was dealt with by Mr. Justice Field, at the circuit, in the case of *Re Pacific R. Commission*, 32 Fed. 241, 255. Of these terms that learned justice said:

"The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. *Chisholm v. Georgia*, 2 Dall. 431, 432, 1 L. ed. 445, 446, 1 Tucker's Bl. Com. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse par-

ties, whose contentions are submitted to the court for adjudication."

The power being thus limited to require an application of the judicial power to cases and controversies, Is the act which undertook to authorize the present suits to determine the constitutional validity of certain legislation within the constitutional authority of the court? This inquiry in the case before us includes the broader question, When may this court, in the exercise of the judicial power, pass upon the constitutional validity of an act of Congress? That question has been settled from the early history of the court, the leading case on the subject being *Marbury v. Madison*, *supra*.

In that case Chief Justice Marshall, who spoke for the court, was careful to point out that the right to declare an act of Congress unconstitutional could only be exercised when a proper case between opposing parties was submitted for judicial determination; that there was no general veto power in the court upon the legislation of Congress; and that the authority to declare an act unconstitutional sprang from the requirement that the court, in administering the law and pronouncing judgment between the parties to a case, and choosing between the requirements of the fundamental law established by the people and embodied in the Constitution and an act of the agents of the people, acting under authority of the Constitution, should enforce the Constitution as the supreme law of the land. The Chief Justice demonstrated, in a manner which has been regarded as settling the question, that with the choice thus given between a constitutional requirement and a conflicting statutory enactment, the plain duty of the court was to follow and enforce the Constitution as the supreme law established by the people. And the court recognized, in *Marbury v. Madison* and subsequent cases, that the exercise of this great power could only be invoked in cases which came regularly before the courts for determination, for, said the chief justice, in *Osborn v. Bank of United States*, 9 Wheat. 819, 6 L. ed. 223, speaking of the third article of the Constitution, conferring judicial power:

"This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only

when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States."

Again, in the case of *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257, Chief Justice Marshall, amplifying and reasserting the doctrine of *Marbury v. Madison*, recognized the limitations upon the right of this court to declare an act of Congress unconstitutional, and granting that there might be instances of its violation which could not be brought within the jurisdiction of the courts, and referring to a grant by a state of a patent of nobility as a case of that class, and conceding that the court would have no power to annul such a grant, said:

"This may be very true; but by no means justifies the inference drawn from it. The article does not extend the judicial power to every violation of the Constitution which may possibly take place, but to 'a case in law or equity' in which a right under such law is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend. The same observation applies to the other instances with which the counsel who opened the cause has illustrated this argument. Although they show that there may be violations of the Constitution of which the courts can take no cognizance, they do not show that an interpretation more restrictive than the words themselves import ought to be given to this article. They do not show that there can be 'a case in law or equity' arising under the Constitution, to which the judicial power does not extend."

See also, in this connection, *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400. On page 345 of the opinion in that case the result of the previous decisions of this court was summarized in these apposite words by Mr. Justice Brewer, who spoke for the court:

"Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another,

there is presented a question involving the validity of any act of any legislature, state or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."

Applying the principles thus long settled by the decisions of this court to the act of Congress undertaking to confer jurisdiction in this case, we find that William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interest in the property allotted under the act of July 1, 1902, and David Muskrat and J. Henry Dick, for themselves and representatives of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, are authorized and empowered to institute suits in the court of claims to determine the validity of acts of Congress passed since the act of July 1, 1902, in so far as the same attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, and provided for in the said act of July 1, 1902.

The jurisdiction was given for that purpose first to the court of claims, and then upon appeal to this court. That is, the object and purpose of the suit is wholly comprised in the determination of the constitutional validity of certain acts of Congress; and furthermore, in the last paragraph of the section, should a judgment be rendered in the court of claims or this court, denying the constitutional validity of such acts, then the amount of compensation to be paid to attorneys employed for the purpose of testing the constitutionality of the law is to be paid out of funds in the Treasury of the United States belonging to the beneficiaries, the act having previously provided that the United States should be made a party,

and the Attorney General be charged with the defense of the suits.

It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial determination, final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy," to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and

amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this court within the limitations conferred by the Constitution, which the court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution.

Nor can it make any difference that the petitioners had brought suits in the supreme court of the District of Columbia to enjoin the Secretary of the Interior from carrying into effect the legislation subsequent to the act of July 1, 1902, which suits were pending when the jurisdictional act here involved was passed. The latter act must depend upon its own terms and be judged by the authority which it undertakes to confer. If such actions as are here attempted, to determine the validity of legislation, are sustained, the result will be that this court, instead of keeping within the limits of judicial power, and deciding cases or controversies arising between opposing parties, as the Constitution intended it should, will be required to give opinions in the nature of advice concerning legislative action,—a function never conferred upon it by the Constitution, and against the exercise of which this court has steadily set its face from the beginning.

The questions involved in this proceeding as to the validity of the legislation may arise in suits between individuals, and when they do and are properly brought before this court for consideration they, of course, must be determined in the exercise of its judicial functions. For the reasons we have stated, we are constrained to hold that these actions present no justiciable controversy within the authority of the court, acting within the limitations of the Constitution under which it was created. As Congress, in passing this act, as a part of the plan involved, evidently intended to provide a review of the judgment of the court of claims in this court, as the constitutionality of important legislation is concerned, we think the act cannot be held to intend to confer jurisdiction on that court separately considered. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 565, 46 L. ed. 679, 693, 22 Sup. Ct. Rep. 431; *Employers' Liability Cases (Howard v. Illinois C. R. Co.)* 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

The judgments will be reversed and the cases remanded to the Court of Claims, with directions to dismiss the petitions for want of jurisdiction.³

³ See *Anway v. Grand Rapids Ry. Co.* (1920), 211 Mich. 592, in which the majority of the court assert and the minority deny that the Muskrat case involves the principle of the declaratory judgment. But see *State v. Grove* (1922), 109 Kan. 619, *Braman v. Babcock* (1923), — Conn. —, 120 Atl. 150, and *Blakeslee v. Wilson* (1923), — Cal. —, 213 Pac. 495, in each of which the court unanimously held that the declaration of rights was a judicial act even when no coercive relief could be had.

The constitutionality of declaratory judgments as involving the question of the declaration of rights as a judicial function, has been discussed at length in the following articles:—The constitutionality of the Declaratory Judgment, by Wm. G. Rice, Jr., 28 W. Va. L. Quar. 1; Declaratory Judgment, by James Schoonmaker, 5 Minn. L. Rev. 172. See also The Declaratory Judgment—A Needed Procedural Reform, by Edwin M. Borchard, 29 Yale L. Jour. 1, 105; The Law of Declaratory Judgments and its Progress, by Thomas R. Gordon, 9 Virginia Law Rev. (Jan. 1923); A Modern Evolution in Remedial Rights—The Declaratory Judgment, by Edson R. Sunderland, 16 Mich. L. Rev. 69; A New Function for Courts—Declaring the Rights of Parties, by Edson R. Sunderland, 88 Cent. L. Jour. 6; The Courts as Authorized Legal Advisors of the People, by Edson R. Sunderland, 54 Am. L. Rev. 161. *14 Mass. S. Court. 1*

In *Bryan v. Kales* (1892), 3 Ariz. 423, it was held that a court could not take jurisdiction of a case in which the plaintiff sued himself in another capacity.

ROBINSON v. KERRIGAN.

Supreme Court of California. 1907.

151 California, 40.

SHAW, J. This is an original proceeding in this court for a writ of mandate. The plaintiff asks a writ to compel the defendant, as judge of the superior court, to make an order appointing a time for the hearing of a petition filed in the superior court to obtain registration of certain lands, as provided in the act of March 17, 1897, entitled "An act for the certification of land titles and the simplification of the transfer of real estate," known as the "Torrens Law." St. 1897, p. 133, c. 110. The defendant refused to make the order, basing his refusal upon the ground that the act above mentioned is unconstitutional and void. The validity of the act is the sole question presented for our consideration.

The object of the act is well stated in the title. It purports to establish a system for the registration of title to land, whereby the official certificate will always show the state of the title and the person in whom it is vested, and to provide that, after the original registration, transfers of the land may be made in the manner prescribed in detail in the act. As a foundation for the system it is necessary to have the title established. To that end a proceeding is authorized whereby such title may be settled and declared by a decree of the superior court. The title, thus established, is to be certified by the county recorder, and the certificate is made conclusive evidence of title in the person therein named as the owner. The principal point urged in opposition to the issuance of the writ is that the proceeding thus provided for is unconstitutional, because, * * * third, it commits to the judicial department of the state functions which are not judicial in character, but purely administrative and executive, contrary to section 1 of article 3 of the state Constitution, prohibiting one department of state from exercising functions belonging to another.

It is necessary to give a brief statement of the essential features of the proceeding to establish and register titles. Any person owning land which he desires to bring within the operation of the act must avail himself of this proceeding. He is required to file in the superior court a verified petition, setting forth his name, occupation, residence, and post office address; whether married or single, and, if married, the name and residence of the husband or wife; the description of the land and a statement of his estate or interest in it; that the land is occupied or unoccupied, as the case may be, and if occupied, the name and post office address of each occupant and the interest or estate such occupant has or claims in the land; the liens and incumbrances thereon and easements therein, with the name and address of the holder thereof, if known; whether or not any other person has or claims any estate or interest of any character in the land, and the name and address, if known, of every such person and the nature of the estate or interest owned or claimed by him; and the names and addresses of all the owners of adjoining lands, so far as the same can be ascertained. The petition must be accompanied by a plat of a survey of the land, made by a county surveyor, or a licensed surveyor, with a verified or certified

abstract of title, made by some person or corporation thereunto authorized as specially provided in the act. Section 6. The court must examine and determine, from the abstract of title, whether or not it shows the title to be in the petitioner as alleged, and, if it so determine, it shall thereupon appoint a day for the hearing of the petition. Section 12. Notice of the time and place of the hearing must be given by four weeks' publication in some designated newspaper of general circulation. Notice thereof must also be served in the manner prescribed for service of summons in a civil action, either personal or by publication, as the facts may require, upon all the parties shown by the petition, or by the abstract of title, to be interested, and also upon the husband or wife of the petitioner and upon the owners of the adjoining lands. Section 13. We construe this provision for service of notice to mean that the service to be thus made on these persons must be personal service, except in those cases wherein, under sections 412 and 413 of the Code of Civil Procedure, service may be made by publication, and that service upon such parties by publication must be made upon affidavit and order, as in those sections provided, and for the period and in the manner there required. Upon the hearing, if the court finds in accordance with the petition, it must make and enter a decree that the petitioner is the owner of the land, accurately describing it, attaching thereto a diagram thereof, and setting forth the particulars of the liens, incumbrances, and easements, and an appeal may be taken therefrom as in civil actions. Section 15. The decree, when it becomes final, is made conclusive of the title and estate therein declared and described, against the rights of all persons, known or unknown, whether named in the proceedings or not. Section 17. A certified copy of the decree is to be filed with the county recorder, who is designated as "registrar" for the purposes of the act, and upon it he is to issue a certificate of title to the person named in the decree as owner, and enter a duplicate thereof in a book kept in his office for that purpose. Sections 22, 23. The land thereupon becomes "registered land," and the owner named in the certificate thereupon holds it free from every claim except those noted in the certificate. Subsequent transfers of such "registered land" are to be made and entered in the manner prescribed in the act, and certificates thereof are to be issued by the registrar to the transferee, which shall be con-

clusive evidence of his title as therein stated. Any person who has been, or would be, defrauded by the decree, and who had no actual notice of the proceeding, may maintain an action to establish his right, against the registered owner, at any time within five years after the first registration. * * *

2. The proposition that the proceeding is judicial and not administrative, that it is properly a matter for the judicial department, was also fully considered and established in *Title, etc., Company v. Kerrigan, supra*, and the reasons there given apply here. The claim on behalf of the defendant in this particular seems to be based on the theory that there is or may be no adverse party to the proceeding; that it may be had where there is, in fact, no adverse claim, lien, or incumbrance to or upon the land; and hence that it is not adversary in character. That it may not become adversary in this sense, is, of course, conceded. It would not necessarily follow that the proceeding was not judicial. It needs no citation of authority to establish the proposition that the power of a court to entertain an action does not depend upon the appearance of the defendant and his active opposition to the claims of the plaintiff.

The contention is further made, in this connection, that judicial power can be exercised only to settle existing disputes and controversies, and that, if none exist, the act of merely describing and declaring an undisputed title is necessarily administrative, and cannot be performed by the judicial department. This argument does not fully meet the case. It may be admitted that the existence of controversies which could not be settled by the interested parties, and the necessity of some other means of determining such controversies, were the primal causes for the institution of courts with power to adjudge between the parties to the strife, and, consequently, that, originally, the exercise of judicial power implied the existence of an actual present controversy to be determined. But the refinements of civilized life, and the necessity for the orderly regulation, determination, and protection of human affairs and rights of property, have long required the extension of the judicial power beyond the settlement of controversies which have actually arisen, so as to include the function of providing security against disputes and claims which may arise. Hence, in modern times, the power of the courts may be, and often is, exerted to protect property and rights

from possible, though at the time unknown, hostile claims and pretensions, or to merely declare a status or right, and thereby to forestall and prevent controversies which, but for the judicial declaration, might arise in the course of future transactions or proceedings. In the case provided for by the McEnerney act, the total destruction of all the public records and muniments of title had endangered all real property, had exposed land titles to any sort of false claims, and had made it impossible for any landowner to prove or exhibit his title in the usual manner, if he wished to dispose of or mortgage his land, or defend his title in court. It therefore became necessary to provide for the establishment of a new record title. In the case of the Torrens law, the plan for a new method of registering and transferring title made it necessary that the absolute title should first be established and declared. In each case a status or right was to be established, declared, and made conclusive, as the foundation for subsequent proceedings and transactions. This was a sufficient cause for placing the property to be thus affected within the jurisdiction of the court as a *res*, the ultimate right and title to which could be there adjudicated, after reasonable notice to all possible claimants to appear and assert their claims. Whether or not this is strictly an exercise of judicial power, as originally instituted, it cannot be denied that it is a power of the class which, from time immemorial, has been committed to and exercised by the courts. At the time the Constitution was adopted this class of powers had long been usually exercised by the courts alone. It must be presumed that in providing therein for the division of governmental power into three departments, legislative, executive, and judicial, and declaring that no person charged with the exercise of the powers belonging to one of them should exercise functions appertaining to either of the others, this usual power of the courts was in mind, and that it was intended that the courts should continue to exercise these *quasi* judicial powers, as they had previously been accustomed to do. A law which merely creates a new occasion and provides a new procedure for the exercise of this power cannot be said to transgress this clause of the Constitution.

Furthermore, in such matters, there is always a possibility that there may be a hostile claim or dispute as to the right to be established. If it were necessary to find further justifica-

tion for classing this power as judicial, this circumstance would be sufficient. A hostile claim being possible, there is, in contemplation of law, an adverse claim to be settled, a right to be protected against the possible claimant, for which a judicial decree is the only practicable and effectual remedy.

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GORMAN v. PEOPLE.

Supreme Court of Colorado. 1892.

17 Colorado, 596.

HAYT, C. J. Plaintiffs in error, James J. Gorman et al., were convicted in the court below of riot, and sentenced to confinement in the county jail of Arapahoe county for the period of 60 days. By an act approved April 19, 1889, the court in which the trial of defendants took place was abolished. This act contained no emergency clause, and, under our constitution, went into effect 90 days after its passage, to wit, on the 18th day of the succeeding month of July. These defendants were sentenced on the next day, July 19th. The pretended judgment in this case cannot be allowed to stand. Where there is an office duly created, public policy frequently requires that the official acts of the person actually filling such office and discharging the duties thereof shall not be questioned on the ground that the incumbent has no title to the office. Were it not for this salutary rule of law, the administration of public affairs might be thrown into the direst confusion, and the functions of government suspended pending inquiry into the right to the office. But this rule presupposes the existence of an office *de jure*. There is no principle of law under which a *de facto* court can be sustained. *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121. At the time of the imposition of this sentence there was no such court in existence as the criminal court of Arapahoe county, and the jurisdiction of the court to enter this or any other judgment cannot be maintained.

* * * * *

4 This is the general rule. *Contra*, *Burt v. Winona & St. Paul Ry. Co.* (1884), 31 Minn. 472; *State v. Gardner* (1896), 54 Oh. St. 24; *Lang v. Bayonne* (1906), 74 N. J. L. 455.

6. Not overruled - dissent.

STATE v. HALL.

7
False Supreme Court of North Carolina. 1906.

142 North Carolina, 710.

[WALKER, J. As we view the case there is but one question presented for our decision. When he was called upon to answer the indictment, the defendant entered what is called a "plea to the jurisdiction of the court," but, in the formal statement of the grounds of his objection to the further prosecution of the case, he does not, either in fact or in a technical sense, attack the jurisdiction of the court, but he denies its right to proceed against him solely upon the ground that the court was unlawfully called and organized, or, in other words, that it was not a court, never having had any legal existence under the law. Jurisdiction, when applied to courts and speaking generally, consists in the power to hear and determine causes. 12 Pl. & Pr. 116. It presupposes always and of course that there is a court to exercise it, for it is not predicable of anything but a lawfully existing tribunal. It relates to the subject-matter of the controversy or to the person, and never is applied to any question touching the existence of the court itself. It is not conferred until the court designated to exercise it has been brought into being according to the mode prescribed by law. The defect here alleged is not that, if the court had been properly called and organized, it would still not have had the necessary jurisdiction of the subject-matter of the prosecution and of the person of the defendant, but that there was no such court as that which pretended to indict and try him. This presents a somewhat different case from an exception to the right of a court admitted to exist, to try a particular cause. The distinction is clear. *Burt v. Railroad*, 31 Minn. 475, 18 N. W. 285, 289. We believe there is no such thing known to the science of pleading as a plea denying the very existence of the court before which the plea is filed, and, in the nature of things, there cannot be, for no court can pass upon the validity of its own constitution and organization. It must always decide that it is a court, because the moment it is admitted that it does not exist, and has never existed, as a legal entity, so to speak, it is at once settled that it never had the power to de-

cide anything, not even the plea denying that it ever was a court. How can a body having no legal existence, and consequently no judicial power or authority, decide anything? Therefore it is that jurisdiction, or the right to hear and determine, necessarily involves the idea that there is some tribunal having legal existence under the law to hear and decide. This is not by any means a new proposition. It certainly has the full sanction of reason and common sense, as it would be a legal solecism for a court to deny or disavow its own existence and it is also, we think, supported by high authority. In *Beard v. Cameron*, 7 N. C. 181, the very question was presented to this court. There a plea to the jurisdiction was filed, and Judge Henderson said: "It is to my mind a very strange and incongruous proposition that an answer is required to be given by A. B., whether he be a judge, which answer he cannot give unless he be a judge. I plead that you are not a judge. A judge alone can decide the plea; and I call on you to decide. This certainly cannot be the way of testing Judge Baker's appointment." And again: "It is said that the extent of the jurisdiction of all courts is settled by the courts themselves. This is true, but then it must be remembered that, in all such cases, there is a court competent to decide, and it is called upon, not to decide whether it is a court, but the extent of its jurisdiction. The plea must therefore be overruled." That was a case in which the defendant pleaded to the jurisdiction because the judge, as he alleged, had no authority whatever to preside over the court—not even color of authority—and that he was no more than a private person, and consequently there was, in fact, as well as in law, no court. * * * We do not understand that the defendant intended to raise any objection to the "jurisdiction of the court," using that term in its only legitimate sense, but that he merely intended to challenge the right of the court to exercise judicial authority under any circumstances, because, in fact, it was not a court recognized by the law. In either view the plea was bad and was properly rejected. Again, if there was no court to hear and determine, how is it that anything has been heard and determined? If the proceedings were void *ab initio* there was no indictment, no arraignment, no trial, and no judgment, and it follows logically that there was nothing to appeal from to this court, and we have, therefore, no jurisdiction to review the proceedings. This court can ac-

quire jurisdiction to correct errors only where they have been committed by a court, constituted and organized according to law, or recognized as having the essential attributes of a properly constituted tribunal, and competent to exercise jurisdiction of controversies between litigants. We cannot entertain an appeal from anything except a court, or a person such as a judge, who is clothed with judicial power. * * *

As the plea must be overruled, and as all the evidence introduced in its support must fall with it, there is nothing left for us to do but to inspect the record to see if there is any defect or error therein, and, finding none, and confining ourselves strictly to the question before us, we must declare that there was no error in overruling the plea of the defendant.

No error.

SECTION 2. JURISDICTION OVER THE GENERAL SUBJECT MATTER.

PEOPLE EX REL. GAYNOR v. MCKANE.

Supreme Court of New York, General Term. 1894.

78 Hun, 154.

Application by William J. Gaynor for an injunction against John Y. McKane, Nicholas J. Johnson, Harlan Crandall, James H. Cropsey, and Richard V. B. Newton. From orders adjudging each defendant guilty of contempt of court, and imposing on each punishment by fine and imprisonment, defendants appeal. Affirmed.

The appellants were adjudged guilty of resistance willfully offered to, and willful disobedience of, an injunction order granted by Justice Joseph F. Barnard on November 6, 1893. The injunction was granted in an action in which the relator was the plaintiff, and the appellants, McKane, Johnson, Crandall, Cropsey, and others, were defendants. In the complaint in that action, it was alleged that the plaintiff was an elector of the state, and entitled to vote in the county of Kings, and had been nominated for the office of justice of the supreme court by the Republican party and various

Democratic bodies, and was to be voted for at the election on November 7th; that the defendant McKane was chief of police of the town of Gravesend, in Kings county, and the other defendants were inspectors of election of the six election districts of said town, and that they had conspired together to make up a false and fraudulent registry list of the voters of said town, and, under the color of such false registry list, to permit persons to vote in said town who were not entitled so to do; that the plaintiff had been prevented by the defendants from inspecting or copying said registry lists, and persons sent by him to take such copies had been arrested, by the direction of said McKane, and committed to jail, without any opportunity to give bail; that said defendants intended to refuse to allow watchers appointed by the Republican organization to enter the polling booths, or be present at the voting, or at the counting of the ballots. The judgment prayed that said defendants be enjoined from preventing the persons appointed as such watchers entering and remaining in the polling places of the election district of said town to which they should be appointed, and their acting as watchers, and performing all duties pertaining to their office, including the right to see the ballots given out and votes cast, and watching and overseeing the canvass of the ballots. Upon the complaint duly verified, and upon accompanying affidavits, a preliminary injunction was granted, substantially as prayed for in the complaint. The appellants were charged in this proceeding with willful resistance to, and disobedience of, said injunction, and have appealed from the orders adjudging them guilty upon such charges.

Argued before BROWN, P. J., and DYKMAN and PRATT, JJ.

BROWN, P. J. If the supreme court had jurisdiction of the subject-matter of the action brought against the appellants, and if Justice Barnard had jurisdiction to grant the preliminary injunction, for disobeying or resisting which the appellants have been convicted, that order must be treated as a valid and binding order of the court, and, as such, was to be obeyed, until it was revoked by subsequent order made in the same action. *People v. Sturtevant*, 9 N. Y. 263; *Railroad Co. v. Ramsey*, 45 N. Y. 644; *Mayor, etc., of New York v. New York & S. I. Ferry Co.*, 64 N. Y. 624; *People v. Dwyer*, 90 N. Y. 402; *People v. Van Buren*, 136 N. Y. 252,

32 N. E. 775. "Jurisdiction," in the strict meaning of the term, as applied to judicial officers and tribunals, means no more than the power lawfully existing to hear and determine a cause. It is the power lawfully conferred to deal with the general subject involved in the action. Bouv. Law Dict.; And. Law Dict. It does not depend upon the ultimate existence of a good cause of action in the plaintiff, in the particular case before the court. "It is the power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case." *Hunt v. Hunt*, 72 N. Y. 217. "Jurisdiction does not relate to the right of the parties, as between each other, but to the power of the court. The question of its existence is an abstract inquiry, not involving the existence of an equity to be enforced nor the right of the plaintiff to avail himself of it, if it exists. It precedes those questions, and a decision upholding the jurisdiction of the court is entirely consistent with a denial of any equity in the plaintiff, or in any one else." *People v. Sturtevant*, 9 N. Y. 263. The constitution of the state gives to the supreme court general jurisdiction in equity; and the Code of Civil Procedure defines that jurisdiction to be all that was possessed by the court of chancery of England on the 4th day of July, 1776, with the exceptions, additions, and limitations created by the laws of the state. The English court of chancery granted the equitable remedy of injunction by final decree and interlocutory writ, and the subject-matter of the action was therefore within the jurisdiction of the court. But, while the power in the supreme court to award the relief by final decree is general, the Code of Procedure has abolished the interlocutory writ, and substituted in its place a temporary injunction, to be granted by order, and has prescribed rules governing the application for, and the granting of, such an order. In this respect, the jurisdiction of the court or judge is not general, but limited; and such temporary order must be made in compliance with the provisions of the Code, or it will be treated as void. *Spears v. Mathews*, 66 N. Y. 127. The question is thus presented whether Justice Barnard acquired jurisdiction to grant the temporary injunction. It is provided in the Code, *inter alia* (section 603), that, when the right to an injunction depends upon the nature of the action, a temporary injunction may be granted, when it appears

from the complaint that the plaintiff demands, and is entitled to, a judgment against the defendant, restraining the commission or continuance of an act, the commission or continuance of which during the pendency of the action would produce injury to the plaintiff. Jurisdiction, under this provision, is made dependent upon the presentation to the court or judge of a complaint setting forth facts upon which the plaintiff claims to be entitled to, and upon which he demands, equitable relief; but it is not dependent upon the conclusion which the judge makes upon the facts of the complaint. Whether they constitute an equitable cause of action, or create a case within equitable cognizance, is a judicial question to be decided by the judge to whom the application is made. His power to decide does not depend upon the correctness of his decision. Jurisdiction is entirely independent of the manner of its exercise. It involves the power to decide either way upon the facts presented to the court. When Justice Barnard granted the injunction we are now considering, he had presented to him a verified complaint, in which the plaintiff demanded equitable relief, and which set forth the facts upon which such relief was claimed, and upon those facts application for a temporary order was made. Upon the presentation of such a complaint, it became his duty to consider and decide whether or not to grant the order asked for. He had power to consider the case, and decide the application made to him. His determination upon the facts before him, and the order which he issued, cannot, therefore, be said to be void. Clothed as he was with the judicial power to decide, the order made was valid. It may have been erroneous, but it was not void; and it cannot be reviewed or questioned in any collateral proceeding, but must be respected and obeyed until vacated or set aside in the same suit in which it was granted. The court having jurisdiction of the subject-matter of the action, and the justice jurisdiction to consider and decide the application for the temporary order, it was the duty of the appellants to obey it; and disobedience or resistance to its mandate was an offense punishable as a criminal contempt. Code Civ. Proc. § 8.

The question whether the complaint contained facts calling for the equitable interference of the court, or, in other words, whether it set forth a valid cause of action in the

plaintiff, did not arise upon the application to punish for a criminal contempt, and hence is not before this court for review. This rule, which is applicable only to cases of criminal contempt, to which class the present proceeding belongs, is to be distinguished from the rule applied in cases of civil contempt. In the latter class, it is essential, to sustain a conviction, that there shall exist, not only jurisdiction in the court or officer granting the order which has been disobeyed, but also a valid cause of action in the aggrieved party; and this results from the fact that a civil contempt is not an offense against the dignity of the court, but against the party in whose behalf the mandate of the court has been issued, and a fine is imposed solely as indemnity to the injured party. And, as there can be no injury when there is no right to maintain the suit, it is essential that this right should exist, in order to sustain a conviction, and that question is always open for examination upon appeal. But it is otherwise in a case of criminal contempt. That offense involves no element of personal injury. It is of a public character, and indictable. It is directed against the dignity and authority of the court alone. Hence, in proceedings to prosecute such an act, the court will look only to the question of power; and, if there was jurisdiction to grant the order, it will impose punishment upon those who willfully disobey it, for the purpose of vindicating its own power and maintaining its own dignity, and leave any error as to private rights to be redressed in the orderly manner provided for by the rules of practice. And obviously no other rule could prevail, and maintain the usefulness of the courts. It would be intolerable if any suitor could question and disregard the orders and decrees of the courts whenever he considered they were erroneous. As well might the sheriff, who is its executive officer, refuse to execute them. Under such a rule, the administration of the law would fail, and government would break down in one of its vital parts. The distinction between a civil and criminal contempt is plainly stated in the Code, in sections 8 to 14, inclusive, and has recently been pointed out by the court of appeals in *People v. Court of Oyer and Terminer of New York*, 101 N. Y. 245, 4 N. E. 259.

* * *

There is a clear distinction between the term "jurisdiction," in its strict meaning, and as generally used in equity

jurisprudence. In its strict meaning, as I have stated, it imports only the power residing in a court to hear and determine an action. But, as applied to the power of a court of equity, it is ordinarily used with more limited signification, and imports, not the power to hear and decide, but the cases or occasions when that power will be exercised. This distinction, while clearly pointed out in the best works on equity jurisprudence, has not always been observed in judicial opinions; and the expression "jurisdiction" has been used when the writers meant only to inquire whether the facts before the court presented a case for the proper exercise of the power of a court of equity. Mr. Pomeroy has very clearly pointed out the distinction here referred to. 1 Pom. Eq. Jur. §§ 129-131. The term "equity jurisdiction," he says, "is used in contradistinction to 'jurisdiction' in general, and to 'common-law jurisdiction' in particular. * * * 'Equity jurisdiction,' in its ordinary acceptation, as distinguished from the general power to decide matters at all, and from the 'common-law jurisdiction,' is the power to hear certain kinds and classes of causes, according to the principles of the method and procedure adopted by the courts of chancery, and to decide them in accordance with the rules of equity jurisprudence. * * * If a court clothed with the equity jurisdiction, as thus described, should hear and decide, according to equitable methods, a case which did not fall within the scope of equitable jurisprudence, such judgment, however erroneous it might be, and liable to reversal, would not necessarily be null and void. * * * Equity jurisdiction may exist over a case, although it is one in which the doctrines of equity jurisprudence forbid any relief to be given, or any right to be maintained. This conclusion is very plain, and even commonplace. Yet equity jurisdiction is constantly confounded with the right of plaintiff to maintain his suit, and obtain his equitable relief; thus, in fact, making the power to decide whether equitable relief should be granted depend upon the actual granting of such relief." In the sense here referred to the expression is used in the cases cited, and, when the term is used in the opinions in connection with the facts, it has no reference to the power of the judge who granted the order, but to the question whether the facts showed a case for equitable cognizance. The discussions which appear in the opinions, in cases of

civil contempt, in reference to the plaintiff's cause of action, are not, therefore, in any wise inconsistent with, or opposed to, the rule applied in cases of criminal contempt; and in the latter class the only inquiry pertinent to the nature of the alleged contemptuous act is, was the order which has been disobeyed or resisted made by a court or officer having power to make it? An examination of the decisions in this class of cases will show how closely the courts have adhered to this rule. * * *

Injunctions which, in effect, anticipate the judgment, or give some of the relief which it is sought to obtain by the decree of the court, should be granted with caution, and only when the necessity is great. Applications therefor call for great care upon the court to which they are made. But not only the power to grant them is undoubted, but the remedial and restraining power of a court of equity would be greatly impaired if such was not the rule. The conclusions of the special term upon the facts have ample support in the evidence, and the orders appealed from are affirmed, with costs. All concur.⁵

⁵ In a number of states statutes have been passed to avoid a dismissal for want of jurisdiction by providing for a transfer to the proper court. Thus, in New Jersey, Laws 1912, ch. 233, as amended by Laws 1915, ch. 13, provide:—

"1. No civil cause or matter, hereafter pending in any court mentioned in the above title, which has not jurisdiction of the subject matter, shall be dismissed for that cause only, but the cause or matter shall be transferred with the record thereof and all papers filed in the cause, for hearing and determination to the proper court, which shall thereupon proceed therein, as if the cause or matter had been originally commenced in that court. The record shall, when necessary, include a transcript of all entries and proceedings in the cause.

2. Such transfer may be made at any stage of the proceedings and upon, or without, application, and subject to rules, or the special orders, of court; and upon an appeal being taken in any such cause that had not been so transferred the appellate court may, subject to rules, hear and decide such appeal and direct the appropriate decree or judgment pronounced thereon to be entered in the court to which such cause ought to have been transferred."

And in Michigan, Judicature Act, 1915, Ch. XI, Sec. 2, C. L. 1915, Sec. 12351, provides:—

"If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, or if it appear that an action commenced on the law side of the court should have been brought in equity, it shall be forthwith transferred to the proper side, and be there proceeded with, with only such alteration in the pleadings as shall be essential."

This act was liberally construed in *Von Hoene v. Barber* (1921), 215 Mich. 538, to authorize a transfer on the court's own initiative or on motion of the defendant, as well as on motion of the plaintiff.

SEABOARD AIR LINE RAILWAY CO. v. RAY.

Jake

Supreme Court of Florida. 1906.

52 Florida, 636.

WHITFIELD, J. * * *

Section 17 of article 5 of the Constitution provides that "the county judge shall have original jurisdiction in all cases at law in which the amount demanded or value of property involved shall not exceed one hundred dollars."

The jurisdiction of the court in actions of this character is to be determined by the sum in good faith demanded or actually put in controversy, and not the amount of the recovery. *Florida Cent. & P. R. Co. v. Seymour*, 44 Fla. 557, 33 South. 424; *Burr v. Bayne*, 10 Watts (Pa.) 299; *Dwyer v. Bassett*, 63 Tex. 274; 11 Cyc. 775 *et seq.*; 1 Ency. Pl. & Pr. 705, and cases cited. The same rule is announced in the cases of *Livingston v. L'Engle*, 27 Fla. 502, 8 South. 728, and *Wilson v. Sparkman*, 17 Fla. 871, 35 Am. Rep. 110.

If the face of the record shows that the amount demanded in the action brought before the county judge exceeded \$100, then he was without jurisdiction to entertain it, and any judgment entered by him in the cause, except to dismiss it, is *coram non judice* and utterly void. In such case the judgment of the circuit court, affirming a judgment of the county judge awarding damages, would not be according to the essential requirements of the law, and should be quashed by this court on certiorari.

The action is brought against the Seaboard Air Line Railway for not transporting with reasonable dispatch 366 crates of cantaloupes committed to it for shipment, by carelessly and negligently allowing the same to be delayed in transportation, so that the 366 crates deteriorated in value, because of such negligence and carelessness, "at least 25 cents per crate, and the plaintiff claims damages for \$125 by reason of the said negligence of the defendant." There is no relinquishment of any part of the damages, alleged to be at least 25 cents per crate, and the demand is made for \$125.

The amount of the demand is the test of the jurisdiction of the county judge. The demand here is for \$125, and the particulars of the demand are at least 25 cents per crate

for 366 crates of cantaloupes. Under this demand the plaintiff in a proper forum could prove an amount not exceeding \$125. While 25 cents per crate for 366 crates of cantaloupes would amount to less than \$100, the demand is for *at least* 25 cents per crate, with a gross demand for \$125. The presumption is that the demand was made in good faith and for the amount which the terms used will cover.

It is clear that the demand made by the declaration in this case is in such terms that proofs can be made to any amount not exceeding \$125, and this excludes the jurisdiction of the county judge. The fact that a judgment was actually entered for an amount within the jurisdiction of the county judge cannot have the effect of giving jurisdiction retrospectively, when none existed, to entertain the cause of action as stated in the declaration. A court having apparent jurisdiction of an action as begun may dismiss it afterwards, if it appears that the amount actually demanded or involved is less than the necessary jurisdictional amount, and that the amount demanded in the declaration or complaint which gave apparent jurisdiction could not have been claimed in good faith. But, where the amount demanded on the face of the record is in excess of the amount of which the court has jurisdiction, no jurisdiction attaches, and the only proper order is a dismissal. *Brown v. Braun* (Ariz.) 80 Pac. 323; 6 Current Law, 334. In this case the judgment entered was for an amount within the jurisdiction of the county judge; but, as the cause of action stated in the declaration was not within his jurisdiction, the entry of any judgment upon the merits of the cause is void for want of jurisdiction. *Gillett & Jennison v. Richards*, 46 Iowa, 652. The appearance of the defendant by demurrer would give jurisdiction of the person, but it could not give the county judge jurisdiction of a subject-matter in excess of the amount limited by the Constitution.

The judgment of the county judge was entered without jurisdiction, and not in accordance with the essential requirements of law. Therefore the affirmance of the judgment by the circuit court on writ of error was not according to the essential requirements of the law, and should be quashed on *certiorari*. An order will be entered here quashing the judgment of the circuit court which purports to affirm the void judgment of the court of the county judge.⁶

* Waiver by plaintiff of the portion in excess of the jurisdiction of the court will not confer jurisdiction upon the court: *Reeves v. Gower* (1913), 14 Ga. App. 293; *Chicago, R. I. & G. Ry. Co. v. Gladish* (Tex. Civ. App. 1915), 175 S. W. 863.

10 *Print*

FOLTZ v. ST. LOUIS & SAN FRANCISCO RAILWAY CO.

United States Circuit Court of Appeals, Eighth Circuit.
1894.

60 *Federal Reporter*, 316; 8 *Circuit Court of Appeals*, 635.

[In 1883 the appellee railway company commenced proceedings in the state court in Arkansas for condemnation of a parcel of land; the appellant Foltz appeared, and the case was removed to the United States circuit court. A judgment of condemnation was rendered, awarding damages to Foltz and vesting the right to use the land in the railway company upon payment thereof. The money was paid by the railway company and received by Foltz. Later, in 1890, Foltz brought ejectment against the railway company for this land, and the present action was brought by the railway company to enjoin Foltz from prosecuting the action of ejectment.]

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. The power of eminent domain—the right to take the property of the citizen for public use—is an attribute of sovereignty. It lies dormant in the state until the right to exercise it is granted by the state to some public or *quasi* public corporation, or until it is exercised by the state itself. It follows that no corporation has the right to exercise this power unless the state has granted to it that right; and it is conceded that, under the constitution of the state of Arkansas, a foreign corporation, as such, cannot have this right. *Holbert v. Railroad Co.*, 45 Iowa, 23, 26; *State v. Scott* (Neb.) 36 N. W. 121, 127; *Trester v. Railway Co.*, Id., 502, 505. The questions presented by this case, and pressed upon our attention in the brief and argument of counsel, are: First. Is the judgment of condemnation of

March 28, 1884, void—a nullity,—so that it may be disregarded on a collateral attack? * * *

Regarding the first question, the contention of counsel for appellant is that, since the appellee was a foreign corporation, and was not one of the parties to whom the right to exercise the power of eminent domain was granted by the state, the circuit court was without jurisdiction to render a judgment of condemnation in its favor, and that judgment is a nullity. Conceding, but not deciding, that the appellee had no right to condemn land for public use, let us examine this question. The appellant was properly served with the statutory notice in the condemnation proceedings, and she appeared and participated in the jury trial to determine the amount of compensation she should receive. In that proceeding a controversy arose between a citizen of Missouri and a citizen of Arkansas, and the amount in controversy was such as to give the circuit court jurisdiction. That court, therefore, had jurisdiction of the parties. It goes without saying that the circuit court had the right and the power to render a judgment of condemnation in a proper case in favor of a railroad corporation which had the right to exercise the power of eminent domain. *Kohl v. U. S.*, 91 U. S. 367, 375; *U. S. v. Oregon Ry. & Nav. Co.*, 9 Sawy. 61, 16 Fed. 524. The state of Arkansas had granted to many corporations the right to exercise this power, and, if the circuit court had rendered a judgment of condemnation in a proper case in favor of any one of these corporations, its judgment would unquestionably have been valid. The contention is that it is an absolute nullity in this case, because the court entered such a judgment in favor of a corporation which had not that right. Stripped of argument and verbiage, the position is that this judgment is void because the appellee had not legal capacity to sue for it, although there were many parties that had such capacity, in whose favor the circuit court had ample power to enter such a judgment. But the question of the legal capacity of the plaintiff to prosecute condemnation proceedings, like that of the necessity for the condemnation, and that of the public or private purpose of it, is a question that the trial court must necessarily hear and determine in every condemnation proceeding. Is every judgment in which the court committed an error in the decision of one of these questions, without

the jurisdiction of the court, a nullity, and only those in which it has made no mistake valid? Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the general power vested in the court, by the law of its organization, to deal with the abstract question. Nor is this jurisdiction limited to making correct decisions. It empowers the court to determine every issue within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong, and every judgment or decision so rendered is final and conclusive upon the parties to it, unless reversed by writ of error or appeal, or impeached for fraud. *Insley v. U. S.*, 14 Sup. Ct. 158; *Cornett v. Williams*, 20 Wall. 226; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552, 8 Sup. Ct., 217; *In re Sawyer*, 124 U. S. 200, 221, 8 Sup. Ct. 482; *Skillerns v. May's Exr's*, 6 Cranch, 267; *McCormick v. Sullivan*, 10 Wheat. 192; *Hunt v. Hunt*, 72 N. Y. 217; *Colton v. Beardsley*, 38 Barb. 30, 52; *Otis v. The Rio Grande*, 1 Woods, 279, Fed. Cas. No. 10,613; *Hamilton v. Railroad Co.*, 1 Md. Ch. 107; *Evans v. Haefner*, 29 Mo. 141, 147; *State v. Weatherby*, 45 Mo. 17; *Rosenheim v. Hartsock*, 90 Mo. 357, 365, 2 S. W. 473; *State v. Southern Ry. Co.*, 100 Mo. 59, 13 S. W. 398; *Hope v. Blair*, 105 Mo. 85, 93, 16 S. W. 595; *Musick v. Railway Co.*, 114 Mo. 309, 315, 21 S. W. 491. Wherever the right and the duty of the court to exercise its jurisdiction depends upon the decision of a question it is invested with power to hear and determine, there its judgment, right or wrong, is impregnable to collateral attack, unless impeached for fraud. In *Colton v. Beardsley*, 38 Barb., 30, 51, 52, the New York court said:

"When the jurisdiction of an inferior tribunal depends upon a fact which such tribunal is required to ascertain and determine, such decision is final until reversed in a direct proceeding for that purpose. The test of jurisdiction in such cases is whether the tribunal has power to enter upon the inquiry, and not whether its conclusion in the course of it is right or wrong."

In *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, *supra*, a judgment of the United States circuit court was collaterally attacked because it appeared on its face that the plaintiff and some of the defendants were citizens of Iowa, and hence that that court appeared to have no jurisdiction of the action. But Chief Justice Waite, delivering the opinion of the supreme court, said:

"Whether, in such a case, the suit could be removed, was a question for the circuit court to decide when it was called on to take jurisdiction. If it kept the case when it ought to have been remanded, or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa when it ought to have confined itself to those between citizens of Iowa and citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part, or not, was certainly within the power of the circuit court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause."

In *Evans v. Haefner* and *Hamilton v. Railroad Co.*, *supra*, judgments of condemnation were collaterally attacked on the ground that the uses for which the lands were condemned were private and not public uses. It goes without saying that private property cannot be condemned for private use; but the courts of Maryland and Missouri held that the judgments were conclusive of this question on a collateral attack.

There are three questions that the trial court must determine in every condemnation proceeding, viz.: First. Has the plaintiff corporation legal capacity to exercise the power of eminent domain? Second. Is it necessary for the plaintiff to take the land it seeks to condemn? Third. Does it seek it for a public use? Every judgment of condemnation is necessarily an affirmative decision of each of these questions. If either of them is erroneously decided, the judgment may be reversed by a writ of error for that purpose; but to hold that either of these questions can be tried *de novo* in an action of trespass or of ejectment, or in any other collateral proceeding, would be counter to our views of justice, of the reason of the case, and of the uniform decisions

of the courts. It is just and reasonable that one who contests the right of a railroad company to take his land should carry his contest to an end before he takes his award, and before the railroad company incurs the expense of improving the property for railroad purposes. It would work great injustice and produce much confusion of rights to permit these judgments of the courts to be disregarded, and the questions they decide to be retried in collateral actions, in which judges and juries might have very different views from those which resulted in the original judgments. The decisions of the courts, to some of which we have referred, leave no doubt that it was the right and the duty of the circuit court to hear and determine the very question whether or not the appellee had the right to exercise the power of eminent domain before it entered its judgment in the condemnation proceeding, and that judgment is conclusive evidence that it did determine that question in favor of the appellee. The judgment was strictly within the powers conferred upon that court by the law of its organization. It had authority to condemn lands for public use in a proper case presented to it. If that judgment was erroneous, it might have been reversed by a writ of error; but the decision of the question that is now admitted to be presented anew was the exercise of jurisdiction, and the rightful exercise of that jurisdiction, and, whether right or wrong, it cannot be successfully attacked in a collateral proceeding.

We have not failed to examine carefully the authorities cited by the counsel for the appellant. They are not in conflict with the views we have expressed. The line of demarcation which separates the case before us from those cited by appellant's counsel is that which marks the limits of the powers of the courts to hear and determine. Judgments within the scope of the power to hear and determine vested in a court by the law of its organization are not void in the face of a collateral attack, whether right or wrong, and such is the judgment before us; but judgments rendered in cases which are not within the scope of this power are nullities. The following cases, cited by appellant's counsel, are illustrations of this rule: *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, in which the police judge of the city of Lincoln, Neb., brought suit against the mayor and councilmen of that city, in the federal court, to enjoin them from enforcing a

judgment against him for misfeasance in office. It was not within the power of the federal court, sitting in equity in any case, or under any circumstances, to determine such a controversy and to grant the injunction there sought, and its decree to that effect was therefore held to be a nullity. *Whitehead v. Railroad Co.*, 28 Ark. 460, in which a judgment of condemnation of land was rendered under an unconstitutional law. As the law which vested the court with the only power it had to render the judgment was void, the judgment itself was so. The stream could not rise higher than its source. *Lessee of Hickey v. Stewart*, 3 How. 751, in which a decree by a state court of chancery establishing the validity of a Spanish grant, over which no power had ever been conferred upon that court, was held void, and its exercise of jurisdiction declared to be a mere usurpation of judicial power. Again, a judgment or decree of a court in excess of the power to hear and determine granted to it by the law of its organization may be void for such excess, although the court may have jurisdiction of the parties and of the subject-matter. Illustrations of this rule are *Bigelow v. Forrest*, 9 Wall. 339, 351, in which a judgment of condemnation and sale of the fee to land, when the court was expressly prohibited by act of congress from condemning any rights outlasting the life of Forrest, was held void for the excess above the life estate; *Ex parte Lange*, 18 Wall. 163, 176, in which the statute authorized the punishment of a criminal by fine or imprisonment, and after the court had imposed a sentence of fine and imprisonment, and the criminal had paid the fine, the trial court vacated its judgment and sentenced him to imprisonment, and the supreme court declared the latter judgment void, because it was not within the power of the court, in any case, to punish the criminal twice for the same offense; *Day v. Micon*, 18 Wall. 156; and *U. S. v. Walker*, 109 U. S. 258, 266, 3 Sup. Ct. 277. In all these cases, which are cited by appellant's counsel, the judgments or decrees were beyond the powers conferred on the courts by the laws of their organization. * * * The result is that the judgment of condemnation of March 28, 1884, was final and conclusive between the parties to it, and could not be successfully attacked in an action of ejectment. * * *

11.
Grant WANZER v. HOWLAND.*Supreme Court of Wisconsin. 1859.**10 Wisconsin, 8.*

PAINE, J. This was a creditors' bill, brought by the respondents against the appellants. There were the usual allegations of the recovery of a judgment at law against the defendants, Barry and Howland, issuing and return of execution, etc. The answers admitted the existence of the judgment at law as alleged, and the issue and return of the execution thereon. But at the trial the defendants offered evidence to show that there was no judgment ever rendered, for the reason that the record was not signed, as this court held necessary; (5 Wis., 138); the decision having, however, been made after the answers were put in. This evidence was rejected, and the principal question argued here by the appellant's counsel, was as to its admissibility. He urged that the existence of the judgment, which the bill was filed to aid, was essential to the jurisdiction of the court, and that being so, the answer of the defendants admitting the judgment did not deprive them of the right to object to the jurisdiction for that cause, upon the ground that when the court has no jurisdiction of the subject-matter consent cannot confer it. But we think the counsel has misapprehended the application of this principle; and that it applies only where the court has no authority to adjudicate upon the subject-matter at all, and not where its general jurisdiction over it is conceded; and the only question is whether in the particular case such facts exist, as bring that case within this general jurisdiction.

Thus, if a court has only civil jurisdiction, and if it should sentence a party for a crime, even though he went before it and consented to be tried, its judgment would be a nullity; because the consent could not confer the jurisdiction. But, if the court had authority to try him for that crime, and to sentence him if guilty, and to a proper indictment he should plead guilty, he could not afterwards, upon that state of pleadings, claim the right to prove that he was not guilty. For although the power of the court to inflict the sentence depends on the guilt of the party, yet it is not upon the ab-

stract question of guilt, but whether the guilt has been made legally apparent in the suit; and, therefore, the party having admitted it according to an authorized method of proceeding in such suit, he could not, without withdrawing his plea of guilty, object to the power of the court to render judgment upon the ground that he was really not guilty. So, if a court has authority to entertain suits upon promissory notes if such a suit is brought, and the existence of the note averred, if the defendant in his answer admitted it, he could not upon that pleading be permitted to disprove the existence of the note.

And, neither in the criminal case supposed, would the offer to prove innocence, nor in the last, the offer to prove non-existence of the note, raise any question as to the jurisdiction of the court. For although in one case guilt, and in the other, the note, constituted the entire ground of action, and was essential to authorize a judgment; yet that goes only to the cause of action, and not to the jurisdiction of the court. For if the court has authority to render a judgment for the cause of action set forth in the complaint, then it has jurisdiction of the subject-matter of the suit, and whether the cause of action exists or not, is the very question it is to try. And this, of course, should then be tried according to the established rules and methods of proceeding. Where issue is taken upon a fact, it is to be tried upon the evidence; where it is admitted by the pleadings, that establishes it for all the purposes of the suit. If a party, therefore, admits a cause of action set up against him in a suit before a court which has lawful authority to render a judgment for that cause of action; this is not conferring jurisdiction by consent upon the court, even though the cause of action does not exist; but is simply admitting by the pleadings facts which it would otherwise have been necessary to establish by evidence. The power of the court to try the case being conceded, the parties are as much bound by admissions of facts in pleading, as they would be by a verdict establishing them upon the trial.

We think these considerations dispose of the question presented here. The general jurisdiction of the circuit courts in suits by creditors' bill is conceded. Undoubtedly the existence of the judgment at law constitutes the whole foundation of the right of action in such a suit. But the power of

the court to entertain the suit and give proper relief, if such judgment is shown, being conceded, the question of its existence becomes a mere question of fact, relating to the cause of action, and is to be determined either upon the pleadings, or the evidence, in the same manner and by the same rules that such questions of fact are determined in all other cases. The answers, therefore, having admitted the existence of the judgment, the defendants could not introduce evidence to disprove it. They were estopped by their pleadings. And it was not contended that it could be done, except for the purpose of disproving jurisdiction over the subject-matter.

But we think, as already stated, that such proof would not raise that question. To determine that, the facts stated in the complaint must be taken as true. If they then present a case which authorizes a judgment, the court has jurisdiction of the subject-matter. It is conceded here that the complaint did present such a case. The very question which the court had jurisdiction to try was whether the cause of action really existed; and the proof offered tended only to show that it did not exist, and not to show that the court had no jurisdiction to determine it, and render a judgment if it did exist. Disproving a cause of action is not showing that the court has no jurisdiction of the subject-matter. The question therefore, of conferring jurisdiction by consent was not presented because there was no attempt to submit to the court any question, which by law it had no authority to determine.

Suppose the existence of the judgment had been denied by the answers, and the court had tried the question and found its existence and rendered judgment; could the judgment have been attacked collaterally, on the ground, that there was no jurisdiction over the subject-matter? Clearly not; as little could be done, if admitted by the pleading. But it might be done in either case, if there was no jurisdiction of the subject-matter.

We do not think the essential facts constituting the cause of action here are to be considered jurisdictional facts, within the rule so frequently and often so rigidly applied to the action of inferior tribunals and officers. But, even if they were, the same result must follow. For even if the existence of the judgment was a jurisdictional fact, it was a fact triable in that suit. And if triable, it must be tried accord-

ing to established rules. If denied, it must be proved; if admitted, it would have been legally ascertained for all the purposes of the suit.

But I do not mean by this to say that the judgment of every tribunal as to its own jurisdiction is conclusive. That I have always denied. If the court decides that it has the power to try a case and render judgment, which by law it has not, such decision does not give it the power. Its judgment may be questioned anywhere for want of jurisdiction. But if the tribunal is authorized to act upon a certain state of facts, and also to try whether the facts exist, then if they are properly alleged before it, and the parties are legally notified and have opportunity to contest them, the finding of such a tribunal upon those facts would be the finding of a competent tribunal, and ought to be conclusive until reversed in a direct proceeding.

I think there is a clear distinction between the finding of such facts and the decision of a court, that as a matter of law it has jurisdiction where it has none. Because in the one case it has authority to try the facts; in the other it has no authority at all, though it decides that it has. And although the authorities upon this subject are full of uncertainty, this distinction is recognized, and seems to me to rest upon solid reasons. It is recognized on *Brodhead v. McConnell*, 3 Barb., 187-8; and in *Betts v. Bagley*, 12 Pick., 582-3; also, in *Brittain v. Kinnard*, 1 Brod. & Bing., 432; which is the leading case on the subject. In that case the magistrate has jurisdiction to seize gunpowder in any boat on the river Thames. Under that authority he seized and condemned a vessel with masts, which was admitted not to be a boat within the act. He was sued in trespass, but the court held his finding, that it was a boat, conclusive.

And this case establishes what I believe to be the true rule, that although such facts have been treated as jurisdictional, yet that, strictly speaking, they are not so. Because, while conceding the vessel seized was not a boat within the act, yet they held that the magistrate had jurisdiction; because he had power to decide whether it was a boat or not, as a part of the offense charged, and this power constituted the jurisdiction and not the actual fact. All suits and judicial proceedings are instituted to try questions of fact, and when they are instituted with proper allegations before a

tribunal authorized to try them, it is not sound logic to say that the jurisdiction of the tribunal depends on the actual existence of the facts alleged. And the neglect of this distinction, growing out of the great strictness with which the proceedings of inferior tribunals have been regarded, has I think, given rise to much confusion and inaccuracy, and has led courts in many instances, to hold facts jurisdictional which were not so. The true rule would seem to be in all cases, that where the allegations are so made that the tribunal has authority to proceed and try them, and to render judgment according to its finding, it has then jurisdiction of the subject-matter. I have thus alluded to what I conceive to be the true rule in respect to the so called jurisdictional facts, for the purpose of showing that even if the existence of the judgment here had been such a fact, it was still competent for the court below to have tried and determined it conclusively, unless directly reversed, and that therefore it was triable by the same rules that govern the trial of all other questions.

When looking into the evidence as to the other matters alleged, we think it sustains the finding of the court below.

The judgment is affirmed with costs.⁷

⁷ See *Litz v. Rowe* (1915), 117 Va. 752, L. R. A. 1916B 799 and note at page 803.

12 *Take*
REYNOLDS v. STOCKTON.

Supreme Court of the United States. 1891.

140 *United States, 254.*

[In the year 1872 the Hope Mutual Life Insurance Co., a New York Corporation, reinsured its risks with the New Jersey Mutual Life Insurance Co. a New Jersey corporation, and the latter company took its assets and assumed its liabilities. In 1877 the New Jersey company failed, and Joel Parker was appointed receiver in New Jersey and ancillary receiver in New York. Prior to the reinsurance the New York company had deposited \$100,000 in securities with the

New York superintendent of insurance as security for policy-holders, and this fund was retained by him. After the appointment of Parker as receiver and ancillary receiver, an action was commenced in New York by Reynolds and other policy-holders and stockholders of the New York company to seize and appropriate to the claims of the plaintiffs the securities in the fund held by the New York superintendent of insurance. The parties defendant were the custodian of the fund, the New York company, the New Jersey company and the Receiver. The prayer of the petition, following the allegations, asked for no relief other than the appropriation of the said fund. A decree was made distributing the fund, and a further judgment was subsequently rendered in the same action against the New Jersey company and its receiver for \$1,010,496.29, ordering this money to be brought into court and distributed according to the original decree of the court. When this judgment was presented to the New Jersey court of chancery, it declined to recognize it as an adjudication against Stockton, who had become receiver, or against the assets in his hands.]

BREWER, J. * * *

We are of opinion that the decision of the chancery court of New Jersey, as sustained by the court of errors and appeals of that state, is correct, and must be affirmed. The first and obvious reason is that the judgment of the supreme court of New York was not responsive to the issue presented. The section of the federal constitution which is invoked by plaintiffs is section 1 of article 4, which provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." Under that section the full faith and credit demanded is only that faith and credit which the judicial proceedings had in the other state in and of themselves require. It does not demand that a judgment rendered in a court of one state, without the jurisdiction of the person, shall be recognized by the courts of another state as valid, or that a judgment rendered by a court which has jurisdiction of the person, but which is in no way responsive to the issues tendered by the pleadings, and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other state. * * * Take an extreme case: Given a court of general jurisdiction, over actions in ejectment as

well as those in replevin; a complaint in replevin for the possession of certain specified property, personal service upon the defendant, appearance, and answer denying title. Could (there being no subsequent appearance of the defendant and no amendment of the complaint) a judgment thereafter rendered in such action for the recovery of the possession of certain real estate be upheld? Surely not, even in the courts of the same state. If not there, the constitutional provision quoted gives no greater force to the same record in another state.

We are not concerned in this case as to the power of amendment of pleadings lodged in the trial court, or the effect of any amendment made under such power, for no amendment was made or asked. And, without amendment of the pleadings, a judgment for the recovery of the possession of real estate, rendered in an action whose pleadings disclose only a claim for the possession of personal property, cannot be sustained, although personal service was made upon the defendant. The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted. Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. In such a case the proposition so often affirmed, that that is to be considered as done which ought to have been done, may have weight, and the amendment which ought to have been made to conform the pleadings to the evidence may be treated as having been made. Here there was no appearance after the filing of the answer, and no participation in the trial or other proceedings. Whatever may be the rule where substantial amendments to the complaint are permitted and made, and the defendant responds thereto, or where it appears that he takes actual part in the litigation of the matters determined, the rule is universal that, where he appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings

are put in issue. And this rule, which determines the conclusiveness of a judgment rendered in one court of a state, as to all subsequent inquiries in the courts of the same state, enters into and limits the constitutional provision quoted, as to the full faith and credit which must be given in one state to judgments rendered in the courts of another state.

In the opinion of the court of errors and appeals, the case of *Munday v. Vail*, 34 N. J. Law, 418, is cited. In that case, the proposition stated in the syllabus, and which is fully sustained by the opinion, is, that "a decree in equity, which is entirely aside of the issue in the record, is invalid, and will be treated as a nullity even in a collateral proceeding."

* * * We quote from the opinion: "The inquiry is, had the court jurisdiction to the extent claimed? 'Jurisdiction' may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: *First*, the court must have cognizance of the class of cases to which the one to be adjudged belongs; *second*, the proper parties must be present; and, *third*, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A. and B. are parties to a suit that a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons, by becoming suitors, do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises." And again: "A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judg-

ments become estoppels. But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants. Thus, Lord Coke, treating of this doctrine, says: 'A matter alleged that is neither traversable nor material shall not estop.' Co. Lit. 352b. And in a note to the *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. 435, Baron Comyn is vouched for the proposition that judgments 'are conclusive as to nothing which might not have been in question or were not material.' For the same doctrine that in order to make a decision conclusive not only the proper parties must be present, but that the court must act upon 'the property according to the rights that appear' upon the record, I refer to the authority of Lord Redesdale. *Giffard v. Hort*, 1 Schouler & L. 408. See, also, *Gore v. Stackpool*, 1 Dow, 30; *Colclough v. Sterum*, 3 Bligh, 186." Reference is made in the opinion to the case of *Corwith v. Griffing*, 21 Barb. 9, in respect to which the court said: "Commissioners in partition, in their distribution, embraced land other than that contained in the petition, and the court confirmed their report, and it was held that such judgment was a nullity, as the jurisdiction was confined to the subject-matter set forth and described in the petition. In this case the court had jurisdiction in cases of partition, and the decision was upon the ground that the decree was void, as it was aside from the issue which the proceedings presented." This case is very much in point. We regard the views suggested in the quotation from the opinion as correct and as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit *inter partes*. * * *

This proposition determines this case, for, as has been shown, the scope and object of the suit in the New York court was the subjection of the fund in the hands of the superintendent of the insurance department of that state to the satisfaction of claims against the New York company. The cause of action disclosed in the original complaint was not widened by any amendment; and there was no actual appearance by the receiver, Parker, or the New Jersey company, subsequently to the filing of their answer. No valid judgment could therefore be rendered therein which went beyond the subjection of this fund to those claims.

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WELCH v. FOCHT.

Supreme Court of Oklahoma. 1918.

67 Oklahoma, 275.

Action by Jesse James Welch, a minor, by O. L. Clark, his legal guardian, against Adam Focht and others. Demurrers to petition sustained, action dismissed, and plaintiff brings error. Affirmed.

RAINEY, J. * * *

The plaintiff's action was instituted to recover the possession of and to quiet the title to a tract of land allotted to him as a newborn freedman. The petition in this action alleged that the title of the several defendants was based upon or deraigned through a certain pretended guardian's deed purporting to have been executed by one C. O. Potter, as the guardian of the plaintiff, Jesse James Welch, to one Lee Patrick; that the sale proceedings (which are fully set out in the petition) were had in the county court of McIntosh county; and that these proceedings were absolutely null and void on account of various alleged errors and irregularities appearing on the face thereof. * * *

The most serious question in the case, and the one most vigorously insisted upon by the plaintiff, is that the petition filed in the county court of McIntosh county for the sale of the land in controversy was insufficient to confer authority or jurisdiction upon the county court of McIntosh county, Okla., to order a sale of the plaintiff's land, in that said petition for the sale of said land failed to disclose the condition of the estate of the ward, and failed to show facts disclosing the necessity or expediency of the sale; and on account of the alleged insufficiency of the petition it is urged that the county court of McIntosh county was without jurisdiction to make the order of sale, and that all the subsequent proceedings are therefore null and void. * * *

Before we proceed further, it might be well here to call attention to the fact that there is quite a conflict in the authorities on the question as to what constitutes jurisdictional defects in the proceedings for the sale of a ward's real estate. As was observed in *Eaves v. Mullen*, 25 Okl. 679, practically all of the courts agree that there are many defects in the

sale proceedings of a ward's real estate which will not render the proceedings void. Some courts hold that practically all of the statutory steps are jurisdictional; but we have adopted the other rule, and there are many compelling reasons, unnecessary to be stated at this time, why we should not at this late date depart therefrom. But the filing of a petition praying for a sale of the ward's land is jurisdictional. This is necessary to invoke the jurisdiction of the court and to set the judicial mind in motion.

We come, then, to the question as to whether the fact that the petition for the sale defectively alleges the statutory grounds for a sale, or fails to allege any of the statutory grounds defeats the jurisdiction of the court on collateral attack. Let us first inquire into the rule obtaining where the judgments of courts of general jurisdiction, other than probate courts, are collaterally assailed. We find the general rule obtaining to be that, where the court is one having power to grant the relief sought and having the parties before it, the fact that the petition defectively states a cause of action, or states it not at all, does not make the judgment void on collateral attack, but, on the contrary, if the relief demanded by the petitioner can be ascertained from the allegations in the petition, no matter how defective they are, or how many necessary ones are omitted, the judgment is not void on collateral attack. *Chivers v. Board of County Commissioners of Johnston County*, 161 Pac. 822, L. R. A. 1917B, 1296; 15 Ruling Case Law, § 339, p. 864; *Altman v. School Dist. No. 6*, 35 Or. 85, 56 Pac. 291, 76 Am. Rep. 468; *Freeman on Judgments*, § 116-118.

Judge Van Fleet is recognized by many courts as the best authority on the subject. In his excellent work on Collateral Attack, he says:

"There is no connection between jurisdiction and sufficient allegations. In other words, in order to 'set the judicial mind in motion,' or to 'challenge the attention of the court,' it is not necessary that any material allegation should be sufficient in law, or that it should even tend to show facts that are sufficient. If that were the rule, the absence of any material allegation would always make the judgment void, because it cannot be said that such a complaint has any tendency to show a cause of action. * * * When the allegations are sufficient to inform the defendant what relief

the plaintiff demands, the court having power to grant it in a proper case, jurisdiction exists, and the defendant must defend himself. * * * Allegations immaterial and wholly insufficient in law may be sufficient 'to set the judicial mind in motion,' and to give a wrongful but actual jurisdiction which will shield the proceedings from collateral attack."

* * * * *

In the case of *Bryan v. Bauder*, 23 Kan. 95, in an opinion by Chief Justice Horton, the Supreme Court of Kansas held that whether the petition for the sale was in proper form, or set forth sufficient facts, were matters for the determination of the probate court in the exercise of its jurisdiction. We quote from the opinion:

"It is well established that, when a court has jurisdiction of the subject-matter and of the parties in an action, the orders and judgment of the court are not void on account of mere defects in the pleadings or irregularities in the subsequent proceedings. In selling the real estate of decedent, complete jurisdiction is acquired by filing the petition praying the court to make an order, which, under the statute, the court is competent to make, and giving the notice of the time and place of the hearing of the petition. The filing of a petition and giving notice to the heirs are jurisdictional acts. The action of the court is upon the petition. All parties interested, after due notice, are required to come in and oppose the application. The statute contemplates a hearing of parties, and an adjudication upon the subject of the petition. Whether the petition is in proper form, or sets forth sufficient facts, are matters for the determination of the court in the exercise of its jurisdiction. Of course, if a mere blank paper is filed as a petition, jurisdiction would not attach, because there would be nothing for the court to act upon; but when a petition contains sufficient matters to challenge the attention of the court as to the merits, and such a case is thereby presented as authorizes the court to deliberate and act, although defective in its allegations, the cause is properly before the court, and jurisdiction is not wanting. This principle underlies all judicial proceedings."

* * * Inasmuch as the sale of plaintiff's land in this case was within the general class of cases of which the county court of McIntosh county had jurisdiction, although the petition was very defective, and although it did not af-

firmatively allege statutory grounds for the sale, we are of the opinion that it was sufficient to invoke the jurisdiction of the court, and to call upon it to decide as to whether the order of sale should be entered. Since the court, after a full hearing, adjudicated the existence of statutory grounds for the sale, as conclusively appears from the decree, reciting as it does that the sale of the real estate mentioned in the petition was "necessary for the purpose of properly maintaining, supporting, and educating the plaintiff, the father of said minors being wholly unable to do so, and that it was for the best interest of said ward," the court in the determination of said matters, and in entering the decree of sale, was acting within the jurisdiction conferred upon it by law, and the subsequent proceedings based on said order are not void in this collateral assault made thereon.

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The judgment of the trial court is therefore affirmed. All the Justices concur.

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MATTIX v. SWEPSTON.

Supreme Court of Tennessee. 1913.

127 Tennessee, 693.

LANSDEN, J. This case is before us upon petition of the defendant, Swepston, for writs of *certiorari* to the judgment of the Court of Civil Appeals. The only question for determination is whether the cause of action asserted by the declaration against the defendant is local or transitory.

A brief statement of the case made in the declaration is that the plaintiffs bought a boundary of timber in Crittenden county, Ark., from one Maudlin. The contract of purchase gave the plaintiffs five years in which to cut and remove the timber, and also granted to them a right of way over adjacent lands of Maudlin, for the purpose of hauling the timber, when cut, over Maudlin's lands to the railroad. The plaintiffs entered into the possession of the land and cut and manufactured timber under their contract for about one year, when Maudlin leased the lands over which plaintiffs

had acquired the right of way to the defendant, Swepston. Maudlin did not expressly reserve plaintiffs' right of way in his contract with Swepston, but Swepston knew of plaintiffs' rights in the premises at the time he made his contract of lease. Soon after acquiring the leasehold estate from Maudlin, Swepston obstructed the roadway over which plaintiffs had the easement, and by threats of violence maintained the obstruction and prevented plaintiffs from using the right of way. As a result of this interference upon the part of Swepston, the plaintiffs were unable to cut and remove the timber purchased from Maudlin. They defaulted in the performance of certain contracts for delivery of the timber, made after the purchase from Maudlin, and as a result of which they were forced into bankruptcy. They allege that they are damaged \$4,000 in the loss of the timber and the breach of contracts, and \$3,500 resulting from a sacrifice sale of their milling plant in the bankruptcy proceedings.

Swepston was found in Shelby county and sued there upon the foregoing facts. He interposed a plea that the cause of action was local and the venue was in Crittenden county, Ark., and not in Shelby county, Tenn. This plea was sustained by the trial judge and the suit dismissed, and his judgment was reversed by the Court of Civil Appeals and the case remanded for further proceedings.

* * * * *

A true statement of the test between a local and a transitory action is whether the injury is done to a subject-matter which, in its nature, could not arise beyond the locality of its situation, in contradistinction to the subject causing the injury. The Supreme Court of Maryland, in *Gunther v. Dranbauer*, 86 Md. 1, 38 Atl. 33, has stated the test as follows:

"There must be a test by which it may be determined whether a particular cause of action sounding in damages is local or transitory; and an unerring one inheres in the nature of the subject of the injury as differing from the means whereby and the mere place at which the injury was inflicted. If the subject of the injury be real estate, or an easement, such as a right of way, whether private or public, obviously the action must be local, for the reason that the injury to that particular real estate or easement could not possibly have arisen anywhere else than where the thing injured was actually situated. But if the subject of the

injury be an individual, then an injury to that individual's person, no matter by what means occasioned or where inflicted, is essentially an injury to a subject not having a fixed, stationary, immovable location; and an action to recover damages therefor would necessarily be transitory."

The most typical illustration of a local action is an injury to real estate, and of a transitory action an injury to the person. An easement of way is an interest in land. *Nunnally v. Iron Co.*, 94 Tenn. 413, 29 S. W. 361, 28 L. R. A. 421; *Long v. Mayberry*, 96 Tenn. 378, 36 S. W. 1040. The wrong of the defendant which conferred a corresponding right upon plaintiffs was the obstruction of the way over which plaintiffs had the right to travel. But plaintiffs' right to use the way does not arise in privity of title with Maudlin, but it exists in privity of contract alone. The easement claimed by plaintiffs does not exist separately from their right to remove the timber purchased of Maudlin. It is merely an appurtenance to the right to cut and remove the timber and place it upon the market. A thing appurtenant is "a thing used with and related to or dependent upon another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant." 3 Washburn's Real Property, 336; *Lucas v. Bishop*, 15 Lea, 167, 52 Am. Rep. 364, note; 4 Am. & Eng. Enc. of Law & Pr. 1237.

In this view the tortious conduct of defendant in forcibly preventing the plaintiffs from enjoying the easement of way purchased of Maudlin is an injury to the business of plaintiffs, because their easement of way cannot exist separately from the purchase, manufacture, and sale of the timber. While it is true that the right of way which the plaintiffs aver over the lands of Maudlin is an interest in the lands, it does not necessarily follow from this postulate that the conduct of the defendant in preventing the use of the way was an injury to the land. The right of way is an incorporeal hereditament which, while appurtenant to the land, does not exist as a separate right of the plaintiffs. It, of course, cannot have existence separate from the land, but the right itself may exist in the plaintiffs by a contract which does not confer upon them any privity in title with Maudlin to the land, so as to localize the cause of action for a wrongful interference with its use. The plaintiffs' cause of action

consists, not alone of the wrongful conduct of defendant, but it also embraces the rights of plaintiffs, acquired under the contract with Maudlin, to cut the timber and haul it to market over Maudlin's lands; and based upon these rights are the contracts which plaintiffs made for the sale of the timber, and which were destroyed by the misconduct of the defendant. These facts must be taken together as composing the entire rights of the parties, in order to determine whether the cause of action is local or transitory.

It is well settled that, where an action on covenant broken is founded on privity of contract between the parties, it is transitory; but, where it is on privity of estate, it is local (*State v. District Court*, 94 Minn. 370, 102 N. W. 869, 3 Ann. Cas. 726, and cases cited), because the latter covenants run with the land and the former do not.

This case is very different from a case of injury to real estate. It is also different from a case of injury to an easement of way existing separately and not appurtenant to the main thing to which the injury is done through it as an instrumentality. It would be a refinement beyond the point of practical justice to hold that the injury which plaintiffs have suffered was an injury to real estate in Arkansas, for which they must bring their suit there. The defendant by his personal act injured the plaintiffs' business, although he adopted as a means of doing so the obstruction of a road on Maudlin's land. This road did not belong to the plaintiffs, and their right to use it is not founded on privity of estate with Maudlin, but is founded solely upon contract. The main thing of the contract out of which the right grows is not the easement, but is the timber and the right to remove it and place it upon the market for sale.

The Court of Civil Appeals is affirmed.

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STATE EX REL. HUNT v. GRIMM.*Supreme Court of Missouri. 1912.**243 Missouri, 667.*

GRAVES, J. Action in prohibition, purpose of which is to determine the right of Hon. Hugo Grimm, one of the judges of the circuit court of the city of St. Louis, to proceed further with a case pending in his court entitled, *Greer Real Estate & Investment Co., Plaintiff, v. Daniel D. Hunt and Mabel R. Hunt, Defendants.* * * *

I. A reading of the petition on file in the court over which respondent presides shows beyond doubt that the action is one to annul and cancel a deed, and thereby remove the apparent cloud upon the plaintiffs' alleged title to the real estate described in the petition. It is true the prayer of the petition asks for the impounding of the alleged forged deed, but this does not change the legal effect of the petition. Impounding a deed already of record would avail plaintiff nothing. But we need not pursue this further at this point. The only fair interpretation of the petition and its purpose is as above indicated. The question, then, is, Has the circuit court of the city of St. Louis jurisdiction to hear and determine a case, the purpose of which is the cancellation, for alleged fraud, of a deed to lands in the state of Virginia? This question we discuss next.

II. The petition in respondent's court states a cause of action, but it goes further, and states facts which show that such cause of action is not cognizable by the courts of this state. A court of equity in Missouri has no jurisdiction to cancel for fraud a deed to lands in the state of Virginia. Nor has such court any greater right to cancel such deed because there is an allegation of a fraudulent change in the name of the grantee. Fraud of any kind, if proven, obviates and vitiates the deed, but the hearing of the question of fraud or no fraud, forgery or no forgery, must be in a court having jurisdiction of the particular case.

We say "forgery or no forgery" because the changing of the name of a grantee in a deed is not only a fraud, but by law is forgery. The cancellation of a recorded deed is an act which affects the title to real estate. Such cancellation is the

destruction of a muniment of title. It involves directly the title to real estate. The decree annulling the deed acts directly upon the land and the title thereto. A cloud upon the title as alleged in this petition is "a title or incumbrance apparently valid, but in fact invalid." 7 Cyc. 256. In such case the courts of one state have no jurisdiction over the subject-matter of the suit, where it is alleged in the petition that the land to be affected lies within the jurisdiction of another state. The jurisdiction of the subject-matter of such action is in the proper court of the state wherein the land is situated. And this is true notwithstanding the general rule that courts of equity act *in personam*. This exception to the general rule is recognized by statutes in many states, as well as by the common law.

In Brown on Jurisdiction, p. 32, it is said: "There are three classes of actions known to the common law, namely, personal actions, mixed actions, and real actions, or actions that are local. Ordinarily, at common law, real actions and mixed actions are local, and personal actions are transitory." And the same author on page 171 further says: "The statutes of the different states usually provide that actions shall be brought in the county or district where the defendants, or some of them, if more than one, reside. But in general the statute provides that real actions, or actions relating to real property, shall be brought in the county where the property lies. If the statute does not provide, the action would be local by common-law rules, which are usually adopted in this country by general consent. In order, therefore, to commence an action, local by common law, it is necessary to see that the statute makes express provision for the trial of it as a transitory one. Where the action is local, the venue must be laid in the county in which the land is situated, unless it is otherwise provided by statute."

In Story on Conflict of Law (8th Ed.) § 545, p. 760, it is said: "But even in England the Court of Chancery will not act directly upon lands in the plantations, so as to affect the title, or the possession, or the rents and profits thereof." Without statutory provisions the common-law rule prevents. In 22 Encyc. of Plead. & Prac. p. 790, it is said: "In the absence of statutory provisions to the contrary, the original division of actions into transitory and local still prevails in the states of the Union, and the venue of a particular action must

be determined by the old common-law rules as to venue." The statutes of the different states, like the common law, have made actions touching the title to real estate local. Speaking of such statutes in 22 Encyc. of Plead. & Prac. p. 792, it is said: "Another common provision as to venue is to the effect that certain actions must be tried in the county where the subject-matter of the action or some part thereof is situated, subject in some states to the power of the court to change the place of trial. Under this division are classed the following actions: Those which are for the recovery of real estate or which are brought on account of injuries thereto; actions of ejectment; for dower; for waste; for partition; to foreclose mortgages upon real estate, or to foreclose a mortgage upon chattels real. In short, as it is often expressed in these statutes, all actions to recover or to procure a judgment establishing, determining, defining, forfeiting, amending, or otherwise affecting an estate, right, title, lien, or other interest in real property come under this classification, and are to be tried in the county where the subject-matter of the action or a part thereof is situated."

In Missouri the statute has made the action stated in this petition a local action. Under our statute, the St. Louis circuit court is without jurisdiction to hear and determine an action affecting the title to real estate, unless such real estate was within the territorial jurisdiction of the court. This statute is but expressive of the common-law rule. It but makes a local action out of what was already a local action by the common law; so that, whilst the circuit court of the city of St. Louis has jurisdiction to hear and determine real actions of the general kind here involved, yet there is a limitation to that power; i. e., that the real estate to be affected must be within the territorial jurisdiction of the court. The petition before the circuit court disclosed that the court had no jurisdiction, because that disclosed that the real estate sought to be affected was in the state of Virginia. In oral argument counsel for respondent admitted that, if title to real estate was involved, then the respondent was without jurisdiction. In the face of that admission we can see nothing left, except to declare that respondent is without jurisdiction, and the preliminary rule in prohibition should be made absolute.

Counsel argues that the subject-matter of the suit is the

alleged forged deed, and that as the alleged forged deed was in the city of St. Louis, and the defendants were found there, the circuit court had jurisdiction of both the subject-matter and the person, and therefore the jurisdiction was complete. The trouble is counsel misconceives his own petition. It is clearly an action to cancel a deed upon the ground of fraud, and to thereby remove a cloud upon the title to lands in Virginia. Incidentally it asks for the impounding of the forged deed, but what of it? Standing alone, that allegation would come to naught, for no court of equity would impound and hold an alleged forged deed. If the bill only asked for such relief, it would be without merit. The only thing which could be of any value to plaintiff is the cancellation, by decree of court, of this alleged forged deed, so that the cloud occasioned by its record might be removed. This is what the bill seeks, but, as stated above, a Missouri court of equity is without power to grant such relief. It is clear to our minds that the respondent is without power to hear and determine the cause now pending before him, and the writ of prohibition should go. It is so ordered. All concur, except LAMM and KENNISH, JJ., who dissent in opinion by LAMM, J.

LAMM, J. (dissenting). My vote is to deny the writ and quash the preliminary rule in prohibition; hence this dissent from the opinion of my learned Brother GRAVES.

The bill in the equity suit sought to be prohibited is loosely drawn. It certainly has allegations looking to clearing away a cloud on the title of the Greer Investment Company to lands in the state of Virginia. It may be conceded that an equity court in this state could not by its decree affect the bare legal title to land in a sister state, or clear up such title. To that extent the bill was too broad, too redundant and rambling in allegation. If the jurisdiction of a circuit court of St. Louis depended alone on those allegations, it would have none. But giving the bill the grace of a liberal construction, as we are bound to do, it states a cause of action in equity to avoid a real estate transaction for fraud and to have a certain deed declared void as a conveyance. If inartificially drawn, nevertheless it was amendable. We are not to sit to prohibit a lower court from proceeding in every case in which the petition is bad. If that were so, we have, indeed, at last embarked on a long voyage on an uncharted sea without boundary. True, also, the prayer of the bill in part is to impound

a *recorded* deed—a vain and useless thing—for the mischief was consummated when the deed was spread of record. But the demurrer below could not strike at the mere prayer in the bill, unless a prayer is demurrable—a proposition strange to the law. The same prayer asked general relief. The Greer Investment Company was in St. Louis, Mo., the Hunts were there, and by due summons the court obtained jurisdiction of their persons. Now, a court of equity is par excellence a court of conscience. In administering that ghostly office, the chancellor's own conscience being moved, he acts directly by his decree on the consciences of the parties litigant. In equity the rule is, I think, that all litigants are conclusively presumed to have consciences, whatever the real fact may be. If the land be in Virginia, and if a Missouri decree cannot act extraterritorially and by its own vigor affect the bare title to Virginia land, yet does that fact oust jurisdiction to lay a burden on the consciences of the Hunts? Or are their consciences also in Virginia, where their treasure is, and therefore not to be bound by a Missouri decree? If their consciences are once bound by a decree, are they loosed across the state line? Hardly; the right doctrine being, once bound always bound. Conceding, therefore, that a decree in St. Louis could not act *in rem* or on the bare legal title, yet that does not oust jurisdiction; for a decree in equity acts *in personam*. It, as said, binds their consciences here and in Virginia. *McCune v. Goodwillie*, 204 Mo., loc. cit. 336, 102 S. W. 997, *ante* and *post*. It is familiar doctrine that specific performance may be decreed in a court of equity in one state, although the land is situated in another. *Olney v. Eaton*, 66 Mo., loc. cit. 567. Now, a decree making void a transfer or rescinding it for fraud is but the converse of specific performance, and if a court of equity, having jurisdiction of the person, may bind the conscience of such person to specific performance, why may not the same court rip up the transaction by operating on the same conscience wherever it may be found? If the deed had not been recorded, but had been delivered, would not this action lie in Missouri if the Hunts had been found there? Or must a wronged grantor lie by until the fraudulent grantee puts his deed of record? The mere record of the deed is not material to the action, nor does such record destroy the action.

Statutes of Missouri relating to the bringing of real actions

and conferring jurisdiction on the circuit court of the county where the land lies have no bearing here. They affect real actions in our own state, local in character, and in my opinion were never intended to affect the general jurisdiction of a court of equity in such an action as this.

KENNISH, J., concurs in these views.⁸

⁸ See *The Extra-territorial Effect of the Equitable Decree*, by W. T. Barbour, 17 Mich. Law Rev. 527; *Enforcement of a Foreign Equitable Decree*, by Herbert F. Goodrich, 5 Ia. Law Bul. 230, with bibliography and cases.

Compare *Carpenter v. Strange* (1890), 141 U. S. 87, 105; *Matson v. Matson* (1919), 186 Ia. 607.

JACOBUS v. COLGATE.

Court of Appeals of New York. 1916.

217 New York, 235.

CARDOZO, J. This case comes here on a demurrer to a complaint. The plaintiff's assignors were the owners of a milling plant in Kansas. More than 33 years ago, in August, 1882, the defendant, according to the averments of the complaint, "willfully and wantonly" set fire to the plant and destroyed the mill and its contents. In December, 1913, the owners of the plant assigned their cause of action to the plaintiff, who is a resident of this state. In January, 1914, the summons was served.

The first question to be determined is whether the courts of New York have jurisdiction of the action. For the moment we lay aside the allegations of injury to the contents of the mill and view the action as one for injuries to the building only. There is no doubt that until 1913 our courts had no jurisdiction of actions for injuries to real property lying without the state. *Brisbane v. Penn. R. R. Co.*, 205 N. Y. 431, 98 N. E. 752, 44 L. R. A. (N. S.) 274, Ann. Cas. 1913E, 593. Nothing inconsistent with that view was held in *Sentenis v. Ladew*, 140 N. Y. 463, 35 N. E. 650, 37 Am. St. Rep. 569. All that was there determined was the power, where other jurisdiction fails, to award judgment for the costs. *Gaines v. City of New York*, 215 N. Y. 533, 109 N. E. 594. In 1913, how-

ever, the Code of Civil Procedure was amended by adding the following provision (section 982a) :

"An action may be maintained in the courts of this state to recover damages for injuries to real estate situated without the state, or for breach of contracts or of covenants relating thereto, whenever such an action could be maintained in relation to personal property without the state."

The trespass complained of here occurred in 1882. We must therefore say whether the statute has any application to wrongs committed before its passage.

The general rule is that statutes are to be construed as prospective only. 27 Halsbury's Laws of England, p. 159. It takes a clear expression of the legislative purpose to justify a retroactive application. *Isola v. Weber*, 147 N. Y. 329, 41 N. E. 704; *O'Reilly v. Utah, N. & C. Stage Co.*, 87 Hun, 406, 412, 34 N. Y. Supp. 358; *Matter of Protestant Episcopal Pub. School*, 58 Barb. 161; *United States v. Heth*, 3 Cranch, 399, 413, 2 L. Ed. 479. Changes of procedure—i. e., of the form of remedies—are said to constitute an exception (*Lazarus v. Met. E. R. Co.*, 145 N. Y. 581, 40 N. E. 240; *Laird v. Carton*, 196 N. Y. 169, 89 N. E. 822, 25 L. R. A. [N. S.] 189), but that exception does not reach a case where before the statute there was no remedy whatever (*Kelley v. B. & M. R. R. Co.*, 135 Mass. 448; *Reinhardt v. Fritzsche*, 69 Hun, 565, 23 N. Y. Supp. 958; *Shipman v. Treadwell*, 208 N. Y. 404, 415, 102 N. E. 634; *Germania Savings Bank v. Village of Suspension Bridge*, 159 N. Y. 362, 54 N. E. 33). To supply a remedy where previously there was none of any kind is to create a right of action. We need not dwell upon the question whether before this amendment of the Code, a trespass on foreign lands was recognized by our law for any purpose as constituting a wrong. Dicey, Conflict of Laws (2d Ed.) pp. 31, 32. If we recognized it as a wrong, we gave no redress for it. If the injured owner had suffered an impairment of his right, he had none the less no right of action. He may have had one under the laws of some other state or country. He had none under our laws. His cause of action till then was local, and limited by the boundaries of the state where the wrong was done. It has now become transitory, giving rise to "an *obligatio*, which like other obligations follows the person, and may be enforced wherever the person may be found." *Slater v. Mex. Nat. R. R. Co.*, 194 U. S. 120, 126, 24 Sup. Ct. 581, 48

L. Ed. 900. When the cause of action was local, it was not in this jurisdiction a cause of action at all. It became a cause of action by force of the statute which made it transitory.

A " 'cause of action' is the right to prosecute an action with effect." *Patterson v. Patterson*, 59 N. Y. 574, 578, 17 Am. Rep. 384; *People ex rel. Pells v. Supervisors of Ulster Co.*, 65 N. Y. 300, 308. "It is not possible for one at the same time to have a cause of action, and not to have the right to sue." *Walters v. City of Ottawa*, 240 Ill. 259, 263, 88 N. E. 651, 653.

We are reminded by Holland (Jurisprudence [11th Ed.] p. 318) of the definition of the Institutes (Lib. IV, tit. VI) :

"Actio autem nihil aliud est quam jus persequendi iudicio quod sibi debetur."

In any community which has developed beyond the stage of self-help, a violated right gives rise to a right of action. Holland, *supra*. The primary or antecedent right may be distinguished in analysis from the right of action for its infringement, but the normal exercise of the state's power is through the agency of the courts, and hence a right which, when violated, does not create a right of action, is shorn of most of the incidents that make a legal right of value. Holland (11th Ed.) p. 318; 1 Cooley on Torts, p. 20. For this reason it is that statutes which take away every remedy for past wrongs, as distinguished from statutes which merely change the remedy, are condemned as unconstitutional. *Parmenter v. State of N. Y.*, 135 N. Y. 154, 166, 31 N. E. 1035; *Gilbert v. Ackerman*, 159 N. Y. 118, 53 N. E. 753, 45 L. R. A. 118; *Soper v. Lawrence Bros. Co.*, 201 U. S. 359, 370, 26 Sup. Ct. 473, 50 L. Ed. 788; *Mulvey v. Boston*, 197 Mass. 178, 83 N. E. 402, 14 Ann. Cas. 349. The destruction of every remedy destroys the cause of action. By parity of reasoning the grant of a remedy where none of any kind was available is equivalent, in substance, to the creation of a cause of action. We do not say that statutes of the latter class are unconstitutional because retroactive. To discuss the limits of constitutional power in that regard would lead us far afield. What we emphasize now is the distinction between statutes which merely change the procedure for the enforcement of a right and statutes which supply a remedy by which a right for the first time becomes enforceable.

This distinction was recognized by the House of Lords in a leading case in which the jurisdiction of the English courts

in actions for trespass on foreign lands was considered with the amplest learning. In *British South Africa Co. v. Companhia de Mocambique*, [1893] L. R. A. C. 602, the question to be determined was the effect of rules of court adopted under the Judicature Acts of 1873, which abolished the technical rule of local venue. The holding was that the abrogation of that rule did not enlarge the jurisdiction in respect of injuries to foreign lands. The rule of local venue, it was held, was a rule of procedure. It determined the county or section of the realm in which the suitor must proceed. It assumed that jurisdiction was present, but defined the manner of its exercise. On the other hand, the rule that, where the matter was local and arose outside the realm, there was no remedy in the courts of England, was held to be in the fullest sense a rule of jurisdiction. The House of Lords held that the Judicature Acts were not intended to confer upon the owners of foreign lands "a right of action in this country which they would not otherwise have possessed." Lord Herschell pointed out in his opinion that "a person whose lands situate in this country were trespassed upon always had a right of action in respect of the trespass," and then he added in words precisely applicable here:

"But in respect of a trespass to lands situated abroad there was no right of action, for an alleged right which the courts would neither recognize nor enforce did not constitute any right at all in point of law."

See, also, *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913; *Huntington v. Attrill*, 146 U. S. 657, 669, 13 Sup. Ct. 224, 36 L. Ed. 1123.

This conception of a right of action is criticized in the dissenting opinion. We are told that:

"When one without permission enters upon the property of another" in a foreign state, "and wrongfully sets fire to the buildings thereon and destroys them, it is evident that a wrong has been done, and that the *right* of the owner has been violated, and the owner has a *right* to redress."

But that is precisely what the owner did not have until the amendment of the statute. He had, if you please, a moral right to redress, but he had no legal right to redress, except in the state where the wrong was done. To give him a right to redress in this state was the very purpose of the amendment. Even now the wrong has not been transformed into an

offense against our laws. The foreign has not been transformed into a domestic tort. *Slater v. Mex. National R. R. Co.*, 194 U. S. 120, 126, 24 Sup. Ct. 581, 48 L. Ed. 900. The statute does not "vindicate a pre-existing right" under our law; it does not redress a pre-existing wrong. The primary wrong is still the violation of the law of the state where the act was done. *Phillips v. Eyre*, L. R. (4 Q. B.) 225, 239; *Slater v. Mex. National R. R. Co.*, *supra*; *Wooden v. Western N. Y. & P. R. R. Co.*, 126 N. Y. 10, 14, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803; Wharton, *Confl. Laws*, § 478b. Out of the foreign tort there once grew a right of action territorial and local which our courts would not enforce. Out of the same tort there now grows a transitory right of action which our courts will enforce. The right of action has not merely been changed; so far as our law is concerned, it has been created. But the wrong, the violation of the primary right, which it redresses, is defined by the foreign law. * * *

We hold, therefore, that section 982a of the Code is not a retroactive statute. * * *

SEABURY, J. (dissenting). * * *

The development of the law in relation to local and transitory actions shows the nature of the technical rule which operated to deny redress to one whose real property situated in another jurisdiction was injured. The common law originally regarded all actions as local. The early rule required that the venue should be correctly stated. In other words, the place where the fact in issue arose was required to be alleged. This rule arose out of the early practice which required a case to be tried by a jury of the vicinage who were presumed to have knowledge of the facts and the parties. When there were several issues, and the facts alleged in relation to them arose in different places, each issue would be tried by a jury summoned from the place in which the facts in dispute were stated to have arisen. *British South Africa Company v. Companhia de Mocambique*, [1893] L. R. A. C. 602, 617. When juries ceased to be drawn from the place where the fact took place and from among those who were supposed to be familiar with the circumstances, "the law began to discriminate between cases in which the truth of the venue was material and those in which it was not so." *British South Africa Case*, *supra*, page 618. The discrimination resulted in the distinction between transitory and local

actions and the rule that the pleader should lay the venue truly was held to relate only to local actions. To meet the difficulty which arose when the local matter occurred out of the realm the courts invented the fiction which permitted the pleader to lay the venue in any county in England. This fictional averment having been made, the courts determined when the defendant should be permitted to put it in issue. For some time there was uncertainty whether this fictional averment was traversable in an action for injuries to foreign real estate, but the courts finally concluded that it was traversable in this character of cases because such an action was not intended to be protected by the fiction. *British South Africa Co. Case*, *supra*; *Livingston v. Jefferson*, 1 Brock. 203, Fed. Cas. No. 8,411; *Little v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 65 Minn. 48, 50, 67 Minn. 846, 33 L. R. A. 423, 60 Am. St. Rep. 421.

Chief Justice Marshall, in *Livingston v. Jefferson*, *supra*, made it clear that authority was the only support of the rule, and he frankly said:

"I have not yet discerned a reason, other than a technical one, which can satisfy my judgment."

This artificial and technical rule, working injustice as it often did, did not escape the efforts of Lord Mansfield to correct it. Thus in *Mostyn v. Fabrigas*, 1 Cowp. 160, 2 Smith's L. C. 916, an effort was made to bring the rule of law in accord with reason and justice, but the effort proved futile when the decision of Lord Mansfield was overruled in *Doulson v. Matthews* (1792) 4 Term. R. 503, which reaffirmed the old distinction. Speaking of this futile effort of Lord Mansfield, Chief Justice Marshall said:

"One of the greatest judges who ever sat on any bench, and who has done more than any other to remove those technical impediments which grew out of a different state of society, and too long continued to obstruct the course of substantial justice, was so struck with the weakness of the distinction, between taking jurisdiction in cases of contract respecting lands and of torts committed on the same lands that he attempted to abolish it." *Livingston v. Jefferson*, *supra*.

In this state the rule which Chief Justice Marshall adopted with reluctance, solely in deference to authority, became the settled rule. * * *. It was to remedy this defect in the

law of procedure, * * * that the Legislature of this state enacted section 982a. * * *

The questions certified to us turn upon whether this statute is retroactive in its effect. The answer to these questions depends in turn upon the answer to the question whether this section creates a right or prescribes a cause of action or remedy for the violation of an existing right. If the statute relates to the law of procedure and merely prescribes a remedy, it is to be given retroactive effect. *Lazarus v. Metr. E. R. Co.*, 145 N. Y. 581, 40 N. E. 240; *Laird v. Carton*, 196 N. Y. 169, 89 N. E. 822, 25 L. R. A. (N. S.) 189. It is conceded that the statute creates a remedy and authorizes a cause of action. The question to be determined is whether it does *only* this, or whether, in addition to this, it also creates a right which did not exist before. When it is read in the light of its history, which has been briefly referred to above, I think that it is apparent that it merely creates a remedy for an antecedent right. Notwithstanding the technical rule relating to the law of venue that existed before this statute was enacted, the *right* of the person whose property was injured to redress was recognized, although the defect in our law of procedure precluded the person injured from seeking redress in the courts of this state. Thus in *Sentenis v. Ladew*, 140 N. Y. 463, 465, 35 N. E. 650, 37 Am. St. Rep. 569, it was held that, notwithstanding the general rule that an action for injuries to real property must be brought in the *forum rei sitae*, a judgment in an action to recover damages for injuries to real property in another state was neither void nor voidable for want of jurisdiction, and was binding and conclusive upon the parties, when the Supreme Court of this state acquires jurisdiction of the parties, and the defendant appears, answers, and goes to trial without objecting to the jurisdiction of the court. The decision in this case recognizes that the plaintiff in a case of this character has a right to redress, and that the rule against entertaining such an action was merely a requirement of the law of procedure which might be waived by consent of the parties. The decision of this court in *Sentenis v. Ladew*, *supra*, cannot be disposed of on the theory that it merely determined as to an award of costs, because in the opinion of Judge Maynard, in which all the court concurred, it is said:

“We entertain no doubt that the Supreme Court had juris-

diction to render the judgment awarded in this action. Under the Constitution it has general jurisdiction in law and equity, and of the class of actions to which this cause belongs. It is not prohibited by any statute from entertaining jurisdiction of a suit for damages for injuries to real property in another state."

When one without permission enters upon the property of another and wrongfully sets fire to the buildings thereon and destroys them, it is evident that a wrong has been done, and that the *right* of the owner has been violated, and the owner has a *right* to redress. It may be that the law of procedure of a particular jurisdiction fails to give a remedy when objection is made to the jurisdiction of the court, but the existence of the *right* to redress in such a case seems to me to be apparent. * * * There is a manifest and important difference between a statute which creates a new statutory right and a statute which prescribes a "cause of action," or remedy for an existing right. For example, a statute such as Lord Campbell's Act, which gave to the widow and next of kin of a person killed by the wrongful act of another the right to recover damages from the wrongdoer, conferred a right which did not exist at common law, and it also prescribed a remedy by which that right might be enforced. The present statute is different. * * * The statute now under consideration attempted to correct the existing defect in our law of procedure by providing that "an action may be maintained in the courts of this state" in such a case. In so providing it created a remedy or authorized a cause of action, but it did not create a substantive right. * * *

* * * As the statute creates only a remedy or cause of action, it should under well-settled principles be given a retroactive effect. * * *

WILLARD BARTLETT, C. J., and HISCOCK, COLLIN, and HOGAN, JJ., concur with CARDOZO, J. SEABURY, J., reads dissenting opinion, and CHASE, J., concurs.

Order reversed, etc.⁹

⁹ A federal court has no jurisdiction of a trespass to real property committed in another state: *Ellenwood v. Marietta Chair Co.* (1894), 158 U. S. 105.

TENNESSEE COAL, IRON & RAILROAD CO. v. GEORGE.

*Supreme Court of the United States. 1914.**233 United States, 354.*

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LAMAR, J. Wiley George, the defendant in error, was an engineer employed by the Tennessee Coal, Iron & Railroad Company at its steel plant in Jefferson county, Alabama. While he was under a locomotive repairing the brakes, a defective throttle allowed steam to leak into the cylinder, causing the engine to move forward automatically, in consequence of which he was seriously injured. He brought suit by attachment, in the city court of Atlanta, Georgia, founding his action on § 3910 of the Alabama Code, which makes the master liable to the employee when the injury is "caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer."

The defendant filed a plea in abatement in which it was set out that § 6115 of that Code also provided that "all actions under § 3910 must be brought in a court of competent jurisdiction within the state of Alabama, and not elsewhere." The defendant thereupon prayed that the action be abated because "to continue said case of said statutory cause of action given by the statutes of Alabama, and restricted by said statutes to the courts of Alabama, would be a denial so far as the rights of this defendant are concerned of full faith and credit to said public acts of the state of Alabama in the state of Georgia, contrary to the provisions of art. 4, § 1 of the Constitution of the United States." A demurrer to the plea in abatement was sustained and the judgment for the plaintiff thereafter entered was affirmed by the court of appeals. The case was then brought to this court.

The record raises the single question as to whether the full faith and credit clause of the Constitution prohibited the courts of Georgia from enforcing a cause of action given by the Alabama Code, to the servant against the master, for injuries occasioned by defective machinery, when another section of the same Code provided that suits to enforce such liability "must be brought in a court of competent jurisdiction within the state of Alabama, and not elsewhere."

There are many cases where right and remedy are so united that the right cannot be enforced except in the manner and before the tribunal designated by the act. For the rule is well settled that "where the provision for the liability is coupled with a provision for the special remedy, that remedy, and that alone, must be employed." *Pollard v. Bailey*, 20 Wall. 527, 22 L. ed. 378; *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 490, 56 L. ed. 522, 32 Sup. Ct. Rep. 205; *Stewart v. Baltimore & O. R. Co.*, 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 753, 30 L. ed. 828, 7 Sup. Ct. Rep. 757.

But that rule has no application to a case arising under the Alabama Code relating to suits for injuries caused by defective machinery. For, whether the statute be treated as prohibiting certain defenses, as removing common-law restrictions, or as imposing upon the master a new and larger liability, it is in either event evident that the place of bringing the suit is not part of the cause of action,—the right and the remedy are not so inseparably united as to make the right dependent upon its being enforced in a particular tribunal. The cause of action is transitory, and like any other transitory action can be enforced "in any court of competent jurisdiction within the state of Alabama * * *." But the owner of the defective machinery causing the injury may have removed from the state, and it would be a deprivation of a fixed right if the plaintiff could not sue the defendant in Alabama because he had left the state, nor sue him where the defendant or his property could be found because the statute did not permit a suit elsewhere than in Alabama. The injured plaintiff may likewise have moved from Alabama, and for that, or other, reason may have found it to his interest to bring suit by attachment or *in personam* in a state other than where the injury was inflicted.

The courts of the sister state, trying the case, would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action, or which name conditions on which the right to sue depend. But venue is no part of the right; and a state cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. That jurisdiction is to be determined by the law of the court's creation, and cannot be defeated by the

extraterritorial operation of a statute of another state, even though it created the right of action.

The case here is controlled by the decision of this court in *Atchison, T. & S. F. R. Co. v. Sowers*, 213 U. S. 55, 70. * * *

It is claimed, however, that the decision in the *Sowers Case* is not in point because the plaintiff was there seeking to enforce a common-law liability, while here he is asserting a new and statutory cause of action. * * *

The decision in the *Sowers Case*, however, was not put upon the fact that the suit was based on a common-law liability. The court there announced the general rule that a transitory cause of action can be maintained in another state even though the statute creating the cause of action provides that the action must be brought in local domestic courts.

In the present case the Georgia court gave full faith and credit to the Alabama act and its judgment is affirmed.

HOLMES, J., dissents.¹⁰

¹⁰ See note in L. R. A. 1916D 688.

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GILLEN v. ILLINOIS CENTRAL RAILROAD CO.

Court of Appeals of Kentucky. 1910.

137 Kentucky, 375.

HOBSON, J. Cora L. Gillen brought this suit in the McCracken circuit court against the Illinois Central Railroad Company. She alleged in her petition that in September and October of 1908 the defendant negligently permitted combustible material to be upon its track and right of way, and thus started a fire which spread upon certain lands owned by her adjoining the right of way, destroying her fences and timber, to her damage in the sum of \$800. The petition was filed on April 24, 1909. On May 18th the defendant filed answer, which was a traverse of the petition. On May 27th the plaintiff filed an amended petition charging that the defendant negligently failed to have its engines equipped with proper spark arresters and negligently operated its engines. The defendant thereupon asked a continuance of the case at the

plaintiff's cost which was ordered. At the next term of the court, the defendant offered to confess judgment for \$165, which was refused. A jury was then called and the trial was begun. A number of witnesses were examined on behalf of the plaintiff, and, it appearing from the evidence that no part of the land lay in McCracken county, the defendant tendered an amended answer pleading this fact. The court allowed the amended answer to be filed, and thereupon dismissed the action without prejudice for want of jurisdiction. The plaintiff appeals.

Section 62 of the Civil Code of Practice is in these words: "Actions must be brought in the county in which the subject of the action, or some part thereof, is situated—(1) For the recovery of real property, or of an estate or interest therein. (2) For the partition of real property except as is provided in section 66. (3) For the sale of real property under title 10, chapter 14, or under a mortgage, lien or other encumbrance or charge, except for debts of a decedent. (4) For an injury to real property."

The ground of the court's ruling is that the action is for an injury to real property; and therefore, under this section, the McCracken circuit court is without jurisdiction. * * *

It is also insisted for the plaintiff that the objection to the jurisdiction of the McCracken circuit court in the case was waived by the defendant answering to the merits, and going into the trial without making the question. A determination of this matter turns on the proper construction of the provisions of the Code when read in connection with the statutes regulating the jurisdiction of courts. * * *

In *Johnson v. Johnson*, 12 Bush, 485, the court had before it an action for divorce not brought in the right county, as required by section 76; but no objection was made until after the proof was taken and the case was submitted. It was held that the objection was waived. This ruling was followed in *Tudor v. Tudor*, 101 Ky. 530, 41 S. W. 768, 19 Ky. Law Rep. 747. In *Norton v. Marksberry*, 9 Ky. Law Rep. 424, the court had before it a judgment in an action for the distribution of a decedent's estate, which it was urged had not been brought in the proper county as required by section 66. The judgment was held valid. The court said: "As before stated, the Grant circuit court had general jurisdiction of the subject of the actions, and if Hannah Norton, as administratrix, and the

children, had the right to have said actions localized, as a personal right, under the provisions of the Code, they certainly had the right to waive and did waive that right by appearing, without objection and defending the actions upon their merits, and seeking personal relief by cross-actions. Therefore the judgments, rendered in these actions, are valid."

A like question has often arisen where actions against a carrier under section 73, or against a corporation under section 72, were brought in the wrong county; and it has been uniformly held that the objection was waived by answer to the merits. *C., O. & S. W. R. Co. v. Heath*, 87 Ky. 659, 9 S. W. 832, 10 Ky. Law Rep. 646; *I. C. R. R. Co. v. Glover*, 71 S. W. 630, 24 Ky. Law Rep. 1447; *Royer Wheel Co. v. Dunbar*, 76 S. W. 366, 25 Ky. Law Rep. 746. * * *

The Supreme Court of Texas, in *De La Vega v. League*, 64 Tex. 214, under a statute similar to section 62 of the Code, had before it the question whether an objection of this sort was waived by a trial on the merits. Disposing of it, the court said: "Every district court in the state has cognizance of such suits. The requirement as to the county in which the suit may be brought is a mere personal privilege granted to the parties, which may be waived like any other privilege of this character."

In *Blackford v. Lehigh Valley Railway Company*, 53 N. J. Law, 56, 20 Atl. 735, the court had before it an action brought in the wrong county for an injury to land, where no objection was made until a trial on the merits. The objection was held waived. The same conclusion was reached in Pennsylvania. *Magee v. Penn., etc., R. R. Co.*, 13 Pa. Super. Ct. 187.

In *Gay, etc., v. Brierfield Coal & Iron Co.*, 94 Ala. 303, 11 South. 353, 16 L. R. A. 564, 33 Am. St. Rep. 122, an action was brought to foreclose a mortgage on land in a county in which the land did not lie. The defendant appeared and consented to a change of venue. It was held that he thus waived his objection to the action having been brought in the wrong county. In *Snyder v. Pike*, 30 Utah, 102, 83 Pac. 692, and *Burton v. Graham*, 36 Colo. 199, 84 Pac. 978, it was held that the defendant waived his objection, that an action was not brought in the proper county to enforce a lien on land, by appearing and defending. In *Lyon v. Waggoner*, 37 Tex. Civ.

App. 205, 83 S. W. 46, the venue was changed by consent, and it was held that the plaintiff was not thereafter entitled to have the action transferred to the county in which the land lay. * * *

The purpose of sections 62-77 of the Code is not to regulate the jurisdiction of courts. The Code of Practice does not treat of the jurisdiction of courts or attempt to regulate it. It simply regulates the procedure in civil actions. The purpose of these sections of the Code, as shown in the title, is to regulate the county in which the action may be brought; or, in other words, the venue of actions. If an action under any of these sections for the recovery of money within the jurisdiction of the court is not brought in the proper county, it may be dismissed if the objection is properly taken; but, if the defendant does not object to the venue, the matter is waived.

For these reasons, we conclude that the McCracken circuit court was not without jurisdiction of the subject of the action, and that the objection to the venue of the action had been waived.

Judgment reversed, and cause remanded for further proceedings consistent herewith.¹¹

¹¹ *Accord*: Miller v. Kern County Land Co. (1901), 134 Cal. 586; Fletcher v. Stowell (1891), 17 Colo. 94; Smith v. Barr (1899), 76 Minn. 513, notwithstanding a statute which declared that courts in other counties "shall have no jurisdiction of said action"; Stark v. Ratcliff (1904), 111 Ill. 75; Cole v. Potter (1884), 135 Mich. 1; Wolff v. McGaugh (1912), 175 Ala. 299.

In some states, however, the statutes regulating venue have been held to be jurisdictional and not subject to waiver: Jacks v. Moore (1878), 33 Ark. 31; Orcutt v. Hanson (1887), 71 Ia. 514; Loeb v. Mathis (1871), 37 Ind. 306.

Local venue has been practically abolished in England. The English rule on venue is as follows: "*Order 36, Rule 10*. There shall be no local venue for the trial of any action, except where otherwise provided by Statute, but in every action in every division the place of trial shall be fixed by the Court or a Judge. In fixing the place for the trial of any action, cause, issue or matter, the court or judge shall have regard to the convenience of the parties and their witnesses and the date at which the trial can take place, and when a view may be desirable the locality of the object to be viewed; and to the other circumstances of the case, including (*inter alia*) the wishes of and expense to the parties, the relative facilities for trial in Middlesex or at the assizes and the burden imposed on jurors."

In Ontario the plaintiff is required, in his statement of claim, to name the place at which he proposes that the action shall be tried. Where the cause of action arose and the parties all reside in the same county, he must name the county town of that county, and in actions for posses-

sion of land he shall name the county town in the county where the land is situated. The action shall be tried at the place named unless otherwise ordered upon the application of either party. Such application must show that the balance of convenience is against the place named by the plaintiff. Ontario, Rule 245, and notes.

Compare the elaborate American statutes prescribing in detail where the various kinds of actions shall be commenced and tried, such as Michigan, C. L. 1915, Sec. 12340.

SECTION 3. JURISDICTION OVER THE PERSON.

(a) *By Consent.*

COFRODE v. CIRCUIT JUDGE.

Supreme Court of Michigan. 1890.

79 Michigan, 332.

Relators applied for *mandamus* to vacate an order striking a case from the trial docket.

CHAMPLIN, C. J. On the 7th day of December, 1889, the relators commenced suit in the circuit court for the county of Wayne by filing a declaration against Walston H. Brown, Columbus R. Cummings, Samuel Thomas, and William B. Howard. * * * The circuit judge on January 13, 1890, of his own motion made an order striking the cause from the docket on the ground that all the parties to the suit were non-residents. * * *

The plaintiffs are both residents of the state of Pennsylvania. Three of the defendants are residents of New York; one, of Illinois.

The controversy respecting which suit is brought arises under a contract for building a railroad in this state in the upper peninsula. * * *

The relators pray that a writ of *mandamus* issue to said circuit judge, directing him to vacate the above order striking the case from the docket. In showing cause why the *mandamus* should not be granted, Judge Gartner sets out the opinion rendered by him at the time he ordered the case struck from the docket, as follows:

"* * * The affidavit of counsel * * * stated:

* * * No process ever issued out of this court in said matter, nor was service had, and it is apparent that this forum wherein to litigate and determine this controversy is by consent of counsel, and selected for convenience. * * *

He summarizes his reasons for striking the cause from the docket as follows: "(1) That the said circuit court has no jurisdiction of the said alleged cause. (2) That the consent of parties and their attorneys does not and cannot confer jurisdiction upon said court, inasmuch as all parties, both the alleged plaintiffs and the alleged defendants, are non-residents of this state. (3) That, if jurisdiction can be conferred by consent of parties and attorneys, it does not become obligatory upon the court to entertain jurisdiction, but whether the same shall be entertained or not by the court is a matter which rests in the sound discretion of the court; and that public convenience and interest are paramount to the private convenience of the parties. (4) That it is apparent from the facts set out that the said alleged suit is brought into the circuit court for the county of Wayne for the convenience of the parties and their attorneys only."

I shall consider these reasons in the order named by the circuit judge.

1. As to the jurisdiction of the circuit court. The several circuit courts in this state are courts of general jurisdiction. The cause of action stated in the declaration is transitory. It is an action of *assumpsit*, arising out of a contract claimed to have been performed in this state; and the circuit court for the county of Wayne has recognizance of suits upon contracts like the one sued upon irrespective of the locality of their origin, provided the parties, by service of process or otherwise, are before the court. *Thompson v. Association*, 52 Mich. 522, 18 N. W. Rep. 247. Were the parties properly before the court? The suit was not commenced by either of the two methods authorized by section 7291, How. St. The petition asserts that the suit was commenced by the filing of a declaration, (and a copy is attached to the petition.) In so doing the plaintiffs submitted themselves to the jurisdiction of the court, as a party to the record, (*People v. McCaffrey*, 75 Mich. 115, 42 N. W. Rep. 685;) and the defendants, by appearing and pleading to the dec-

laration, voluntarily submitted themselves likewise to the jurisdiction of the court.

2. While it is true that no consent of parties can give a court jurisdiction of the subject-matter of a suit which the court did not possess without such consent, it is equally true that a court can obtain jurisdiction over the person by the consent of such person; and service of process is always treated as waived by a general appearance in the cause, and pleading to the merits. And this is so although the defendant is a non-resident, and suable only in a particular place. *Thompson v. Association*, 52 Mich. 522, 18 N. W. Rep. 247. There is no claim or pretense that this is a fictitious suit, or that it is not brought in good faith, to determine a genuine controversy, of vital interest to the parties concerned. Section 7547 of Howell's Statutes enacts that issues of fact in actions upon contracts shall be tried in the county where one of the parties shall reside at the commencement of suit, unless for the convenience of parties and their witnesses, or for the purposes of a fair and impartial trial, the court shall deem it necessary to order such issues to be tried in some other designated county. This provision, however, applies only to residents. We held in *Atkins v. Borster*, 46 Mich. 553, 9 N. W. Rep. 850, that the statute does not apply to non-resident defendants, nor to a resident plaintiff suing a non-resident defendant, from the necessity of the case; that, if a non-resident could not be sued in any county where he could be found, he could not be sued at all. In that case the plaintiff was a non-resident of the county where the suit was brought, and the defendant was a non-resident of the state. The action was transitory, and we held the court had complete jurisdiction.

Whether courts ought to take jurisdiction in suits between aliens, when the cause of action arose in a foreign country, is not the question in dispute here. If it were, I should be willing to follow the views expressed by Chief Justice Marshall in *Mason v. The Blaireau*, 2 Cranch. 240. In that case the want of jurisdiction was urged, and in delivering his opinion he said: "These doubts seem rather founded on the idea that, upon principles of general policy, this court ought not to take cognizance of a case entirely between foreigners, than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in

favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of this court that, whatever doubts may exist in a case where the jurisdiction may be objected to, there ought to be none where the parties assent to it." In suits between foreigners, brought in our courts, the courts are not obliged to entertain jurisdiction. They may and usually do so upon principles of comity, and seldom decline, except through a fear that they may not be capable of doing full and exact justice through a want of knowledge of the laws of the place where the cause of action arose, which enter into and make a part of the contract, or affect the rights and remedy of the parties. In *Railway Co. v. Miller*, 19 Mich. 305, the plaintiff was a resident of Canada, and brought suit against the railroad company in Wayne circuit court, in Michigan, for a trespass to his person committed in Canada. The defendant appeared voluntarily. It was objected that the court erred in taking and exercising jurisdiction. This court said: "The voluntary appearance of the defendant below renders any discussion of the subject of the ~~venue~~ unnecessary. There can be no doubt that the locality of the trespass does not of itself oust the jurisdiction, where the court has lawfully obtained control over the parties. But where the parties are not residents of the United States, and the trespass was committed abroad, the right of action in our courts can only be claimed as a matter of comity, and they are not compellable to proceed in such cases." * * * The case of *McCormick v. Railroad Co.*, 49 N. Y. 303, was a case where a non-resident of the state of New York sued a foreign corporation upon a cause of action which was transitory in its nature, and arose in another state. The defendant had appeared voluntarily by attorney. Mr. Justice Folger said: "We hold that, where the court has the jurisdiction of the subject-matter or cause of action, that consent may confer jurisdiction of the person, and that such consent may be expressed by a foreign corporation by appearing by attorney and answering generally in the action."

3. The next reason given by the circuit judge is that if jurisdiction is conferred by consent it does not become obligatory upon the court to entertain jurisdiction. The correctness of this position must depend upon the right of the plaintiff to seek redress in the courts of the state. If a party has a right to plant his suit in a circuit court of this state, the circuit

judge has no discretion to exercise in the matter. He cannot say to one suitor, "I will retain your suit," and to another, "I will dismiss it." It is among the fundamental rights of a people under one government that they may be secured in the acquirement, possession, and enjoyment of property, and for this purpose courts are instituted as part of the organic law, in which every person shall have his remedy by due process of law. It is secured as a privilege to which every citizen of the United States is entitled. The redress of wrong and the means of enforcing contracts are of the greatest consequence to the citizens of every state.

* * * * *

The right to bring suit in the several courts of this state having jurisdiction is a privilege of every citizen of this state. Especially is this true with reference to the enforcement of contracts. A citizen of another state may come into this, and acquire and enjoy property. He may inherit and transmit property. He may enter into contracts, to the same extent that a citizen of this state can do so, and in this his rights are guarantied by the above provision of the constitution; and I think that his right to bring suit in this state, in any case where a citizen of the state may, is also guarantied and protected by this provision of the constitution. This right does not depend upon the fact of the defendant's having property in this state which can be reached by execution. There are many cases where, in a suit between citizens of this state, there can be no property found out of which to satisfy an execution; nevertheless the plaintiff has a right to plant his suit, litigate his claims, and obtain judgment. *Wilson v. Fire-Alarm Co.*, (Mass.) 20 N. E. Rep. 318.

4. The fourth reason set out by the circuit judge affords no excuse for his declining to hear the case. None of the reasons alleged appear to me to be valid reasons for refusing to hear the case, or for striking it from the docket. No court or judge has a lawful right to deny to suitors the privilege of bringing and prosecuting their suits, upon the ground that to entertain them will entail expense upon the county. The parties were rightfully before the circuit court for the county of Wayne. The court had full jurisdiction of the parties and the subject-matter, and the circuit judge was in error in holding that the court had no jurisdiction, or that

it had a discretion whether to entertain the suit or not. A *mandamus* must issue as prayed for, directing Hon. George Gartner, circuit judge for the county of Wayne, to reinstate said cause upon the calendar of said court.

MORSE and GRANT, JJ., concurred.

CAMPBELL, J. (dissenting.) * * * The jurisdiction, in my view, depends entirely on the policy of the statutes of Michigan. Without passing on the point directly, I am inclined to think that, if the suit had been begun in the statutory way, the controversy might be litigated in our courts somewhere against the parties reached. But the controversy is fairly presented, not whether our courts can entertain proceedings between non-residents, but whether this suit is brought at such a place and in such a way that the Wayne circuit court is legally bound to hear it, and has no option on the subject. If not legally bound to do so, we have no right to review its discretion in declining to hear it. * * *

* * * When a suit has been so far instituted as to fix the jurisdiction against any defendant, although the authorities are not entirely clear, there is usually no obstacle to a waiver of strict procedure by voluntary action under appearance. But I have found no support anywhere for the doctrine that jurisdiction itself can be given in any way or in any case not provided for by law; and there is no provision in statute or common law which allows jurisdiction to depend on the mere will of parties. * * *

When we look at the judiciary laws, we shall find them as precise in their directions as the common-law practice, but simplified in details. They provide both where and how suits shall be begun, and of what the courts shall have cognizance. It is declared that the circuit courts shall have power, and it shall be their duty, to hear and determine all such matters as may be lawfully brought into said courts." It is further declared that the rules regulating their practice "shall govern the practice and proceedings in the circuit courts, until altered by the supreme court, or by their authority." Section 6467.

* * * Under our statutes it is impossible to hold that any circuit court has jurisdiction without either process or service of declaration. Those are the only methods recognized. Until a suit is pending, no attorney has official authority to appear for a client, and when a suit is actually

pending no party can answer for any other party. No court can be compelled to assume the burden or authority of jurisdiction, unless in cases authorized by law. It is not in the power of private persons, whether citizens or not, to impose duties on courts, except by following the legal rules. The public officers, judicial or otherwise, cannot have duties laid on them by private action. * * *¹²

¹² An express waiver of service of process in a suit confers jurisdiction over the defendant making such waiver, even though it is made outside the territorial jurisdiction of the court. But a mere admission or acceptance of the fact of service outside the jurisdiction will not amount to such a waiver.—*Jones v. Merrill* (1897), 113 Mich. 433.

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NASHUA RIVER PAPER CO. v. HAMMERMILL PAPER CO.

Supreme Judicial Court of Massachusetts. 1916.

223 Massachusetts, 8.

RUGG, C. J. The question is whether, in a contract between a manufacturer and its sales agent, a provision is valid to the effect that:

"No action at law, equity or chancery shall be instituted or maintained by the corporation in any court of any state of the United States or in any Circuit or District Court of the courts of the United States against the company other than in the courts of the common pleas of the state of Pennsylvania."

This stipulation occurs in an ordinary commercial contract between a corporation domiciled in this commonwealth and another corporation incorporated under the laws of Pennsylvania.

It becomes necessary to review some of the cases. *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray, 174, was an action upon a policy of insurance, one stipulation of which, incorporated in the contract by reference to the by-laws of the company, was in substance that any "action shall be brought at a proper court in the county of Essex." It was held that this stipulation was not binding, and that an action could be

brought in any county where the venue properly might be laid. The general principle on which this decision was made to rest was that it was not within the province of parties to enter into an agreement concerning the remedy for a breach of a contract, which is created and regulated by law. Considerations of public policy were adverted to as supporting the conclusion, but not given decisive weight. Chief Justice Shaw, in concluding the discussion, said:

"The greatest inconvenience would be in requiring courts and juries to apply different rules of law to different cases, in the conduct of suits, in matters relating merely to the remedy, according to the stipulations of parties in framing and diversifying their contracts in regard to remedies."

In *Hall v. People's Mut. Fire Ins. Co.*, 6 Gray, 185, the provision of the contract of insurance was explicit to the effect that no action should be brought upon the policy except in the county of Worcester. Chief Justice Shaw, in giving the opinion of the court, after adverting to *Nute v. Hamilton Mut. Ins. Co.* as substantially deciding the question said:

"The court were of opinion that a stipulation in an original contract, that in case of breach the suit shall be brought in a particular county, or, in other words, that a suit shall not be brought in a county in which it is directed by law to be brought, is not a proper matter of contract. After a contract has been made and broken, the remedy is regulated by law, and of course must be governed by the law of the forum where the remedy is sought. * * * It is a well settled maxim that parties cannot, by their consent, give jurisdiction to courts, where the law has not given it; and it seems to follow, from the same course of reasoning, that parties cannot take away jurisdiction, where the law has given it."

* * * * *

It was held in *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365, that a statute making it a condition precedent to a foreign corporation doing business within a state, that it would not remove suits from state to federal courts, was unconstitutional and a contract to that effect was invalid. It there was said, at page 451:

"A man may not barter away his life or his freedom, or his substantial rights. * * * In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exer-

cise his right to remove his suit to a federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented."

This point was reaffirmed expressly in *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148. * * *

It was held in *Benson v. Eastern Building & Loan Ass'n*, 174 N. Y. 83, 86, 66 N. E. 627, in substance that parties cannot in the ordinary case by contract deprive courts of competent jurisdiction of their power to adjudicate causes on the ground that that jurisdiction is prescribed by law and it cannot be increased or diminished by agreement of parties. In *Mut. Reserve Fund Life Ass'n v. Cleveland Woolen Mills*, 82 Fed. 508, at page 510, 27 C. C. A. 212, at 214, it was said by Lurton, J.:

"The policy [of insurance] * * * contained a stipulation that no suit in law or equity should be brought upon it except in the Circuit Court of the United States. This provision intended to oust the jurisdiction of all state courts is clearly invalid. Any stipulation between contracting parties distinguishing between the different courts of the country is contrary to public policy and should not be enforced."

* * * * *

So far as we are aware, the current of authority (with the exceptions presently to be noted) is unbroken in support of the principle laid down in *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray, 174, although that principle is followed by compulsion of authority and under protest by Judge Hough in *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.* (D. C.) 222 Fed. 1006. There are two of our own cases where the principle was not applied and which appear to be exceptions to it. In *Daley v. People's Building, Loan & Sav. Ass'n*, 178 Mass. 13, 59 N. E. 452, an action was brought by a citizen of this commonwealth which involved the construction of a condition contained in his certificate of membership in the defendant corporation, to the effect that:

"Any action brought against this association by any shareholder shall be brought * * * in the county of Ontario, state of New York."

It was held that this condition of the contract should be enforced. After stating that it was not meant to overrule *Nute v. Hamilton Mutual Insurance Co.*, 6 Gray, 174, the court said:

"Here we are dealing with a New York corporation, most of whose members would live in New York, and the greater part of whose dealings and contracts naturally would take place also in New York. There, we take it from *Greve v. Aetna Live Stock Ins. Co.*, 81 Hun, 28 [30 N. Y. Supp. 668], which was put in evidence, the condition would be an answer to an attempt to sue in another county. * * *

It is obvious that the assumption based upon *Greve v. Aetna Live Stock Ins. Co.*, 81 Hun, 28, 30 N. Y. Supp. 668, that such a contract would be valid under the laws of New York, was an important factor in the reasoning of the court. The *Daley* Case was decided in February, 1899. It was held, however, in *Benson v. Eastern Bldg. & Loan Ass'n*, 174 N. Y. 83, 86, 66 N. E. 627, decided in March, 1903, that *Greve v. Aetna Live Stock Ins. Co.* did not state correctly the law of New York, and precisely the same condition that was before this court in *Daley v. People's Bldg., Loan & Sav. Ass'n* was there adjudged to be invalid and unenforceable. If this case had been decided before the *Daley* Case, and the law of New York had been proved, as there declared finally and conclusively, instead of the erroneous view put forward in the decision of the *Greve* Case by an inferior court, an important link in the chain of reasoning by which the conclusion in the *Daley* Case was reached would have been wanting. The binding force of such a decision is open to question. * * *

In *Mittenthal v. Mascagni*, 183 Mass. 19, 66 N. E. 425, 60 L. R. A. 812, 97 Am. St. Rep. 404, the parties were both nonresidents. The action was on a contract made in Florence, Italy, where the defendant, a subject of the king of Italy, had his home and where the plaintiffs, citizens of New York, elected a domicile by a provision of the contract. It related to a concert tour through the various states of this country, and was partly to be performed in Florence, and contained the provision that the courts of Florence, Italy, should have exclusive jurisdiction of any difference between the parties, except that the defendant reserved a right of action in New York for a payment of his recompense due under the contract. It was held that under the circumstances

of hurried travel through many different jurisdictions, it was reasonable that the parties should fix upon the jurisdiction of the domicile of the defendant as the one where disputes should be adjusted. As both the parties were nonresidents, they had no standing in the courts of this state as matter of strict right, but only as matter of comity. * * *

The *Daley* and *Mittenthal* Cases as to the points adjudicated, while not extending the doctrine of the *Nute* Case, do not overrule it and are not inconsistent with it. All three of these cases may be treated as stating the law applicable to the several states of facts presented to the court. The *Nute* Case lays down the general principle. The other two cases stand as sound upon their several states of facts. To extend them to the present case involves overruling the *Nute* Case. That case, as has been pointed out, states a general principle which has been adopted and prevails in all federal courts by reason of the binding decisions of the United States Supreme Court, in *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365; and *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148. The same rule prevails generally in all states where the question has arisen. It relates to a matter as to which uniformity of decision and harmony of law among the several jurisdictions of this country is desirable. It would be unfortunate if contracts touching a subject of general commercial interest and which may be broadly operative as to jurisdiction, should be held valid in one state and invalid in all others. All these circumstances bring us to the conclusion that the clause in the contract here in question is unenforceable and that, therefore, the action can be maintained in the courts of this commonwealth.

The plaintiff's demurrers to the defendant's answer in abatement and answer in bar must be sustained. The defendant has leave to answer to the merits.

So ordered.¹⁸

¹⁸ See note to this case in L. R. A. 1916D 696.

As to the right of a state, by various devices, to prevent removal of cases to federal courts by foreign corporations, see *Harriscn v. St. Louis & San Francisco R. R. Co.* (1913), 232 U. S. 318; *Herndon v. Chicago, R. I. & Pac. Ry. Co.* (1909), 218 U. S. 135.



FULTON v. RAMSEY.

*Supreme Court of Appeals of West Virginia. 1910.**67 West Virginia, 321.*

POFFENBARGER, J. The sole question in this cause, namely, whether Joseph Ramsey, Jr., George J. Gould, and William E. Guy, non-resident defendants, proceeded against by order of publication, appeared herein, in the court below, by attorneys, so as to enable that court to render a personal decree against them grows out of the operations of what is styled in an agreement, and popularly known, as "the Little Kanawha Syndicate," which agreement is dated December 2, 1901, and was signed by said Ramsey, Gould, Guy, and others.

That syndicate seems to have been formed for the purpose of purchasing the Little Kanawha Railroad, large areas of coal lands, and other properties in this state. * * *

In anticipation of the launching of this enterprise, Mr. Edward D. Fulton had acquired an option on the Little Kanawha Railroad as well as the title to, and options upon, large areas of coal and coal lands and other property in the counties of Braxton, Gilmer, and Lewis. Under certain agreements, and with intent to dispose of the same to the syndicate, he assigned the option on the railroad, at the option price, and assigned his coal and coal land options, and conveyed his coal and coal lands, at certain prices named in the assignments and deeds, to the St. Louis Union Trust Company, to hold as trustee for the syndicate. For some reason, the syndicate concluded to abandon its plan and sell all its property. Accordingly, it failed to carry out its contemplated arrangements with Fulton, and he brought this suit, in the Circuit Court of Braxton county to compel specific performance of his alleged contract with the syndicate. * * *

On the 1st day of December, 1908, the following order, relied upon by Fulton as showing a general appearance, was entered: "This day R. W. McMichael and John B. Morrison, attorneys practicing in this court, appeared and asked the court to permit them to appear specially for Joseph Ramsey, Jr., George J. Gould, and William E. Guy, as managers of the Little Kanawha Syndicate, and ask a

continuance of this cause for thirty or sixty days to enable them to prepare their defense, or to determine whether they would desire to appear generally, and stating that they did not desire to appear generally for said parties at this time, but that they desired to move the court to continue the cause without appearance other than specially for the purposes of the continuance. The plaintiff, by his counsel, resisted the said motion to continue the hearing, and thereupon said counsel for said defendants Ramsey, Gould, and Guy, announced that it was their desire to withdraw and not appear to the case, and thereupon counsel for plaintiff and while said counsel for defendants were present, asked that the cause be submitted for hearing and accordingly the said cause was submitted for hearing." * * *

* * * * *

We think the order was nothing more than an inquiry, addressed to the court, for information as to what could be done by way of obtaining a postponement of action in the cause, without submitting to the jurisdiction of the court for all purposes, or a conditional, not an absolute and unqualified, motion for a continuance. The motion, as recorded, if it can be regarded as a motion, signified a desire for a continuance, if it could be had without a waiver of service of process upon the defendants, but distinctly declared unwillingness to ask or to take a continuance if it involved such a waiver. It does not say in express terms that a motion to continue was made. On the contrary, it says McMichael and Morrison asked the court to permit them to appear specially for their clients and ask a continuance, to enable them to determine whether they would desire to appear generally, and stated that they did not desire to appear generally at that time. It then says counsel for plaintiff resisted "said motion to continue." That means the motion or request made. It was not in terms a motion, and, read in the light of the protest, submitted along with it, it cannot be regarded as anything more, in substance and effect, than an offer to move for a continuance, if it could be done without waiving process, accompanied by a declaration of intent not to move at all, if such action involved waiver, and an immediate declaration of determination not to say or do anything more, after having been informed that a motion for

a continuance, so made and described upon the record, would be in law a submission to the jurisdiction of the court.

* * * * *

* * * No instance can be found in which a party has been held to have impliedly bound himself to submission, without having asked or received some relief in the cause or participated in some step taken therein. Mere presence in the court room when the case is called, or examination of the papers in it filed in the clerk's office, is not enough. Nor could a conversation with plaintiff's counsel or the judge of the court, about the case, be regarded as an appearance. No decision goes that far. Under this text in 3 Cyc. 504. "Any action on the part of defendant, except to object to the jurisdiction, which recognizes the case as in court, will amount to a general appearance," a long list of decisions is cited, but, in every one of them, something was done in the cause—some affirmative act was done to delay, speed, or defend the cause. In every instance the conduct, deemed a waiver, amounted to more than a mere inquiry or conversation about it. The test, according to a late decision of the Federal Supreme Court (*Merchant's Heat & Light Co. v. Clow & Sons*, 204 U. S. 286, 27 Sup. Ct. 285), is whether the defendant became an actor in the cause. The instances of the assumption of the role of actor in a suit disclosed by the federal decisions, are such as the taking of a continuance; filing a demurrer to plaintiff's pleadings, without limiting it to the question of jurisdiction; filing a plea of intervention, pleading to issue or to the merits in the first instance; or filing sets-off, counter-claims or notices of recoupment. Broad as is this doctrine of waiver, it does not cover all acts done by a defendant. He may talk even to the court about the merits of the cause without subjecting himself to it. In *Citizens' Sav. & Trust Co. v. Railroad Co.*, 205 U. S. 46, 27 Sup. Ct. 425, argument upon the merits of the cause was indulged in, at the hearing upon the sufficiency of the pleas to the jurisdiction, and this was relied upon as constituting a general appearance; but Mr. Justice Harlan, speaking for the court, said: "This is too harsh an interpretation of what occurred in the court below. There was no motion for the dismissal of the bill for want of equity. The discussion of the merits was permitted or invited by the court in order that it might be informed on that question in

the event it concluded to consider the merits along with the question of the sufficiency of the pleas to the jurisdiction. We are satisfied that the defendants did not intend to waive the benefit of their qualified appearance at the time of filing the pleas to the jurisdiction." * * * These precedents amply sustain the view that something substantially beneficial to the defendant or detrimental to the plaintiff, relating to or affecting the progress of the cause, asked, done, or accepted by the former, is essential to the establishment of a waiver of process or service thereof. There must be something more than a mere pretext for the claim of jurisdiction over him. He must either enter an appearance, ask some relief in the cause, accept some benefit as a step therein or do something from which the necessary implication of submission to the jurisdiction of the court over his person arises. "The principle to be extracted from the decisions on the subject as to when a special appearance is converted into a general one is that, where the defendant appears and asks some relief which can only be granted on the hypothesis that the court has jurisdiction of the cause and the person, it is a submission to the jurisdiction of the court as completely as if he had been regularly served with process, whether such an appearance, by its terms, be limited to a special purpose or not." 2 Ency. Pl. & Pr. 625. "The expression 'for any purpose connected with the cause,' however, is not to be taken as wholly unrestricted in meaning. The appearance must have some relation to the merits of the controversy, and the purpose must be to invoke some action on the part of the court having direct bearing in some way upon the question of the judgment or decree proper to be entered." *Bank v. Knox*, 133 Iowa, 443, 446, 109 N. W. 201. The general principle, upon which we rely, was applied by the Supreme Court of Massachusetts in *Lowrie v. Castle*, 198 Mass. 82, 83 N. E. 1118, under circumstances even more unfavorable to the defendant than those presented here. The non-resident defendant in that case, within 10 days after the return day of the writ, applied to the court for an extension of the time within which he could appear, in order that he might decide whether to waive the lack of proper service and voluntarily appear, or to insist upon his rights as a non-resident, and the court allowed such extension. After the expiration of the 10 days, but within the period of

the extension allowed, he moved to dismiss the action, stating in his motion that he appeared only for the purpose of moving a dismissal, and the motion was sustained. The appellate court held it to be within the inherent power of the trial court to grant such an extension, without prejudice to the right to except to the jurisdiction, and affirmed the judgment of dismissal. In delivering the opinion of the court, Hammond, Judge, said: "It is to be borne in mind that this is not a case where a defendant, upon whom process has been duly served, and who, therefore, is within the jurisdiction of the court and liable to default if he does not seasonably appear, asks for delay. It is a case where a non-resident defendant who, for lack of service upon him, is not within the jurisdiction and cannot be brought within it, fearing lest the court may regard the service sufficient and default him, comes into court, and says, in substance, that he is in doubt whether to waive proper service and voluntarily appear, or to insist upon his rights as a non-resident, and ask for time to decide. Certainly it is a part of the inherent power in a court to set a time within which the non-resident must make up his mind and act accordingly, and that was all the court did. The motions for dismissal were properly before the court." Against this express decision of a reputable and able court, under a state of facts less favorable to the defendant than those presented here, and other decisions, showing that something substantial must be asked or done by the defendant, relating to or affecting the merits of the cause, we have nothing but a generalization, founded upon, and, therefore, to be interpreted by, facts falling far short of those disclosed here, for the proposition that [a defendant who makes]¹⁴ a mere offer to move for a continuance provided it can be done without a waiver of service, accompanied by his declaration of intention not to appear generally nor to ask or take such continuance, if it involved such waiver, and signification of his desire and determination to withdraw the request, for nothing but a request had been made, on being informed that such a motion would be a general appearance, is bound thereby. We feel amply justified, upon authority as well as upon reason and principle, in withholding our assent to it, and saying such action did not constitute a general appearance. * * *

*Affirmed.*¹⁵

[BRANNON and WILLIAMS, JJ., dissent.]

¹⁴ There appears to be a misprint in the published opinion, which is here sought to be corrected by introducing the words inclosed in brackets.

¹⁵ The question is further discussed at some length in *Western Indemnity Co. v. Rupp* (1914), 235 U. S. 261.

The Texas statute by which a special appearance, made solely to contest the jurisdiction of the court over the person of the defendant, is converted into a general appearance and submission to the jurisdiction of the court, does not violate the Fourteenth Amendment which forbids a state to deprive any person of life, liberty or property without due process of law,—*York v. Texas* (1890), 137 U. S. 15; but such a statute will not be followed by a federal court sitting in Texas,—*Mexican Central Ry. Co. v. Pinkney* (1892), 149 U. S. 194.

In *Perrine v. Knights Templar, etc., Indemnity Co.* (1904), 71 Neb. 267, it was held that an objection to the jurisdiction of the court over the subject matter of the action constituted a general appearance.

June WALL v. CHESAPEAKE & OHIO RAILWAY CO.

United States Circuit Court of Appeals, Seventh Circuit.
1899.

95 Federal Reporter, 398; 37 Circuit Court of Appeals, 129.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. * * * The summons issued by the Superior Court of Cook county was returned with an indorsement of service as follows:

"Served this writ on the within-named Chesapeake & Ohio Railway Company, a corporation, by delivering a copy thereof to U. L. Truitt, the Northwestern passenger agent of said corporation, this 12th day of April, 1898. The president of said corporation not found in my county.

"JAMES PEASE, Sheriff.

"By B. Gilbert, Deputy."

After this return was made, and the declaration filed, the defendant proceeded to remove the case to the United States Circuit Court for the northern district of Illinois, and, when so removed, entered its special appearance for the purpose of moving to set aside the return of the summons on the ground that U. L. Truitt, the person on whom it was served, was not the defendant's agent, or a person on whom proper service of summons could be made. The motion to set aside

was founded upon the affidavits of Ulysses L. Truitt and H. W. Fuller, the general passenger agent of the defendant, setting forth that at the time of the service Truitt was in the employ of the defendant company for the purpose of influencing persons who might be desirous of travelling from Chicago and vicinity to points east of Cincinnati and Lexington to patronize those railway lines leading out of Chicago that made connections with defendant's road at Cincinnati and Lexington; that Truitt had no other connection with the defendant, and had no power or authority from said defendant, either express or implied, to make any contract or rates for transportation over the railway of the defendant, and that his authority was strictly limited to conveying information concerning existing rates as established by the officials of the defendant company, and concerning the connections and time made and facilities possessed by the defendant in and about its passenger traffic, and had no other authority whatever; that the defendant was a resident of the state of Virginia, having its principal office at Richmond, in that state, and was not operating any railway in said county of Cook, and had no place of business therein. Upon these affidavits (no counter affidavits being filed) the court below, by its order, set aside the service of the summons, to which ruling the plaintiff duly excepted. * * *

The contention is that the practice adopted to get rid of the service by motion to quash and set aside was irregular and unjustified in law, and that instead of proceeding by motion, the defendant should have filed a plea in abatement, and had a trial of the question by a jury. This is an important and radical contention, and the ground upon which it is sought to support it is that it is the practice in such cases recognized and established by the Supreme Court of the state of Illinois. That court first made such a ruling in *Railway Co. v. Keep*, 22 Ill. 9, and has in numerous decisions since adhered to it, and it is contended that this court should follow the state practice. But this contention cannot be supported, either upon reason or authority.

* * * * *

Under these decisions, it is evident that the law vests a reasonable discretion in the federal courts to judge in any given case how far they will feel bound to follow the practice or decisions of the state courts. There can be no doubt

that the rule upon this question of practice prevailing in the Illinois state courts is contrary to the general rule on the subject in this country, as well as in England. There is no more reason for requiring a plea in abatement and a jury trial to test the question of a sufficient service of a summons than there would be to require the same proceeding, including a jury trial in all cases where now a motion is held to be the proper remedy. The constitutional right to a jury trial obtains whenever there is any question at issue involving the life, liberty, or property of the citizen. But a motion to quash a service of summons, or any other process or order, for insufficiency in the service, involves no such substantial right. The setting aside of service does not affect the writ or the status of the action in court. Another service can be made, and the action proceed. If the original process were exhausted, a new summons could be issued. If the objection were to the writ itself, a plea in abatement would be the proper remedy, the office of which is to give the plaintiff a better writ. 1 Chitty Pl. 446-457. But here the plaintiff still has his writ. The order only sets aside the service, as being unwarranted and insufficient in law. No substantial right is affected by the decision. There are many matters pending in the progress of a case which are daily determined upon motion that are much more important in affecting substantial rights than a motion to set aside an irregular service of process. Take, for instance, the motion for a new trial upon newly discovered evidence after the plaintiff has recovered a substantial verdict. The court, in its discretion, may set aside the verdict upon a motion. Whether the plaintiff will ever be able to obtain another is uncertain, and yet no one would think of objecting to trying such a question before the court upon motion supported and opposed by affidavits.

The practice in the United States Circuit Court for this circuit was fairly well established by precedent when this action was begun. So that if the defendant had resorted to a plea in abatement, instead of making a motion, he would have subjected himself to the criticism that he was departing from the usual practice adopted in such cases. In *Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, *supra*, [9 U. S. App. 212, 4 C. C. A. 403, 54 Fed. 420] a similar motion was made and heard before Judge Blodgett at

the circuit court without question as to the propriety of the practice, and an order made quashing the service. Judge Blodgett delivered an opinion, holding the service insufficient, which was affirmed by this court, where no question was made as to the proper practice being by motion. In *American Cereal Co. v. Eli Pettijohn Cereal Co.*, 70 Fed. 276, the same practice was adopted, and the service set aside upon motion; Judge Showalter delivering an opinion justifying the practice, and giving good and sufficient reason for it, as follows:

"The determining consideration is that the matter at issue, however it may result, will not end the suit. If found against the defendant, the defendant is in court and must plead; if in favor of the defendant, the return of the writ is vacated or quashed, and the suit remains pending; whereas a plea, either in abatement or in bar, if made out by proofs, puts an end to the proceeding. The view that a motion to be determined upon affidavits is the proper practice in such cases is sustained by English decisions,"—citing *Hemp v. Warren*, 2 Dowl. (N. S.) 758; *Preston v. Lamont*, 1 Exch. Div. 361.

In the last of the above-named English cases, Amphlett, B., in a concurring opinion, gives the reason for having the question of service determined summarily upon motion, instead of by plea, as follows:

"The decision of the judge at chambers can be contested on appeal, and, if necessary, in the house of lords. There is convenience in this because it is a speedy and inexpensive mode of determining that question before any expense is incurred upon the merits of the action, whereas, if the question may be raised by plea, all the expenses of the action may be thrown away. * * * Convenience and justice, I think, require that this question should not be the subject of a plea."

In the state courts in this country, while some question has been made as to the conclusiveness of the sheriff's return, it has generally been held, that it is only *prima facie* true, and that the truth or falsity of the return may be determined upon motion supported by affidavit. The rule in England at the common law was that the sheriff's return was conclusive and could not be disputed, and the defendant's only remedy was by an action against the sheriff for

a false return. But in this country, where we have so many different codes of practice, and so many kinds of substituted service, such a rule would be inconvenient, unjust, and impracticable. Upon examination of a great many American cases, we believe the general rule in this country, with some dissenting cases like those in Illinois, to be this: That the sheriff's return stands in the first instance as the affidavit of the sheriff, but is subject to be disputed by affidavits on the part of the defendant showing to the satisfaction of the court, upon motion to quash, that the return is not true in point of fact, or, as in the case at bar, is insufficient in law. *Carr v. Bank*, 16 Wis. 50; *Bond v. Wilson*, 8 Kan. 228; *Crosby v. Farmer*, 39 Minn. 305, 40 N. W. 71; *Walker v. Lutz*, 14 Neb. 274, 15 N. W. 352; *Wendell v. Mugridge*, 19 N. H. 109; *Stout v. Railroad Co.*, 3 McCrary 1, 8 Fed. 794; *Van Rensselaer v. Chadwick*, 7 How. Prac. 297; *Wallis v. Lott*, 15 How. Prac. 567; *Watson v. Watson*, 6 Conn. 334; *Rowe v. Water Co.*, 10 Cal. 442. In this case the sheriff returned that he had made service upon U. L. Truitt, Northwestern passenger agent of the defendant. If this return had been true, the service would have been good. But it is very clear from the affidavits filed that it was not true. Truitt was not Northwestern passenger agent of the company, or any other agent, but a mere employe for a certain purpose. The sheriff was mistaken, and there was no need to resort to the clumsy method of a plea in abatement and a trial by jury to ascertain this fact.

It has been suggested that, allowing the practice by motion to be correct and preferable, still, in analogy to the practice under a plea in abatement of giving the plaintiff a better writ, the defendant should state in his affidavits on whom the summons may be properly served, or, if there be no such person in the district, to state that fact. No authority is cited for such a rule, and we have searched in vain for a precedent to warrant it. * * * There is no suggestion in any of the adjudicated cases that this doctrine has any application to a motion to set aside service. It only applies to a plea in abatement where the objection is to the writ itself. * * * The judgment of the circuit court is affirmed.

WOODS, Circuit Judge (dissenting). I agree that it was proper practice to try the question of service by affidavits,

but I think the showing defective because it was not made to appear that there was in Cook county, or elsewhere in Illinois, or the Northern District of Illinois, no agent on whom an effective service could be made. If there is no precedent on the subject, it is a good time to make one. The analogy of the motion to set aside the return of service to a plea in abatement of the writ was strong. The writ issued, as it was, out of the county court had been exhausted, and, the service thereof having been set aside, the plaintiff needed a new or *alias* writ as well as a new service. * * *

23
Take WABASH WESTERN RAILWAY v. BROW.
Supreme Court of the United States. 1896.

164 United States, 271.

Joseph Brow commenced suit in the Circuit Court of Wayne County, Michigan, against the Wabash Western Railway to recover the sum of twenty thousand dollars for personal injuries, caused, as he alleged, by defendant's negligence, by the service, September 24, 1892, of a declaration and notice to appear and plead within twenty days, on Fred J. Hill, as agent of the company, which declaration and notice were subsequently filed in that court. On the 7th of October defendant filed its petition and bond for removal in that court, and an order accepting said bond and removing the cause to the Circuit Court of the United States for the Eastern District of Michigan, and directing the transmission of a transcript of record, was entered.

* * * * *

The record having been filed in the Circuit Court of the United States for the Eastern District of Michigan, a motion to set aside the declaration and rule to plead was made in the cause in these words and figures: "And now comes the Wabash Western Railway, defendant (appearing specially for the purpose of this motion), and moves the court, upon the files and records of the court in this cause, and upon the affidavit of Fred J. Hill, filed and served with this motion, to set aside the service of the declaration and rule to plead in this cause, and to dismiss the same for want of jurisdiction of the

person of the defendant in the state court from which this cause was removed, and in this court." The affidavit was to the effect that Hill, on September 24, 1892, was the freight agent of "the Wabash Railroad Company, a corporation which owns and operates a railroad from Detroit to the Michigan state line, and was not an agent of the Wabash Western Railway, defendant in this suit;" * * *

* * * * *

FULLER, C. J. This was not a proceeding *in rem* or *quasi in rem*, but a personal action brought in the Circuit Court of Wayne county, Michigan, against a corporation which was neither incorporated nor did business, nor had any agent or property, within the state of Michigan; and service of declaration and rule to plead was made on an individual who was not, in any respect, an officer or agent of the corporation. The state court, therefore, acquired no jurisdiction over the person of the defendant by the service. Did the application for removal amount to such an appearance as conceded jurisdiction over the person?

We have already decided that when in a petition for removal it is expressed that the defendant appears specially and for the sole purpose of presenting the petition, the application cannot be treated as submitting the defendant to the jurisdiction of the state court for any other purpose. *Goldey v. Morning News*, 156 U. S. 518.

The question "how far a petition for removal, in general terms, without specifying and restricting the purpose of the defendant's appearance in the state court, might be considered, like a general appearance, as a waiver of any objection to the jurisdiction of the court over the person of the defendant," was not required to be determined, and was, therefore, reserved; but we think that the line of reasoning in that case and in the preceding case of *Martin v. Baltimore & Ohio Railroad*, 151 U. S. 673, compels the same conclusion on the question as presented in the case before us.

In *Goldey v. Morning News*, Mr. Justice Gray, speaking for the court, observed: "The theory that a defendant, by filing in the state court a petition for removal into the Circuit Court of the United States, necessarily waives the right to insist that for any reason the state court had not acquired jurisdiction of his person, is inconsistent with the terms, as well as with the spirit of the existing act of Congress regu-

lating removals from the court of a State into the Circuit Court of the United States.

* * * To use the language of Judge Drummond in *Atchison v. Morris*, 11 Fed. Rep. 582, we regard it as not open to doubt that "the party has a right to the opinion of the Federal court on every question that may arise in the case, not only in relation to the pleadings and merits, but to the service of process; and it would be contrary to the manifest intent of Congress to hold that a party, who has the right to remove a cause, is foreclosed as to any question which the Federal court can be called upon, under the law, to decide."

* * * * *

Moreover the petition does not invoke the aid of the court touching relief only grantable in the exercise of jurisdiction of the person. The statute imposes the duty on the state court, on the filing of the petition and bond, "to accept such petition and bond and proceed no further in such suit," and, if the cause be removable, an order of the state court denying the application is ineffectual, for the petitioner may, notwithstanding, file a copy of the record in the Circuit Court and that court must proceed in the cause.

* * * * *

It is conceded that if defendant had stated that it appeared specially for the purpose of making the application, that would have been sufficient; and yet when the purpose for which the applicant comes into the state court is the single purpose of removing the cause, and what he does has no relation to anything else, it is not apparent why he should be called on to repeat that this is his sole purpose; * * *

* * * * *

We are of opinion that the filing of a petition for removal does not amount to a general appearance, but to a special appearance only.

* * * * *

BREWER and PECKHAM, JJ., dissented.¹⁶

¹⁶ The Supreme Court of Illinois, in *Greer v. Young* (1887), 120 Ill. 184, explains and justifies the common law rule as follows:—

"Where the objection is founded upon extrinsic facts the matter must be pleaded in abatement, so that an issue may be made thereon, and tried, if desired, by a jury, like any other issue of fact. If the plaintiff is successful upon such issue, the judgment is *quod recuperet*. It is therefore to him a valuable right to have the issue thus made up and

tried. To permit the defendant to try an issue of this kind on affidavit, as was done, gives him a decided advantage, for if he fails, his motion would be simply overruled, and he would still have a right to a trial on the merits. To permit a party to thus speculate on the chance of succeeding on a purely technical ground, without incurring any risk, and without any compensation to the plaintiff in case of failure, is contrary to the spirit of the common law, and is in direct conflict with the decisions of this court."

See also *Mayfield v. Barnard* (1870), 43 Miss. 270.

11
Labbe

NEOSHO VALLEY INVESTMENT CO. v. CORNELL.

Supreme Court of Kansas. 1899.

60 Kansas, 282.

SMITH, J. On January 15, 1897, judgment was rendered in the district court of Bourbon county in favor of plaintiffs below, Carrie A. Cornell and others, against the Neosho Valley Investment Company, for the sum of \$5665, with interest at the rate of ten per cent. per annum and costs, declaring the same to be a first lien upon certain real estate located in said county, and directing foreclosure. Upon the summons in the cause was indorsed the following return:

"Received this summons May 17, 1896; executed it by delivering to the Neosho Valley Investment Company, by delivering a true and certified copy of the within summons to L. M. Bedell, its cashier and treasurer; the president or other chief officer not found in my county. May 19, 1896.

"J. W. Bennett,

"Sheriff Labette County, Kansas."

The judgment was rendered by default, the investment company making no appearance. On April 19, 1897, the investment company filed its petition for a new trial of the foreclosure case, under section 606 of chapter 95, General Statutes of 1897 (Gen. Stat. 1889, § 4671), wherein it attacked the service of summons in the cause, and alleged that L. M. Bedell, mentioned in the return of the sheriff, was not during the month of May, 1896, nor had he ever been, the cashier of the company, and that the vice-president, secretary and treasurer of the company, during the month of May, 1896, had resided in the city of Chetopa, in Labette county, Kansas.

Coupled with this attack on the service was an allegation in the petition for a new trial in substance as follows: * * * that the judgment was taken in fraud of the rights of the company. * * *

[Proceedings under this petition for a new trial were apparently dropped, and when the sheriff was about to sell the land upon which the judgment was a lien, this action was commenced by a petition alleging the same facts as the petition for a new trial, an injunction being prayed for. Trial was had and judgment went against the company.]

Our view of this case renders it unnecessary to consider the questions raised on the sufficiency of the service of the summons. That question has been put past our consideration by the act of the plaintiff in error. In the petition for a new trial the investment company was not content with an attack upon the service of summons only, but sought to impeach the validity of the judgment on other grounds not jurisdictional in character. This appeal to the court for relief against the judgment, for reasons other than that the court failed to obtain jurisdiction over the person of the party defendant, involved the admission that the judgment was valid, and the plaintiff in error by this act treated it as such. In one paragraph of the petition for a new trial it is alleged that the court was without jurisdiction by reason of a fatal defect in the service. In another paragraph the judgment is attacked on the ground that there was no consideration for the note sued on, etc.

In *Adolph Cohen v. C. B. Trowbridge*, 6 Kan. 385, it is held that the filing of a motion to set aside a judgment, based partly on lack of jurisdiction and partly on error in the judgment itself, is a general appearance. (2 *Encycl. Pl. & Pr.* 632). Where a party voluntarily appears in court it is unnecessary to inquire what, if any, process has been served upon him. (*Carr v. Catlin*, 13 Kan. 393.) In *Meixell v. Kirkpatrick*, 29 Kan. 679, a party filed a demurrer to the petition upon several grounds, some jurisdictional and some not, claiming that the court had no jurisdiction of the person of the defendant, that the petition did not state facts constituting any cause of action, and that several causes of action were improperly joined. This demurrer was sustained on the ground that several causes of action were improperly joined. Justice Brewer, speaking for the court, said:

"When served with the summons, he (the defendant) appeared and filed a demurrer, which, while it alleged a lack of jurisdiction, presented also a number of other defenses, and defenses on the merits. Such plea, by the prior adjudications of this court, was equivalent to an appearance. A party who denies the jurisdiction of a court over his person must first present this single question. He may not mingle with his plea to the jurisdiction other pleas which concede jurisdiction, and thereafter insist that there was error in overruling his plea to the jurisdiction. As heretofore stated, the defendant by his demurrer raised a number of questions other than those which were jurisdictional, and invoked the judgment of the court thereon. By such other pleas he submitted himself and his rights to the jurisdiction of the court, and can no longer be heard to say that it had no jurisdiction."

The plaintiff in error earnestly contends that this petition for a new trial, being filed after judgment, cannot be construed into an entry of appearance in the cause, for the reason that the judgment was originally based upon void service and was wholly inoperative to affect any rights or property of the defendant below. This contention cannot be sustained under the authorities. The case of *Life Association v. Lemke*, 40 Kan. 142, 19 Pac. 337, is substantially similar in its facts to the case at bar. There, after judgment, defendant filed a motion on jurisdictional and non-jurisdictional grounds to set the judgment aside, and it was held that he entered a general appearance to the action.

* * * * *

For the reasons above stated, the judgment of the district court is affirmed.

25
Circuit

LOUISVILLE HOME TELEPHONE CO. v. BEELER'S
ADM'X.

Court of Appeals of Kentucky. 1907.

125 Kentucky, 366.

SPECIAL JUDGE CLAY. This action was instituted by Maggie Beeler, administratrix of her deceased husband, E.

C. Beeler, against the Cumberland Telephone & Telegraph Company and the Louisville Home Telephone Company, to recover damages for the death of her husband, which occurred in Louisville, Jefferson county, Ky., and which is alleged to have resulted from the joint negligence of the two companies. In addition to the allegations of negligence, the petition states that decedent was a resident of Bullitt county, and that each of the defendants was a common carrier, and passed into Bullitt county. Summons was served upon the Home Telephone Company by delivering a true copy thereof to its president, and also by delivering copies to parties who were stated in the return to be agents of said company, residing in Bullitt county. * * * The defendant Louisville Home Telephone Company filed an answer in three paragraphs. In the first paragraph defendant raised the question of jurisdiction by setting forth that its residence was in Jefferson county, that it did not have any office or agent in Bullitt county, and that it did not pass into said county. In the second and third paragraphs defendant, without waiving its objection to the jurisdiction of the court pleaded to the merits of the case. * * *

[The Bullitt Circuit Court held that the plea to the merits was a waiver of the plea to the jurisdiction; a trial was had, and verdict and judgment were rendered against the Home Telephone Company. From an order overruling its motion for a new trial the Company appeals.]

At the outset there is presented for our consideration the question, did the Bullitt circuit court have jurisdiction of the appellant, Louisville Home Telephone Company? In passing upon this point, we should first discuss the question whether or not appellant entered its appearance by filing its answer both to the jurisdiction and to the merits. * * *

Among the cases relied upon by appellee is the case of *City of Covington v. Limerick*, 107 Ky. 680, 19 Ky. Law Rep. 330, 39 S. W. 836, in which the court, after holding that the circuit court undoubtedly had jurisdiction over the person of the defendant, added the following: "But, in addition to the plea of jurisdiction, the answer of the defendant goes to the merits of the controversy, and is a waiver of any objection to the jurisdiction over the person of the defendant. This is the common law doctrine, and was held to be the law in this State in the case of *Baker v. L. & N. R. R. Co.*, 4 Bush 623."

In the case of *Baker v. L. & N. R. R. Co.*, 4 Bush 623, we find, however, that the defendant first answered to the merits without suggesting any objection to the jurisdiction, and trial was then had, resulting in a verdict which was set aside and a new trial ordered. Next came a hung jury. About a year and a half thereafter the defendant attempted to plead to the jurisdiction of the court. The court very properly held that its appearance had been entered long before.

* * * * *

Now, in the case under consideration, defense could not be made by demurrer to the jurisdiction because the petition stated facts sufficient to show jurisdiction. Nor could defense be made by motion to quash the summons, because, if the court had jurisdiction at all, the summons had been served upon the proper officer, the president of the corporation. Under the circumstances, therefore, the only kind of a defense that could be made by appellant, Louisville Home Telephone Company, was by answer. This method is provided for by section 118, which is as follows: "A party may, by an answer or other proper pleading, make any of the objections mentioned in section 92, the existence of which is not shown by the pleadings of his adversary; a failure so to do is a waiver of any of said objections except that to the jurisdiction of the court of the subject of the action." An answer being the only kind of defensive pleading that could be filed, the question arises, what sort of an answer should be filed? Should a party be required to file first an answer to the jurisdiction, and afterwards an answer to the merits, or should he have the right to file both at the same time? There is certainly no authority in the Code for filing one answer and then another answer; any answer subsequent to the original answer must be an amended answer. While in every case, no doubt, the trial court would permit an answer to the merits to be filed after an answer to the jurisdiction had been passed upon, yet the right to file an amended answer has always been held to be a matter within the sound discretion of the court. That being the case, would it not be the better practice to join all defenses in the same answer? There is certainly nothing in section 118 to the contrary. All that that section requires is that the party shall not answer to the merits without first making objection to the jurisdiction of the court. This view is not without authority to sustain it. Maxwell on

Code Pleading, p. 394, speaks as follows: "At common law pleas must be pleaded in their order; that is, dilatory pleas must be made and disposed of before a plea in bar could be determined. Under the code, however, all the defenses which a defendant may have are to be pleaded at one time, and in one answer. Therefore, matter in abatement may be joined with a plea to the merits."

* * * * *

The New York court of appeals has taken the same view. In *Sweet v. Tuttle*, 14 N. Y. 465, we have the following: "The first question is whether a defendant along with other defenses may set up in his answer the non-joinder of other parties who ought to have been sued with him. Under the former practice the non-joinder of defendants could be pleaded only in abatement, and could not be joined with a plea in bar; but, under the Code, there is no classification of answers or defenses corresponding with the distinction between pleas in abatement and in bar. The distinction is entirely gone, with the system to which it belongs. The defendant now answers but once, and he may set forth as many defenses as he thinks he has, but must state them separately

* * *

* * * * *

And in the case of *Little v. Harrington*, 71 Mo. 390, we find the following: "It is evident from these statutory provisions that only one answer is contemplated, and this is to contain whatever defense or defenses the defendant may have, thus dispensing with the common law rule that a plea in bar waives all dilatory pleas or pleas not going to the merits."

* * * * *

In view of the foregoing authorities, * * * we have reached the conclusion that a defendant may in one answer plead both to the jurisdiction and to the merits. It necessarily follows that a plea to the merits that recites that the defendant does not waive his objection to the jurisdiction of the court is not a waiver of the plea of the jurisdiction. We, therefore, hold that appellant's answer did not enter its appearance to this action.

* * * * *

Judgment reversed, and cause remanded for a new trial consistent with this opinion.¹⁷

¹⁷ The same practice obtains in Michigan under a statute passed in

1915, whereby all defenses, in abatement as well as in bar, may be raised simultaneously by notices given under the general issue, but the former defenses may be brought up for determination in advance of the trial on four days notice by either party. C. L. 1915, § 12456.

But the principle does not apply where defendant becomes an actor by filing a counterclaim. This constitutes a general appearance. *Linton v. Heye* (1903), 69 Neb. 450, affirmed by the Supreme Court of the United States in 194 U. S. 628.

Take 7 ⁶ FISHER, SONS & CO. v. CROWLEY.

Supreme Court of Appeals of West Virginia. 1906.

57 West Virginia, 312.

[Action of assumpsit. The defendants moved to quash the summons. After the motion was overruled and an exception taken, a plea of *non assumpsit* was tendered. Judgment for the plaintiffs. Defendants assign error.]

POFFENBARGER, J. * * * It has been suggested that, by tendering the plea of *non assumpsit* after the motion to quash had been overruled and making other defenses, the defendants submitted themselves to the jurisdiction of the court, waiving the defect in the writ. * * * No decision of this court holds that there is a waiver of a defect in a summons by proceeding to trial after an adverse ruling on a motion to quash and an exception taken thereto. *Sears v. Starbird*, 78 Cal. 225, and *Desmond v. Superior Court*, 59 Cal. 274, so hold, but they are not in accord with the more carefully considered cases of *Lyman v. Milton*, 44 Cal. 630, and *Deidesheimer v. Brown*, 8 Cal. 339, neither of which is noticed in the opinion in the two subsequent inconsistent cases. * * *

Against this doctrine of waiver in cases of defective service stand the decisions of many states and the high authority of the Supreme Court of the United States. *Harkness v. Hyde*, 98 U. S. 476, holds that "Illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside; nor after such motion is denied, by his answering to the merits. Such illegality is considered as waived only when he, without having insisted upon it, pleads in the first instance to the merits." * * *

He has a perfect right to remain out of court until regularly and legally brought in, and, if an attempt is made to bring him in irregularly, he has a perfect right to object, on the ground of irregularity, in proper time, and manner. To force him to waive it, by saying, if he does not do so, he can make no defense on the merits, is a palpable denial of a legal right. He must then determine whether he will risk his whole case on the question of insufficiency of the writ or return, as the case may be, however full and complete he might be able to make his defense on the merits, or waive the defect and submit himself to a jurisdiction not lawfully obtained, in order to prevent his being forever deprived of his defense in case his objection to the writ or return should prove to be not tenable. A test of the court's jurisdiction could never be made except at great peril, a result of which would be that no attempt to do so would ever be made in a case in which defense on the merits could be made. In order to do so it would be necessary to suffer a judgment by default, then go back to the same court with a motion to set it aside for insufficiency of process, vainly ask the court to reverse itself, suffer the same adverse ruling, and then, if possible, obtain a writ of error from this Court and reverse the judgment for the defect in process alone, and, on failure of that, to be forever barred of any defense on the merits. For the court to present to a party the alternative of waiving a jurisdictional defect or giving up his defense, and compel him to choose, is not to allow a voluntary submission to its jurisdiction, but to coerce such submission or a relinquishment of the defense on the merits, however ample and just it may be, and give to the plaintiff what he is clearly not entitled to—the appearance of the defendant without process or relinquishment of defense in that action. How can the action of a court, in arbitrarily taking from one man a right, trivial and unimportant though it be, and conferring it upon another, be justified, either legally or morally? Is the right to stay out of court until legally brought in worth nothing? Is process a mere idle formality? If so, why allow a default judgment to be set aside for want of it? That this will be done all admit, and, in admitting, confess that the acquisition of jurisdiction by process is a matter of substance and not of form. To say in the same breath that a man may not test it without surrendering his defense to the merits is squarely and flatly inconsistent, con-

tradictory of the admitted nature of the right, and violative of law in that it forcibly deprives the citizen of a substantial legal right. To say that the office of process is to bring the defendant into court and that, after his appearance, it is wholly unimportant and may be disregarded, falls far short of justifying the ruling. His appearance is involuntary. He must come or risk everything on the question of insufficiency of the process. If he does not, a judgment by default goes against him, forever precluding any defense, be it a release, payment, fraud or what not, unless he can have it set aside for the defect in the process or some other error. It puts him under compulsion from the moment of service. The court has laid its powerful hand upon him and will render judgment against him without a hearing if he does not bring to its attention the defect in its process and ask to be discharged. For the court to say, upon such compulsory appearance and protest against jurisdiction, now that you are here, you must stay, no matter how you were dragged in, is but bitter mockery, utterly inconsistent with the principles of the law, eulogized in these days of enlightenment for their justice and fairness even in those periods in which society was comparatively crude and barbarous.

* * * * *

For the foregoing reasons, the judgment must be reversed, the summons quashed and the action dismissed, with costs both in this court and the court below.

Reversed.

SANDERS, Judge, dissented in part.

False

CORBETT v. PHYSICIANS' CASUALTY ASSOCIATION.

Supreme Court of Wisconsin. 1908.

135 Wisconsin, 505.

Action to recover on an accident insurance policy issued on the mutual assessment plan. * * * The answer stated three defenses, as follows, in effect: (1) The defendant is a Nebraska corporation which has never complied with the

laws of this state authorizing service of process upon it by serving upon the commissioner of insurance and the only service made was of that character; (2) without waiving the plea to the jurisdiction of the court the defendant shows that it never qualified to do business in this state and, therefore, the making of the insurance contract was prohibited by sec. 1978, Stats. (1898), and is not enforceable in the courts of this state; (3) without waiving any right under the foregoing, the allegations of the complaint as to the assured being a member in good standing of the association at the time he was injured are denied. * * *

The plea to the jurisdiction was tried first and overruled. Defendant by its counsel excepted to the ruling. No specific objection was made to then proceeding to a trial upon the merits, which was done. * * *

Judgment was rendered in favor of the plaintiff, from which this appeal was taken.

MARSHALL, J. At the threshold in the consideration of this case is presented the question of whether a defendant can challenge the jurisdiction of the court in which he is cited to appear, upon the ground that the summons in the action was not efficiently served, and failing in that can submit to a trial upon the merits and in case of an adverse decision can, on appeal, have the benefit of the objection made at the start. * * *

As we view the case we need not follow and endeavor to answer counsel's argument in detail on the jurisdictional question, because it is firmly settled in respondent's favor by numerous decisions of this court. *Lowe v. Stringham*, 14 Wis. 222; *Grantier v. Rosecrance*, 27 Wis. 488; *Blackwood v. Jones*, 27 Wis. 498; *Anderson v. Coburn*, 27 Wis. 558; *Ins. Co. of N. A. v. Swineford*, 28 Wis. 257; *Alderson v. White*, 32 Wis. 308; *Dikeman v. Struck*, 76 Wis. 332, 45 N. W. 118. * * *

In *Lowe v. Stringham, supra*, * * * the doctrine which has from the start prevailed here, was thus plainly stated in these words:

"We think it is also a waiver of such a defect for the party, after making his objection, to plead and go to trial on the merits. To allow him to do this, would be to give him this advantage. After objecting that he was not properly in court, he could go in, take his chance of a trial on the merits,

and if it resulted in his favor, insist upon the judgment as good for his benefit, but if it resulted against him, he could set it all aside upon the ground that he had never been properly got into court at all. If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection."

We recognize that there are very respectable authorities to the contrary of the foregoing, among which are the following: *Harkness v. Hyde*, 98 U. S. 476; *Miner v. Francis*, 3 N. D. 549, 58 N. W. 343; 2 Ency. Pl. & Pr. 629, 630, and note 1. However, it is believed that the great weight of authority, or at least the better reasoning, is the other way.

* * * * *

By the Court—The judgment is affirmed.¹⁸

¹⁸ See *Preserving a Special Appearance*, by E. R. Sunderland, 9 Mich. L. Rev. 396, in which the cases pro and con. are fully set out.

ELDRED v. BANK.

Supreme Court of the United States. 1873.

17 Wallace, 545.

Error to the Circuit Court for the Eastern District of Wisconsin.

* * * The Michigan Insurance Bank, on the 14th of August, 1861, sued Anson Eldred, Elisha Eldred, and Uri Balcom, trading as Eldreds & Balcom, in the court of Wayne County, Michigan, as indorsers on a promissory note for \$4,000. * * * Publication-notice under the laws of Michigan was given. * * * The defendant *Anson Eldred*, filed a plea of non-assumpsit, with notice of set-off, December 27th, 1861, and demanded a trial.

On the 22nd of April, 1862, as the record of the case stated, the cause came on to be heard, and the plea of the defendants theretofore pleaded by them was withdrawn, and the default of *Elisha Eldred* and *Uri Balcom* entered, and on the 10th day of May the said default was made absolute. On the 13th of May, the record continues:

"The plea of the defendant, ~~Anson~~ Eldred, heretofore pleaded by him, having been withdrawn, and the default of the defendants, Elisha Eldred and Uri Balcom, having been duly entered, * * * therefor, it is considered that said plaintiffs do recover against said defendants their damages aforesaid, together with their costs aforesaid to be taxed, and that said plaintiff have execution therefor."

In this state of things the bank brought this, the present suit, in the court below, on the same note against the same Anson Eldred, Elisha Eldred, and Uri Balcom. * * * *Anson* Eldred, who alone was served or appeared, pleaded the general issue; and the case came on for trial. * * * The defendant * * * then offered in evidence the record of the above mentioned suit on the same note in the Wayne County Court:

1st. * * *

2nd. As being a *bar* to recovery on this note in suit.

* * * * *

Judgment having gone accordingly for the bank, Anson Eldred brought the case here on error; the error assigned being the refusal of the court to instruct the jury that the judgment was a bar.

* * * * *

MILLER, J. It is argued by the counsel of the defendant in error that the withdrawal of the plea of Anson Eldred left the case as to him as though he had never filed the plea, and that never having been served with process he was not liable to the personal judgment of the court.

We do not agree to this proposition. The filing of the plea was both an appearance and a defense. The case stood for the time between one term and another with an appearance and a plea. The withdrawal of the plea could not have the effect of withdrawing the appearance of the defendant, and requiring the plaintiff to take steps to bring that defendant again within the jurisdiction of the court. Having withdrawn that plea he was in a condition to demur, to move to dismiss the suit if any reason for that could be found, or to file a new and different plea if he chose, either with the other defendants jointly, or for himself. He was not, by the withdrawal of the plea, out of court. Such a doctrine would be very mischievous in cases where, as it is very often, the first and only evidence of the appearance of a party is the

filing of his plea, answer, or demurrer. The case might rest on this for a long period before it was ready for trial when, if the party could obtain leave of the court to withdraw his plea (a leave generally granted without objection), he could thereby withdraw his appearance, the plaintiff is left to begin *de novo*.

We are of opinion that the record of the suit in Michigan shows a valid personal judgment against Anson Eldred, and that that judgment was a bar to recovery in the present suit.

* * * * *

Judgment reversed, but without costs to either party in this court, and a new trial granted in the Circuit Court.¹⁹

¹⁹ In *Insurance Trust and Agency v. Failing* (1903), 66 Kan. 144, the court said:—

"The court has no more right to permit a withdrawal of such appearance conferring jurisdiction, than it would have to set aside service of a summons regularly made."

But see *McArthur v. Leffler* (1886), 110 Ind. 526, where it was held that the court had power to allow the withdrawal of a defendant's appearance.

HAMILTON v. WRIGHT.

Court of Appeals of New York. 1868.

37 New York, 502.

This was an action of ejectment, brought in the name of the appellants [Hamilton and Livingston] and one Gleason, to recover possession of certain lands in the town of Shandaken, Ulster county. * * * Judgment in favor of the defendant for his costs, was rendered against all of the plaintiffs, and was affirmed on appeal to the General Term.

Hamilton and Livingston moved at the Poughkeepsie Special Term that the judgment against them be vacated, or, in case Gleason failed to pay the costs, that William Lounsbury, plaintiffs' attorney, should pay the judgment, upon the ground that the use of their names as plaintiffs was unauthorized and unknown to them. The special Term denied the motion with costs. From this order denying the motion, Hamilton and Livingston appealed to the General Term,

where the order was modified, directing that the judgment be in the first instance collected, if collectible, of W. S. Gleason, their co-plaintiff, who caused the action to be brought, and that the question of the liability of plaintiffs' attorney to Hamilton and Livingston, in case they are to pay the judgment, be left open: neither of the parties to have costs, as against the other, upon such appeal. From this last order, Hamilton and Livingston appealed to this court.

WOODRUFF, J. The general rule, that an appearance by attorney, whether for the plaintiff or the defendant, if there be no collusion, may be recognized by the adverse party as authentic and valid, I deem important to the safe administration of justice, and well founded in the scheme and plan of such administration in England and this country ever since such officers were commissioned to represent litigants in the courts.

Receiving their authority from the court, they are deemed its officers. Their commissions declare them entitled to confidence, and, in a just sense, their license is an assurance, not only of their competency, but of their character and title to confidence.

The direct control of the courts over them as officers, by way of summary discipline and punishment to compel the performance of their duty, or to suspend or degrade them, is retained and exercised as a guaranty of their fidelity. It is no denial of the rule that, where there are special circumstances calling for its relaxation, the courts may and do relieve from its rigid application. The exception arising from such special circumstances strengthens, as well as recognizes the rule itself.

Hence, when an appearance is entered by an attorney without authority, the inquiry, whether such attorney is of sufficient responsibility to answer for his unauthorized conduct to the party injured thereby, is entertained. And it may be proper always to inquire, whether the injury to the party is irremediable unless such appearance be set aside, and the proceedings founded thereon vacated.

In exercise of their general equitable control over their own judgments, the court may and should consider whether they can relieve the party for whom an unauthorized appearance is made, without undue prejudice to the party, who

has in good faith relied upon such appearance and the official character of the attorney who appears.

But it would be at variance with the scheme and plan upon which we universally administer the law, if a defendant could be prosecuted by a responsible attorney, in full authority to practice in our courts, and after having successfully and in good faith defended, as the case might be, through all the tribunals of justice, and to final judgment in the court of last resort, be required to submit to an order setting aside the proceedings, and be left to be again prosecuted for the same cause of action, on the mere ground that the plaintiff's attorney had no authority from the plaintiff to bring the action. The law which gives to attorneys their commissions, must be deemed to guarantee to defendants protection against such a result. And, at the same time, the rule should yield to equitable considerations, where they arise, and should permit the courts to give relief when they can thereby prevent irremediable wrong to either party.

And if it be asked, why should the party for whom he appears be left to seek his remedy against the attorney?—why should not the party who has been subjected to an unauthorized litigation pursue that remedy, rather than cast that hazard and burden on one who has done nothing to deserve it?—the answer lies in the suggestion already made, that the law warrants a party in giving faith and confidence to one who, by law, is authorized to hold himself out as a public officer, clothed with power to represent others in the courts. And besides this, the consequences of the contrary rule would often be altogether disastrous. Evidence would be lost; witnesses die; the statute of limitations bar claims; and death of parties themselves might often happen. In various ways, to set aside proceedings at the end of a protracted litigation would be to work inevitable wrong to the party who had relied upon an appearance.

It may be said that proof of the authority of the attorney to appear and prosecute should be demanded, if the party would be safe. If such demand could in all cases be insisted upon, it would be only one step toward safety. It might often be practically ineffectual. *Ex parte* evidence of authority might be produced, and yet, if the party might afterward impeach it, the question would again arise, in all its force. Besides, it is not the practice to require attorneys to produce

their authority, except in special cases. No doubt there is power in the courts to order it: it has sometimes been done.// (*Ninety-nine Plaintiffs v. Vanderbilt*, 4 Duer, 632.)

When, pending a litigation, the authority of the attorney to appear is denied, and application is made in due season, the court, if probable cause appears, would, in general, protect the party applying. Still, the general rule remains, that a retainer will be presumed; and the adverse party, having no notice or ground of suspicion, may act on that presumption. (3 Merivale, 12; 2 Mylne & Keen, 1; 1 Ves. 196; 6 Johns. 297; 9 Paige, 496.) And in general where there are no circumstances of suspicion, of facts indicating fraud, and no evidence of bad character discrediting the appearance, the courts do not require a respectable and responsible attorney to exhibit his authority to appear. (6 Johns. 34; 5 Duer, 643.)

It is, however, suggested, that, as in ejectment, the defendant is authorized by statute to require the attorney for the plaintiff to produce his authority (2 R. S. 306), this action should be deemed an exception to the general rule, and it be held that the defendant's own *laches* have caused his misfortune, if it afterward appear that the plaintiff did not authorize the suit. But it is obvious that the statute itself does not furnish complete protection. It only makes the production of apparent written authority, sustained by affidavit, presumptive evidence. And if the authority do not actually exist, the same question will arise in ejectment as in other actions: How far is the plaintiff bound by the appearance of an attorney for him? And, as respects an appearance for a defendant, the statute makes no provision.

I do not think, therefore, that the omission of the defendant to demand the production of authority, where he has nothing to put him on his guard, awaken his suspicion, or to lead him to distrust the good faith of the attorney who prosecutes the action, should affect his right to insist upon his judgment, when it is not claimed that the attorney is not of full and sufficient responsibility to answer to the plaintiff for any costs or other damage he may have sustained.

* * * * *

Judgment affirmed.

DANVILLE, HAZLETON AND WILKES-BARRE RAIL-
ROAD CO. v. RHODES.

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Supreme Court of Pennsylvania. 1897.

180 Pennsylvania State, 157.

Appeal by plaintiff from order striking off warrant of attorney.

David C. Harrington, for appellant.

George L. Crawford, for appellee.

WILLIAMS, J. On the seventh day of June, 1892, D. C. Harrington, Esq., an attorney at law regularly admitted to practice in the courts of Philadelphia filed the bill in equity in this case as the attorney of the plaintiff.

On the eighteenth day of the same month a rule was entered in the minutes by the prothonotary, on the direction of Crawford & Laughlin, attorneys for Rhodes et al. and the D. H. and W. Railroad Co., requiring D. C. Harrington to file his warrant of attorney. No affidavit or statement of facts tending to throw doubt upon his authority was filed and no application whatever was made to the court of which Harrington was a sworn officer. On the twenty-fifth of the same month Harrington filed a warrant of attorney in due form executed by the corporation under its seal. This was a compliance with the rule and it should regularly have been discharged. The court however without any formal disposition of the warrant of attorney, and without even a suggestion on the record that it was not what it purported to be, granted a rule on Harrington to show cause why the warrant should not be struck from the records. This rule it subsequently made absolute and the warrant was struck off. For what reason this rule was granted, or for what reason it was made absolute, it is impossible to tell so far as the records in this case are concerned. Having thus disposed of the attorney of the plaintiff, a rule was at once granted requiring the plaintiff to show cause why the bill should not be struck from the records. This was soon after made absolute. The cause was sent out of court, after the attorney, in a novel and peremptory manner. The record shows no reason whatever, given by Messrs. Crawford & Laughlin, for asking either of these rules, and none given by the court below for making them

absolute. We know of no authority for such a practice. It is elementary law that an attorney is an officer of the court in which he is admitted to practice. His admission and license to practice raise a presumption *prima facie* in favor of his right to appear for any person whom he undertakes to represent. When his authority to do so is questioned or denied the burden of overcoming this presumption in his favor rests on him who questions or denies his authority, and such person must show by affidavit the existence of facts tending to overcome the presumption before he can be called upon to file his warrant of attorney: Weeks on Attorneys at Law, 387 to 400.

The established practice in this country and England is to apply to the court by petition stating the facts relied on to overcome the presumption and asking a rule upon the attorney to file his warrant. When he has complied with the rule by filing a warrant sufficient in form and in the manner of its execution, the rule has been complied with and is *functus officio*. If the warrant is alleged to be defective, or forged, or in any manner insufficient to justify the court in treating it as authority for the appearance of the attorney, the defect should be pointed out by exceptions and its sufficiency passed upon by the court. If the court holds the warrant sufficient the case proceeds. If it is held insufficient proceedings therein will be stayed or in a proper case the suit may be dismissed. In *Campbell v. Galbreath*, 5 Watts, 423, Justice Kennedy discusses the practice to some extent and says at page 430, that after it is ascertained that the attorney for the plaintiff has no authority to appear for him in the suit pending, the defendant may proceed to have it dismissed. The same practice prevails in the United States courts and in those of most of the states. * * *

[Order affirmed on other grounds.]

(b) *By Service.*

(1) The Notice Served.

EGGLESTON v. WATTAWA.

*Supreme Court of Iowa. 1902.**117 Iowa, 676.*

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Action on a judgment recovered by default in the circuit court of South Dakota in and for Brule county. Defendant demurred on the ground that the summons in the action on which the judgment was recovered was not sufficient to give the court jurisdiction. The trial court sustained this demurrer, and, on plaintiffs election to stand on his petition, rendered judgment for defendant, from which plaintiff appeals.—*Affirmed.*

MCCLAIN, J.—Although the action on which the judgment was rendered in South Dakota was entitled in the circuit court, the summons required defendant “to answer the complaint of N. W. Eggleston, plaintiff, which will be filed in the office of the clerk of the district court within and for said Brule county, at Chamberlain, Brule Co., S. D., and to serve a copy of your answer to the said complaint on the subscriber at the office in the city of Chamberlain, S. D., in said county and state, within thirty days after the service of this summons exclusive of the day of service, or the plaintiff will apply to the court for the relief demanded in the complaint, besides costs.” This summons was served on January 9, 1892. The complaint on which judgment was rendered by the circuit court of Brule county was not filed until December 9, 1892, and judgment by default was entered on that day. The provisions of the statutes of South Dakota, set out by plaintiff in his petition, provide, with reference to the summons, that it shall require defendant “to answer the complaint and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the state to be therein specified, in which there is a postoffice, within 30 days after the service of the summons, exclusive of the day of service.” It is evident that under such statutory provision the summons in question was fatally defective in not correctly naming the

court in which the complaint would be filed. The statutes of the state do not, so far as made to appear in this record, specifically require that the court in which the defendant is to appear shall be named, but certainly that is essential to such a notice as would be sufficient to constitute due process of law. Moreover, it is required by the statutes of that state, if a copy of the complaint is not served with the summons, that "the summons must state where the complaint is or will be filed." The summons in question did not state that essential fact, for no complaint was ever filed in the "district court." There was in fact no such court then in existence, the "district court" as known under the territorial government, having been replaced by the "circuit court" by the provisions of the constitution under which the state was admitted. This change of courts is pleaded in the case by plaintiff as an excuse for the mistaken description, but the fact remains that defendant was not notified that the complaint would be filed in the circuit court, in which the judgment was rendered, but was advised that it would be filed in another court, which in fact did not exist. Under such circumstances we think defendant was justified in assuming that no valid judgment could be rendered against him. The circuit court acquired no jurisdiction, and the judgment on which this action is based was therefore void. See, as bearing in general on the question, *Lyon v. Vanatta*, 35 Iowa 521. Other questions are argued, but, as they involve the construction of statutes of another state, their decision would be of no advantage to anyone.

The demurrer was rightly sustained, and the judgment is affirmed.²⁰

²⁰ As suggested in this case, the requisites of a summons are to be found both in the common law conception of due process and in the statutes in force in the jurisdiction. A further differentiation must be made between the directory and mandatory provisions of the statutes. It will be apparent from this and succeeding cases that the question of the sufficiency of a summons is not a simple one, but depends upon the elements just named coupled with the further problems of waiver growing out of a consideration of the stage in the proceedings when the objection is raised. This of course carries one eventually into the field of direct and collateral attack on judgments.

Due process consists essentially of notice and an opportunity to be heard. McGehee on Due Process of Law, p. 76 *et seq.*

In *King v. University of Cambridge* (1723), 1 Strange 557, 567, Fortesque, J., says:—"The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have

heard it observed by a very learned man upon such an occasion, that even God Himself did not pass sentence upon Adam, before he was called upon to make his defense. 'Adam,' says God, 'where art thou? Hast thou eaten of the tree, whereof I commanded that thou shouldest not eat?' And the same question was put to Eve also."

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LYMAN v. MILTON.

Supreme Court of California. 1872.

44 California, 630.

BELCHER, J. The plaintiff seeks by this action to enforce the execution of a resulting trust.

The complaint names as defendants, Martha Ellen Milton, administratrix of the estate of Daniel Milton, deceased, Martha Ellen Milton, and Ida May Milton. It alleges the death of Daniel Milton, leaving him surviving as his only heirs at law his widow, Martha Ellen Milton, and his daughter, Ida May Milton, an infant of about the age of three years, and that Martha Ellen Milton had been duly appointed the administratrix of his estate.

Upon the complaint a summons was issued, entitled: "*W. Lyman, plaintiff, v. M. E. Milton (administratrix, etc.) et al., defendants.*" It was addressed to "M. E. Milton, administratrix et al., defendants," the name of Ida May Milton nowhere appearing in it. This summons was served upon both defendants, and afterwards, upon application of the plaintiff, the adult defendant was appointed the guardian *ad litem* of the infant defendant. The said Martha Ellen accepted the trust of guardian *ad litem*, and, thereupon, before filing answer, or otherwise appearing, appeared in court by counsel, stating to the court that she appeared on behalf of said infant for the purpose only of moving to quash the summons. The court refused to permit such an appearance, and refused to recognize counsel, or hear anything they might have to say on behalf of the infant, unless they entered an unqualified appearance for the general purpose of defense. Having duly entered an exception to this ruling, counsel then, in obedience thereto, stated without qualification that they appeared on behalf of all the defendants. Thereupon they submitted a writ-

ten motion on the part of the said infant and her guardian, that the summons be quashed on the ground, among others, that the same is radically defective in not stating the parties to the action. The court overruled this motion and the defendants excepted.

Afterwards, upon answers filed in behalf of each defendant, the case was tried by the court and judgment entered in favor of the plaintiff.

The statute (Practice Act, Sec. 24) provides that "the summons shall state the parties to the action, the Court in which it is brought, the county in which the complaint is filed, the cause and general nature of the action, and require the defendant to appear and answer the complaint within the time mentioned in the next section after the service of the summons, exclusive of the day of service, or that judgment by default will be taken against him according to the prayer of the complaint, briefly stating the sum of money or other relief demanded in the complaint."

It is manifest that the summons in this case did not state the parties to the action. M. E. Milton, in her representative capacity of administratrix, was but one of three parties defendant. The words "*et al.*," in the connection in which they are used, are of no significance. They indicate, at most, that there are still other parties who are not named. Without them, so far as a compliance with the statute is concerned, the summons would have been as complete as with them.

Is a summons, in which one defendant only is named, when in fact there are several defendants to the action, a good summons to the defendants not named in it? Must one who is served with a summons to which he does not appear to be a party take notice at his peril that he is really a party to the action? To hold so we must hold that the section of the statute referred to is only directory in its requirements. But if it be directory and not mandatory, why may the summons not omit to state the court in which the action is brought, or the county in which the complaint is filed, or the cause and general nature of the action, or the time within which the defendant is required to appear, or the amount of money or other relief demanded in the complaint, or all of them together, and still be held good? All of these things are stated in the complaint, except the time within which the defendant must appear, and that is a matter regulated by law, which

every one is presumed to know. If notice only is required, the party has that when he sees a copy of the complaint and himself named in it as a defendant. And yet no one would contend that a summons which omitted to state the several matters required by the statute could be held good.

The summons is the process by which parties defendant are brought into Court, so as to give the Court jurisdiction of their persons. Its form is prescribed by law; and whatever the form may be it must be observed, at least substantially. It may be that a summons under our system is required to state more than is necessary for the information of the defendant; that a copy of the complaint served by the Sheriff or the attorney would have been all that is needful. If that be so it is a matter for the legislature and not for the Courts. We entertain no doubt that a summons must contain all that is required by the statute, whether deemed needful or not, and, among other things, must state the parties to the action.

It may be that when the defendant moved to quash the summons for insufficiency the Court might have entertained a counter motion to have it amended by inserting the omitted names of the defendants, and, on its being so amended, might have denied the original motion.

In *Polack v. Hunt*, 2 Cal. 193, it was held that the court had power to amend the summons so as to make it conform to the law, when it operated no hardship or surprise to the defendants. No such counter motion, however, was made in this case, and we cannot pass upon that question.

A defendant has a right to appear for the purpose of moving to dismiss a defective summons, and it is error in the Court to refuse him that privilege. Nor does the fact that he afterwards appears and answers waive his right or cure the error. (*Deidesheimer v. Brown*, 8 Cal. 339; *Gray v. Hawes*, id. 569.)

For the error named the judgment must be reversed and cause remanded for further proceedings, and it is so ordered.²¹

²¹ In *Saddler v. Smith* (1907), 54 Fla. 671, 45 So. 718, the court said: "Where there are several parties defendant it would not be sufficient to give the name of one defendant *in the body* of the subpoena or copy, followed by the words *et al.* *Lyman v. Milton*, 44 Cal. 630. And so we have held that in a writ of error or appeal, all parties thereto must be named and cannot be included in the words *et al.* * * * While the words *et al.* are incapable of standing in the place of the names of parties

required by law to be stated in a subpoena or writ of error, they may be used in endorsing the title of the cause on the copy of subpoena where there is no statute or rule requiring the *names* of the *parties* to be indorsed thereon."

Since the defendant can always ascertain the nature of the cause of action from the plaintiff's pleading, it is seldom required that this should appear in the writ of summons, and when the statute does contain such a requirement a very general statement will be deemed sufficient.—*Bewick v. Muir* (1890), 83 Cal. 368. The original writ at common law contained a full statement of the nature of the cause of action, but this was probably due to the fact that the writ gave the court jurisdiction to try the particular case there described.—See *The Formulary System*, being Section 1 of Chapter 1, *Sunderland's Cases on Common Law Pleading*.

Sometimes a copy of the complaint is required to be served with the summons, and in *Dunnett v. Thornton* (1900), 73 Conn. 1, the court said the writ was void if there was no complaint.

33
James LAWYER LAND CO. v. STEEL.
of the Supreme Court of Washington. 1906.

41 Washington, 411.

HADLEY, J. * * *
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This appeal is from an order quashing a summons and the service thereof. The essential part of the summons reads as follows:

"You and each of you are hereby summoned to appear within twenty days after the service of this summons, exclusive of the day of service, if served within the state of Washington, and within sixty days if served out of the state of Washington, and defend the above entitled action in the court aforesaid, and answer the complaint of the plaintiff and serve a copy of your answer on the person whose name is subscribed to this summons at Spokane, Spokane county, state of Washington, and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint which will be filed with the clerk of said court, a copy of which is herewith served upon you."

The summons and complaint were personally served upon respondents in the state of North Carolina. The affidavit of service is in all respects regular and sufficient. Bal. Code, Section 4879, provides as follows:

"Personal service on the defendant out of the state shall be equivalent to service by publication, and the summons upon the defendant out of the state shall contain the same as personal summons within the state except it shall require the defendant to appear and answer within sixty days after such personal service out of the state."

It is argued by respondents, and such seems to have been the view of the superior court, that inasmuch as the summons was so drawn that it contemplated that a service might be made either within or without the state, it is fatally defective. It is contended that the duty was upon appellant in advance to determine whether service was to be made within or without the state, and that the summons should have been drawn with reference to one or the other only. It seems to us that the essential inquiry is, Was the summons by its terms confusing or misleading to respondents? We cannot see that it was. It plainly told them that, if they were served without the state, they were required to appear within sixty days. That portion relating to service within the state became mere surplusage in view of the service that was made, and it was so manifestly such that it was in no sense confusing. We therefore think the court erred in quashing the summons and its service. Under the above statute, the service was equivalent to service by publication.

* * * * *

The judgment quashing the summons and service is therefore reversed, and the cause remanded, with instructions to vacate that part of the order appealed from and proceed with the action.²²

²² *Return Day.* In *Clough v. McDonald*, (1877) 18 Kan. 114, the statute required that the summons should be served and returned by the officer within ten days from its date. The summons was in fact made returnable in six days, and was served on the day before the return day. The court said: "Now a summons of this kind we think is never void. It might be voidable however, if the officer should take the whole time (ten days) given him by law within which to serve it upon the defendant, for in that case the time given to the defendant within which to answer or demur would be shortened. But when the officer serves the summons before the return day thereof, as in this case, we do not think that either the summons or the service is either void, or voidable. In such a case the defendant has lost nothing. He has his full twenty days after the return day of the summons within which to answer or demur, and that is all that the law gives him in any case. It is the time of the officer, and not that of the defendant, that is shortened, by making the return of the summons less than ten days from its date."

Where the return day and appearance day are the same, as in some states, the argument just quoted would of course not apply.

See, also, *Morris v. Healy Lumber Co.*, (1903) 33 Wash. 451, 74 Pac. 662.

Indorsment of Amount Claimed. Statutes sometimes provide that when an action is brought for money only there shall be indorsed on the writ the amount for which judgment will be taken in case of default. In such case, where there is no indorsement a judgment on default for money only is sometimes held void,—*Elmer v. Chicago, B. & Q. R. R. Co.*, (1905) 75 Neb. 37; sometimes only voidable,—*Lawton v. Nichols*, (1903) 12 Okla. 550.

34
False LOWE v. MORRIS.

Supreme Court of Georgia. 1853.

13 Georgia, 147.

Motion to dismiss writ of error.

* * * * *

LUMPKIN, J., concurring.

Is a writ of error a nullity without a seal?

My first impression was, that this defect was fatal. Upon reflection, my final conclusion is, the other way. * * *

* * * * *

Lord Coke defines a seal to be, wax with an impression, (3 Inst. 169.) "*Sigillum*" says he, "*est certa impressa, quia cera sine impressione non est sigillum.*" And this has been adopted as the Common Law definition of a seal. Perk. 129, 134, Bro. tit. Faits. 17, 30. 2 Leon. 21. But it is a curious fact that there is neither an Act of Parliament nor an adjudged case, up to *Lord Coke's* day, to bind the courts as to what constitutes a seal. His opinion was probably founded on the practice of the country in his day.

New York, and most of the States North, have held that a seal is an impression upon wax, wafer or some other tenacious substance, capable of being impressed. 5 John. Rep. 239, 2 Caine's Rep. 262. 21 Pick. Rep. 417. But in Pennsylvania, New Jersey, and the Southern and Western States generally, the impression upon wax has been disused, and a circular, oval, or square mark, opposite the name of the signer, is held to have the same effect as a seal, the

shape of it being altogether indifferent. It is usually written with a pen, sometimes printed. 2 Serg. & Rawle, 503. 1 Dall. 63. 1 Walls, 322, 2 Halst, 272.

The truth is, that this whole subject, like many others, is founded on the usage of the times, and of the country. A scroll is just as good as an impression on wax, wafer, or parchment, by metal, engraved with the arms of a prince, potentate, or private person. Both are now utterly worthless, and the only wonder is, that all technical distinctions growing out of the use of seals, such as the Statute of Limitations, plea to the consideration, etc., are not at once universally abolished. The only reason ever urged at this day, why a seal should give greater evidence and dignity to writing is, that it evidences greater deliberation, and therefore should impart greater solemnity to instruments. Practically we know that the art of printing has done away with this argument. For not only are all official and most individual deeds, with the seals appended, *printed* previously, and filled up at the time of their execution, but even merchants and business men are adopting the same practice, as it respects their notes.

Once the seal was everything, and the signature was nothing. Now the very reverse is true: the signature is everything, and the seal nothing. * * *

So long as seals distinguished identity, there was propriety in preserving them. And as a striking illustration see the signatures and seals to the death warrant of Charles the First, as late as January, 1648. They are 49 in number, and no two of them alike. But to recognize the waving, oval circumflex of a pen, with those mystic letters to the uninitiated, L. S. imprisoned in its serpentine folds, as equipotent with the coats of arms taken from the devices engraven on the shields of knights and noblemen; shades of Eustace, Roger de Beaumont, and Geoffry Gifford, what a desecration! The reason of the usage has ceased; let the custom be dispensed with altogether.

* * * * *

With these desultory remarks I am content to leave the law, learning and logic of the case to my brother *Warner*, to whom it legitimately belongs, and who, I have no doubt,

will do ample justice to the argument, and with whom I *concur*, in *retaining* the writ of error.²³

* * * * *

²³ The entire opinion, only a small part of which is given here, is replete with wit and learning, and a reading of it will afford both entertainment and profit.

Contra, Insurance Co. v. Hallock (1867), 6 Wall. (U. S.) 556; Choate v. Spencer (1893), 13 Mont. 127.

The *style* of process is often prescribed by constitution or statute, as "The State of....." v. "The People of the State of.....," or otherwise. See Brooks v. Nevada Nickel Syndicate (1898), 24 Nev. 311, holding that a notice or summons which does not issue from the court is not process within such a provision, and need not conform thereto.

The *Teste* and *Signature* of the writ are usually prescribed by statute. See Ambler v. Leach (1879), 15 W. Va. 677, for exhaustive consideration of the effect of errors in these matters.

35 Take

BEN KRESS NURSERY CO. v. OREGON NURSERY CO.

Supreme Court of Montana. 1912.

45 Montana, 494.

HOLLOWAY, J. Plaintiff commenced this action on October 13, 1910, against the Oregon Nursery Company and the Bitter Root Valley Irrigation Company. Service was made upon each defendant; but on October 25th, before the time for appearance had expired and before any appearance had been made by either defendant, the plaintiff filed an amended complaint and served a copy of it upon defendant Bitter Root Valley Irrigation Company, but did not serve the defendant Oregon Nursery Company. The Bitter Root Valley Irrigation Company interposed a demurrer to the amended complaint, which was sustained. The plaintiff was given time to plead, but apparently took no further steps as against that defendant, or at all, until September 12, 1911, when the default of defendant Oregon Nursery Company was entered "for failure to appear or answer"; and, proof having been made, a judgment in favor of plaintiff and against the defendant Oregon Nursery Company was rendered and entered. On October 6, 1911, the Oregon Nursery Company appeared specially and moved the court to set aside the judgment, and

in support of the motion tendered affidavits to the effect that the amended complaint was never served upon it. Upon the argument of the motion counsel for plaintiff admitted the truth of this statement. The motion was overruled, and the Oregon Nursery Company has appealed from the judgment, and from the order refusing to vacate the judgment.

The amended complaint was filed by the plaintiff as a matter of right under section 6588, Revised Codes. The time for appearance had not expired, and neither defendant had appeared. By filing the amended complaint, the original complaint was superseded and became *functus officio*. * * *

Section 6518, Revised Codes, provides that a copy of the original complaint need not be served upon every defendant where there are two or more residing in the same county, but the same rule does not obtain in the case of the amended complaint, and for the very obvious reason: In commencing an action a copy of the summons must be served upon every defendant, and this constitutes the notice to him; but, where an amended complaint is filed, summons is not served, and, unless the defendant receives a copy of the amended pleading, he is without notice. The provisions of section 7149, Revised Codes, do not apply to a case of this character, where the amendment is made before the time for appearance expires, and before any appearance has been made. Section 6588 above in no uncertain terms requires that a copy of the amended pleading must be served.

The question before us is not a new one. It has arisen in many instances, and the authorities are practically unanimous in holding that, until the amended pleading is served and the statutory time for appearance thereafter has expired, the adverse party cannot be adjudged in default. *Elder v. Spinks*, 53 Cal. 293; *Linott v. Rowland*, 119 Cal. 452, 51 Pac. 687; *Nodine v. Richmond*, 48 Or. 527, 87 Pac. 775; *Watson v. Miller*, 69 Tex. 175, 5 S. W. 680; *Merrill v. Thompson*, 80 App. Div. 503, 81 N. Y. Supp. 122. * * *

If plaintiff is put in a disadvantageous position, it cannot blame any one but itself. There is not any reason apparent for filing the amended complaint; but plaintiff exercised a right given by statute, and must assume the burdens which accompany it.

This judgment could not be based upon the original complaint, which has ceased to perform the function of a plead-

ing; and it could not be founded upon the amended complaint, of which the Oregon Nursery Company did not have notice. In *Linott v. Rowland*, above the Supreme Court of California disposed of a like question as follows: "An amended complaint must be served on all the adverse parties who are to be bound by the judgment, whether it materially affects them or not (*Elder v. Spinks*, 53 Cal. 293), and, as the amended complaint herein was not served upon the appellant, there was no pleading upon which the judgment against him can be sustained." * * *

The judgment and order are reversed, and the cause is remanded, with directions to vacate the judgment.

*Reversed and remanded.*²⁴

²⁴ See also *Gallup v. T. B. Jeffery Co.* (1912), 86 Conn. 308 and *Drake v. Mowder* (1916), 89 N. J. L. 306.

36
~~36~~ (2) Personal Service.
PHILADELPHIA & READING RAILWAY CO. v.
McKIBBEN.

Supreme Court of the United States. 1916.

243 United States, 264.

BRANDEIS, J. A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the state, the process will be valid only if served upon some authorized agent. *St. Louis Southwestern R. Co. v. Alexander*, 227 U. S. 218, 226, 57 L. ed. 486, 488, 33 Sup. Ct. Rep. 245, Ann. Cas. 1915B, 77. Whether the corporation was doing business within the state, and whether the person served was an authorized agent, are questions vital to the jurisdiction of the court. A decision of the lower court on either question, if duly challenged, is subject to review in this court; and the review extends to findings of fact as well as

to conclusions of law. *Herndon-Carter Co. v. James N. Norris & Co.*, 224 U. S. 496, 56 L. ed. 857, 32 Sup. Ct. Rep. 550; *Wetmore v. Rymer*, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. 293. The main question presented here is whether the plaintiff in error—defendant below—was doing business in New York.

The Philadelphia & Reading Railway Company, a Pennsylvania corporation, operated a railroad in that state and in New Jersey. McKibben, a citizen and resident of New York, was a brakeman in one of its New Jersey freight yards. For injuries sustained there, he brought this action in the United States district court for the southern district of New York. The summons was served on defendant's president, while he was passing through New York, engaged exclusively on personal matters unconnected with the company's affairs. The defendant appeared specially in the cause for the sole purpose of moving to set aside the service of the summons; and invoked the provisions of the Federal Constitution guaranteeing due process of law. The motion was denied "upon the sole ground that upon the facts stated in the affidavits said defendant is doing business within the state of New York, so as to be subject to service of process within said state." Under a right reserved in the order, the objection to the jurisdiction was renewed in the answer, and insisted upon at the trial before the jury. The motion to dismiss was again heard upon the affidavits originally presented, and was denied. Exceptions were duly taken. A verdict was rendered for the plaintiff; judgment entered thereon; and the case brought here on writ of error; the question of jurisdiction being certified in conformity to § 238 of the Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215.]

The affidavits established the following facts: No part of the Philadelphia & Reading's railroad is situated within the state of New York. It has no dock, or freight or passenger ticket office or any other office or any agent or property therein. Like other railroads distant from New York, it sends into that state, over connecting carriers, loaded freight cars, shipped by other persons, which cars are, in course of time, returned. The carriage within that state is performed wholly by such connecting carriers, which receive that portion of the entire compensation paid by the shipper

therefor; and the Philadelphia & Reading receives only that portion of the compensation payable for the haul over its own line. The Central Railroad of New Jersey is such a connecting carrier, and has a ferry terminal at the foot of West 23d St., New York City. It issues there the customary coupon tickets over its own and connecting lines, including the Philadelphia & Reading and the Baltimore & Ohio. The whole ticket, in each case, is issued by the Central Railroad of New Jersey; and each coupon so recites. In these tickets there is a separate coupon for the journey over each of the connecting railroads; and the coupon for the journey over each such railroad bears also its name. Each coupon is declared thereon to be "void if detached." The Philadelphia & Reading receives in ultimate accounting between the carriers, that portion of the fare which is paid for the journey over its own line. Passengers for points on the Philadelphia & Reading or on the Baltimore & Ohio, or beyond, may reach these railroads over the Central Railroad of New Jersey. At various places in and on this ferry terminal are signs bearing the name "Philadelphia & Reading," "P. & R.," or "Reading,"—and also like signs of the "Baltimore & Ohio," or "B. & O." In the New York Telephone Directory there are inserted the words "Phila. & Reading Ry., ft. W. 23d St. Chelsea 6550." These signs on the terminal, this insertion in the telephone directory, and the information given in response to inquiries at the ticket office or over the telephone, are all designed to facilitate and encourage travel and for the convenience of the public. Neither the Philadelphia & Reading nor the Baltimore & Ohio has any office or any employee at the terminal. The Philadelphia & Reading did not direct the insertion of its name in the telephone book. Chelsea 6550 is the number of the trunk line of the Central Railroad of New Jersey; and that company pays the whole expense of the telephone service.

An affidavit filed on plaintiff's behalf, states that the names of the Philadelphia & Reading Coal & Iron Company and of the Philadelphia & Reading Trans. Line, Towing Dept., appear in the telephone directory as at 143 Liberty street, telephone number 5672 Cortlandt; and upon information and belief alleges, that these are subsidiary companies of the Philadelphia & Reading, and "tow the cars of said company from the Jersey points to the city of New York."

The finding that the defendant was doing business within the state of New York is disproved by the facts thus established. The defendant transacts no business there; nor is any business transacted there on its behalf, except in the sale of coupon tickets. Obviously the sale by a local carrier of through tickets does not involve a doing of business within the state by each of the connecting carriers. If it did, nearly every railroad company in the country would be "doing business" in every state. Even hiring an office, the employment by a foreign railroad of a "district freight and passenger agent * * * to solicit and procure passengers and freight to be transported over the defendant's line," and having under his direction "several clerks and various traveling passenger and freight agents," was held not to constitute "doing business within the state." *Green v. Chicago, B. & Q. R. Co.*, 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595. Nor would the fact, if established by competent evidence, that "subsidiary companies" did business within the state, warrant a finding that the defendant did business there. *Peterson v. Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. Rep. 513. As the defendant did no business in New York, we need not consider its other contention, that it could not be sued there on a cause of action arising in New Jersey, and in no way connected with the business alleged to be done in New York. On this proposition we express no opinion.

On behalf of the plaintiff it was also urged that an arrangement between counsel by which service of the summons had been facilitated operated as a waiver of all objections to the jurisdiction of the court. We find this contention to be unfounded.

The judgment of the District Court is reversed and the cause remanded to that court with directions to dismiss it for want of jurisdiction.

*Reversed.*²⁵

²⁵ See *Flexner v. Farson* (1918), 248 U. S. 289, holding that the rule does not apply to a resident agent of a nonresident natural person, because the state has no power to exclude such person from local business.

See *Jurisdiction over nonresidents Doing Business within a State*, by Austin W. Scott, 32 Harv. L. Rev. 871.

37


BECKER v. BECKER.

Court of Civil Appeals of Texas. 1920.

218 Southwestern Reporter, 541.

[Action to set aside a personal judgment rendered against plaintiff upon personal service made upon him pursuant to a Texas statute, while he was temporarily out of the state. He was a resident of Texas.]

MOURSUND, J. * * *

Appellant complains of the overruling of his special exception by which he attacked the right of the court to render a personal judgment against him upon notice served upon him outside of the state, contending that this violated the due process of law clause of the Fourteenth Amendment to the federal Constitution, and also article 1, § 19, of the Constitution of this state.

* * * * *

However, we conclude there is no merit in the appellant's contention. At the time of the alleged service upon appellant he was a citizen of Texas, and the statutes of this state authorized the kind of service complained of. Our decisions uniformly support the validity of the personal judgment rendered upon such service upon citizens of Texas. The contention is prompted by expressions in the opinion of the federal Supreme Court in the case of *McDonald v. Mabee*, 243 U. S. 90, 37 Sup. Ct. 343, 61 L. Ed. 608, L. R. A. 1917F, 458. In that case it was held that service by publication upon a citizen of Texas, who had left the state intending to make his home in another state, but whose family was still residing in Texas, would not support a personal judgment. The court did not hold that when a citizen is absent from his state the courts thereof are as powerless with respect to the rendition of a personal judgment against him as if he resided in another state. On the contrary, the language used is rather persuasive to the effect that the court would have upheld the service had it been such as is under consideration in this case. Articles 1869 to 1873, R. S. 1911, are not violative of the due process of law clauses of the federal and state Constitutions in so far, at least, as they authorize the rendition of a personal judgment against a

citizen of this state upon personal service of process upon him while temporarily absent from the state. This conclusion is not contradicted by anything in the opinion in the case of *McDonald v. Mabee*, and of course is fully supported by our decision.

* * * * *

BURKE v. INTER-STATE SAVINGS & LOAN ASSOCIATION.

38
Jube

Supreme Court of Montana. 1901.

25 Montana, 315.

Action by John Burke against the Inter-state Savings & Loan Association for an accounting and to quiet title. From a judgment for defendant, plaintiff appeals. Affirmed.

PIGGOTT, J. * * *

2. To establish its title to the land, the defendant introduced in evidence the judgment roll in a cause entitled "*Moritz Conhaim v. John Burke*." The roll disclosed that on October 16, 1893, Conhaim caused to be filed in the district court of Cascade county, Mont., his complaint in an action upon a promissory note alleged to have been made by Burke to him, and that on the same day a summons in proper form was issued; that thereafter the summons was returned and filed, together with the proof of service indorsed thereon as follows:

"State of Montana, County of Cascade. J. M. Burlingame, Jr., being duly sworn, says that I received the within summons on the 16th day of October, A. D. 1893, and personally served the same on the 13th day of November, A. D. 1893, upon John Burke, being the defendant named in said summons, by delivering to said defendant, personally, in the said county of Cascade, a copy of said summons. James M. Burlingame, Jr.

"Service, \$1.50.

"Subscribed and sworn to before me at Great Falls, Mont., this 13th day of November, 1893. F. B. Wilcox, Notary Public."

The judgment roll further disclosed that the default of Burke was duly entered, and that on November 24, 1893, judgment by default was rendered and entered for the amount of money stated in the complaint and summons; the judgment reciting, among other things, the following: "In this action, the defendant, John Burke, having been regularly served with process, and having failed to appear and answer the plaintiff's complaint filed herein, the legal time for answering having expired, and no answer or demurrer having been filed, the default of the said defendant, John Burke, in the premises having been duly entered according to law, upon application of said plaintiff to the court judgment is hereby entered against said defendant, in pursuance of the prayer of said complaint. * * * To the introduction of the judgment roll the plaintiff objected upon two grounds: * * * Second, because the court had no jurisdiction over the defendant in that action, for the reason that he never appeared, "and the summons therein was not served by an officer or a person over the age of eighteen not a party to the action, and for the further reason that the affidavit constituting the proof of attempted service of summons does not state that the affiant was of the age of eighteen, or any other age, at the time of such attempted service." Plaintiff excepted to the overruling of the objections, and specifies the action of the court in that regard as error.

* * * * *

From the time the summons is served the court is deemed to have jurisdiction of the defendant, and hence jurisdiction of the defendant in *Conhaim against Burke* was acquired, if acquired at all, by the fact that service was made upon him, not by proof of such fact. If he was personally served with summons within the state of Montana, jurisdiction was acquired. Sections 71, 78, 79, and 80 of the First Division of the Code of Civil Procedure of the Compiled Statutes of 1887 provide that the summons may be served by the sheriff, or by any other person over the age of 18 years, not a party to the action; that summons must be served by delivering a copy thereof to the defendant personally; and that proof of the service, when made by any person other than the sheriff, must be by his affidavit showing the time and place of service; and from the time of service of summons the court is deemed to have acquired jurisdiction of the parties or prop-

erty, as the case may be, and to have control of all subsequent proceedings. The omission from the affidavit of Burlingame of the statement that, at the time he served the summons upon the defendant, he (Burlingame) was over the age of 18 years, is the defect which the plaintiff in the case at bar urges as fatal. He contends that thereby the judgment roll shows that the summons was not served by a competent person, and that therefore the judgment is void upon its face. The plaintiff fails to distinguish between a want of jurisdiction and an irregularity in obtaining it. Says Mr. Freeman in his work on Judgments: "There is a difference between a want of jurisdiction and a defect in obtaining jurisdiction. * * * The fact that defendant is not given all the time allowed him by law to plead, or that he was served by some person incompetent to make a valid service, or any other fact connected with the service of process, on account of which a judgment by default would be reversed upon appeal, will not ordinarily make the judgment vulnerable to a collateral attack." Section 126. Upon this subject, Mr. Black, in section 224 of his Treatise on the Law of Judgments, says: "Although the service of process in an action may have been characterized by some defect or irregularity, it does not necessarily follow that the ensuing judgment will be void. For, if the party would take advantage of such a matter, he must do so in the action itself, by some proper motion or proceeding. It is only when the attempted service is so irregular as to amount to no service at all that there can be said to be a want of jurisdiction. In any other case there may be error in the subsequent proceedings, but they will be sustained against a collateral attack." And in section 263 he remarks: "We have already seen that defects or irregularities in the process, or in the manner of its service, are not sufficient to render the judgment void, unless the flaw or omission is so serious as to make the process equivalent to no process at all, or the service entirely nugatory, in which case the judgment fails for want of jurisdiction. It follows that the judgment of a court of general jurisdiction cannot be attacked collaterally when there has been some service of notice, although such service of notice may be materially defective." * * *

Inspection of the judgment roll in *Conhaim against Burke* does not disclose a want of jurisdiction of the defendant in

that action, and therefore the judgment may not be declared void on collateral attack. Assuming the Burlingame affidavit to have been the only proof of service, the court merely erred in adjudging the service regular.

3. From what has thus far been said it is not to be inferred that we tacitly assume the judgment would be void if the roll affirmatively disclosed that Burlingame was less than 18 years of age when he served the summons, or if upon direct attack by suit in equity that fact were established by proof; nor can such an inference reasonably be deduced. When Burlingame, who was not a party to the action, delivered to Burke personally a copy of the summons, the latter was thereby notified of the pendency of the action, and of the fact that, unless he appeared, judgment would go against him. He was put upon inquiry, and such delivery was sufficient to subject Burke to the jurisdiction of the court, despite the fact that Burlingame was not of the age prescribed. The service, though irregular or defective, sufficed to accomplish the substantial purpose and object which the law designs the summons to perform. We are of the opinion that even if the judgment roll should exhibit the incompetency of Burlingame in the respect mentioned, or such incompetency were otherwise shown, the judgment for that reason would not be either void, or subject to any attack save that by appeal. A judgment rendered by a court having jurisdiction of the subject-matter and of the parties, and keeping within the limits of its power, though it may be voidable, is never void. Jurisdiction of a defendant, when irregularly acquired, may be renounced as the result of suitable proceedings seasonably taken in the action itself, or on appeal from the judgment; but jurisdiction irregularly obtained is nevertheless jurisdiction,—the power to hear, decide, and adjudge,—and when this exists the judgment cannot be void. This conclusion inevitably results from the principles announced in the former part of the opinion. Were it not for the case of *Hauswirth v. Sullivan*, 6 Mont. 203, 9 Pac. 798, we should content ourselves with the foregoing observations, and affirm the judgment appealed from without further remark; but that case, when tested by these principles, seems to us to be so manifestly wrong that we deem it not improper to indicate our views upon the principal point there cited. In the *Hauswirth* Case the supreme

court of the territory of Montana decided that the service of a summons on Sunday was void, and that a judgment by default against the defendant, founded upon such service, was a mere nullity, although the sheriff's return stated that the service was made on Saturday. It was held that the defendant might maintain a suit in equity to have the judgment set aside on the ground that the service was made on Sunday. We are satisfied that the doctrine there announced is erroneous. Service of summons on Sunday is not a nullity, but a mere irregularity with respect to the time or day on which it was made, and a judgment based upon it is not void. * * * So with the service of the summons in *Conhaim against Burke*. The defendant in that case had the right to move that the service be set aside, and the motion, if made, should have been granted, unless the affidavit were amended, or a new one filed, stating that Burlingame was over 18 years old at the time of service; and, perhaps, on appeal from the judgment, relief would have been obtained, although no such motion had been interposed. But Burke cannot otherwise, either upon collateral or direct attack, successfully impeach the judgment because of the irregular service, or because of the defect in the proof of service.

* * * * *

The other assignments of error are without merit. The judgment will be affirmed, and it is so ordered. Remittitur may issue forthwith.

Affirmed.

39
Cited

WALLACE v. UNITED ELECTRIC CO.

Supreme Court of Pennsylvania. 1905.

211 Pennsylvania State, 473.

BROWN, J. The first prayer of appellant's bill is for full discovery. * * *

A decree for discovery is a personal one to be enforced against the person decreed to make it; and, if the appellee was properly brought within the jurisdiction of the court be-

low personally, a decree that it make discovery could be enforced against it personally by the appellant as his first move to obtain the ultimate relief asked for. In view of this, the proceeding must, as was held by the learned judge below, be regarded as *in personam* as to the appellee; and the question whether the Act of April 6, 1859, P. L., 387, even if it does authorize extra-territorial service of process from a court of this state, is effectual to acquire jurisdiction over the person of a defendant residing and served in another state, is not an open one.

Before the passage of that act, Chief Justice Gibson, in discussing the attempt to acquire jurisdiction over the person of the defendant by the extra-territorial service of process, said in *Steel v. Smith*, 7 W. & S. 447: "Jurisdiction of the person or property of an alien is founded on its presence or situs within the territory. Without this presence or situs, an exercise of jurisdiction is an act of usurpation. An owner of property who sends it abroad subjects it to the regulations in force at the place as he would subject his person by going there. The jurisdiction of either springs from the voluntary performance of an act, of whose consequences he is bound to take notice. But a foreigner may choose to subject his property, reserving his person; and it is clear that jurisdiction of property does not draw after it jurisdiction of the owner's person; consequently, there can be no rightful action by the tribunals on the foundation of jurisdiction acquired by the attachment of property, which reaches beyond the property itself. * * * What, then, is the right of a state to exercise authority over the persons of those who belong to another jurisdiction, and who have, perhaps, not been out of the boundaries of it? 'The sovereignty united to domain,' says Vattel, 'establishes the jurisdiction of the nation over its territories or the countries which belong to it. It is its province, or that of its sovereign, to exercise justice in all places under its jurisdiction, or the country which belongs to it; to take cognizance of the crimes committed and the differences that arise in the country.' 'On the other hand,' adds Mr. Justice Story (Conf. Ch. 14, § 539), no sovereignty can extend its process beyond its own territorial limits, to subject other persons or property to its judicial decisions. Every exertion of authority beyond these limits is a mere nullity, and incapable of binding such persons or property in other tribunals.' And

for this he cites *Picquet v. Swan* (5 Mason, 35-42). Not to multiply authorities on a point so plain, it will be sufficient to add the name of Mr. Burge (1 Confl. 1), who says it is a fundamental principle, essential to the sovereignty of every independent state, that no municipal law, whatever its nature or object, should, *proprio vigore*, extend beyond the territory of the state by which it has been established.' And again (3 Burge Confl. 1044), 'that the authority of every judicial tribunal, and the obligation to obey it, are circumscribed by the limits of the territory in which it is established.' Such is the familiar, reasonable and just principle of the law of nations; and it is scarce supposable that the framers of the constitution designed to abrogate it between states which were to remain as independent of each other, for all but national purposes, as they were before the revolution. Certainly it was not intended to legitimate an assumption of extra-territorial jurisdiction which would confound all distinctive principles of separate sovereignty; and there evidently was such an assumption in the proceedings under consideration." Speaking of the act of 1859, under which the court made the order for the extra-territorial service of process upon the appellee, Sharswood, J., in *Coleman's Appeal*, 75 Pa. 441, in stating that it has not been the policy of our jurisprudence to bring non-residents within the jurisdiction of our courts, unless in very special cases, said: "In proceeding against them for torts, even property belonging to them cannot be reached by process, and in cases of contract nothing but the property can be affected unless the defendant voluntarily appear and submit to the jurisdiction. We may congratulate ourselves that such has been the policy, for nothing can be more unjust than to drag a man thousands of miles, perhaps from a distant state, and in effect compel him to appear and defend under the penalty of a judgment or decree against him *pro confesso*. The act of 1859 ought, therefore, to receive a construction in harmony with this policy. There exists no good reason why courts of equity should be invested with a more enlarged jurisdiction against non-residents than courts of law." This was followed by the case of *Scott v. Noble*, 72 Pa. 115, in which we held that Noble was not bound by process directed to be served upon him by the supreme judicial court of Massachusetts outside the state, though he had accepted service of the writ in the state of Pennsylvania. By the Act

of March 13, 1815, P. L. 150, regulating proceedings in divorce, the act provides for service upon the respondent "wherever found," but in *Ralston's Appeal*, 93 Pa. 133, we said of that act: "It declares 'upon due proof at the return of the said subpoena that the same shall have been served personally on the said party wherever found, or that a copy had been given to him or her fifteen days before the return of the same,' a divorce may be decreed. It is contended in case the libellee in divorce is not found within the bailiwick of the sheriff, the latter may, under this act, depute some person to make the service in another state. If a legal service could thus be made in Delaware it can be in California. Such cannot be a true construction of the statute. The language 'wherever found' cannot be so construed as to give to a court of this state extra-territorial power to bring within its jurisdiction the person of a citizen and resident of another state. The property found within this state of a non-resident may be reached and charged and sold in the enforcement of a debt resting on a contract without any personal service on the debtor. In the case of an ordinary debt, the person of a non-resident defendant not found within the state cannot be reached by any process issued by a court of common law. In cases where the language of the statute would seem to give extra-territorial power this court has denied its exercise. Thus the 16th section of the Act of 13th June, 1836, relating to the removal of paupers, authorizes them to be removed 'at the expense of the district to the city, district or place where he was last legally settled, whether in or out of Pennsylvania.' It has, however, been held the provision for a removal into another state is of no force or effect: *Overseers of Limestone v. Overseers of Chillisquaque*, 6 Norris 294. The first section of the Act of 6th April, 1859, authorizes any court of this commonwealth having equity jurisdiction, in any suit in equity instituted therein concerning property within the jurisdiction of the said court, to order and direct that any subpoena or other process to be had in such suit be served on any defendant therein 'then residing or being out of the jurisdiction of said court wherever he, she or they may reside or be found.' It further provides for the proof of service both within and without the limits of the United States. It was held in *Coleman's Appeal*, 75 Pa. 41, that process thus issued in this state and served in another state on a resident thereof

could not give jurisdiction of the person thus served." In the federal courts the same view is entertained. By a statute of the state of Oregon provision was made for service upon a non-resident by publication. In *Pennoyer v. Neff*, 95 U. S. 714, it appeared that judgment had been entered against Neff on process which the plaintiff undertook to have served upon him extra-territorially, by publication, in conformity to the statute. Judgment was entered in the proceeding against him, and, in holding that he was not bound by it, through Mr. Justice Field, it was said: "Where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them." In the Circuit Court of the United States, for the western district of this state, in the case of *McHenry v. New York P. & O. R. R. Co.*, 25 Fed. Repr. 65, the Court of Common Pleas of Westmoreland county had made an order of service on aliens in pursuance of the act of 1859, but it was said by the Circuit Court: "It is, indeed, true that pursuant to an order of the Court of Common Pleas, claimed to be authorized by the Pennsylvania Act of April 6, 1859, P. L. 387, process has been served on those defendants in England, where they reside, but, clearly, such extra-territorial service was ineffectual to bring them within the jurisdiction of the court or make them parties to the suit: *Pennoyer v. Neff*, 95 U. S. 714."

The service upon the appellee was ineffectual to bring it into this jurisdiction, and the order of the court below setting it aside was properly made. That order is now affirmed and this appeal dismissed at the costs of appellant.

BOGGS v. INTER-AMERICAN MINING & SMELTING CO.

*Court of Appeals of Maryland. 1907.**105 Maryland, 371.*

SCHMUCKER, J. The first of the cross appeals in this case is by William R. Boggs, the plaintiff below, from an order of the Superior Court of Baltimore City striking out upon terms a final judgment theretofore rendered in his favor against the Inter-American Mining and Smelting Company. * * *

The Mining Company was incorporated in the District of Columbia, but for some time prior to March 7th, 1906, its office, where its records were kept and from which its general business was transacted was in the Calvert Building in Baltimore, and during that time H. C. Turnbull, Jr., who did business in Baltimore City and resided in Baltimore County, was president of the corporation. During the time that the company was thus located in Baltimore City, its president, purporting to act in its behalf, employed the plaintiff, Boggs, as a mining engineer at a salary of \$200 per month and personal and traveling expenses.

On May 28th, 1906, Boggs sued the company in the Superior Court to recover his salary and expenses for October, November, and December, 1905, and January, 1906, amounting in the aggregate to \$1,188. The suit was brought under and in conformity to the Rule Day Acts in force in Baltimore City, and the defendant having been returned summoned, and having failed to appear to the action or plead, judgment by default was entered against it on June 27th, 1906. On the same day the judgment by default was duly extended for \$1,188 and costs.

* * * * *

* * * P. M. Gober, a deputy sheriff of Baltimore City, then testified that having been directed to serve the writ in the case upon Mr. Turnbull he went over to the Calvert Building and asked Turnbull if he was one of the officers of the company, and he replied that he was not, but had formerly been its president. To the best of witness' recollection Turnbull said that he knew the plaintiff Boggs and would like to see him get what was due him. The deputy reported this interview to the sheriff, who told him to serve the writ on

Turnbull, as he was one of the directors and the deputy went back to do it but Turnbull shut the door in his face and would not let him serve it. The deputy further swore that he explained his object to Mr. Turnbull and the latter saw the writ, and said he was doing what he could to get Mr. Boggs righted in the matter, or something to that effect. He, the deputy, did not read the writ to Mr. Turnbull, but he explained it to him and Turnbull looked at the writ.

Thatcher Bell, another deputy sheriff, testified that he was told by the sheriff to go over to the Calvert Building and serve the writ on Mr. Turnbull, that Gober had not been able to get a service. Witness went over to Turnbull's office with the copies ready to serve and said to Turnbull, "I have a paper to serve on you." Turnbull said, "I know what you have," and started to go out. Witness reached for Turnbull with the copies and when the latter kept running, he commenced to read them, but Turnbull got into the next room and slammed the door. Witness then laid the copies on the table and returned to the sheriff's office. He left the copies of the *narr.*, notice to plead, and writ in this case on the table in Turnbull's office. Mr. Turnbull was put on the stand and his account then given of the visits of the two deputy sheriffs to him substantially corroborated their testimony except he denied that he said to the deputy Bell that he knew what he had or that he (Turnbull) saw or looked at the writ. There was also evidence tending to show that Mr. Turnbull never reported the service of the writ on him to the company or took any steps himself looking to a defense of the action, and that the motion had been promptly made by the company when it learned of the suit and judgment.

Assuming that Turnbull was a proper person upon whom to serve the writ and other papers, we are indisposed to consume much time in discussing the sufficiency of the service. It is apparent from the evidence that Turnbull was fully informed as to the institution of the suit by Boggs against the company and the desire of the sheriff to summon the company by serving the papers on him as one of its directors and knew that the deputy was about to make that service when he attempted to elude him and evade the service by running out of the room and slamming the door in the officer's face. Neither he nor the company he represented, if he did represent it for the purpose of the service, can be permitted to set

up such a state of facts in support of the motion to strike out the judgment. He might as well have remained in his office and put his fingers in his ears while the deputy read the writ to him, and then claim to be without information as to its contents or purpose. Defendants have frequently sought to evade or defeat service of process upon them by flight or refusal to accept the process handed them by the serving officer but the courts have held such efforts futile. *Davison v. Baker*, 24 How. Prac. 42; *Slaughter v. Robbins*, 13 N. J. L. 349; *Borden v. Borden*, 63 Wis. 377; *Baker v. Carreton*, 32 Me. 334.

The laws of this state do not prescribe precisely how a summons shall be served upon an individual defendant. The service must be a personal one, 2 Poe, Pleading and Practice, section 62, but the sheriff is not *required* to read the writ to the defendant, although it is usual for him to read it or explain its nature and leave a copy of it with the person served. Secs. 409 to 412 of Art. 23 of the Code provide for service of process upon corporations.

* * * * *

* * * The court below in our opinion acquired jurisdiction over the defendant in this suit by the service of the process upon its resident director, Mr. Turnbull.

* * * * *

Order striking out the judgment reversed with costs.

4 *Baker*

AMY v. CITY OF WATERTOWN.

Supreme Court of the United States. 1888.

130 United States, 301.

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BRADLEY, J. The principal question in this case is whether the defendant, the city of Watertown, was served with process in the suit so as to give the court below jurisdiction over it.

* * *

* * * On the 23d of December, 1882, the marshal made return of service of said summons as follows: "Served on the within-named, the city of Watertown, by delivering to Wm. H. Rohr, last mayor of said city; Henry Bieber, city

clerk; Chas. H. Gardner, city attorney, and Thomas Baxter, last presiding officer (or president or ch'm'n) of the board of street commissioners of said city of Watertown, each personally a copy of the within summons, and by showing each of them this original summons, this 23d day of December, 1882. the office of mayor of said city being vacant, and there being no president of the common council, or presiding officer thereof, in office."

* * * * *

* * * The question then arises whether the attempted service in December, 1882, was a sufficient and legal service. The court below held that it was not. We have already quoted the return of the marshal on that occasion. It appears from this return that he made the attempted service by delivering a copy of the summons to William H. Rohr, the last mayor of the city; a copy to Henry Bieber, city clerk; a copy to Charles H. Gardner, city attorney; and a copy to Thomas Baxter, the last presiding officer of the board of street commissioners of the city of Watertown; the office of mayor being vacant, and there being no president of the common council, nor presiding officer thereof, in office. Was this such a service upon the city as the law requires? It clearly was not, unless by the law of Wisconsin, the circumstances of the case were such as to dispense with a literal compliance with the charter. The charter requires service on the mayor of the city. No such service was made. There was no mayor in office at the time. The last mayor had resigned, and his resignation had taken effect. Service on him was of no more avail than service on an entire stranger. The case is different from those in which we have held that a resignation of an officer did not take effect until it was accepted or until another was appointed. In those cases either the common law prevailed, or the local law provided for the case, and prevented a vacancy. * * *

The question then is reduced to this: Whether, in case the mayor has resigned, and there is no presiding officer of the board of street commissioners, (a body which seems to take the place of the common council of the city for many purposes,) service of process on the city clerk, and on a conspicuous member of the board, is sufficient. If the common law (which is common reason in matters of justice) were permitted to prevail, there would be no difficulty. In the absence

of any head officer, the court could direct service to be made on such official persons as it might deem sufficient. But when a statute intervenes, and displaces the common law, we are brought to a question of words, and are bound to take the words of the statute as law. The cases are numerous which decide that where a particular method of serving process is pointed out by statute, that method must be followed, and the rule is especially exacting in reference to corporations. *Kibbe v. Benson*, 17 Wall. 624; *Alexandria v. Fairfax*, 95 U. S. 774; *Settlemyer v. Sullivan*, 97 U. S. 444; *Evans v. Railway Co.*, 14 Mees. & W. 142; *Walton v. Salvage Co.*, 16 Mees. & W. 438; *Brydolf v. Wolf*, 32 Iowa, 509; *Hoen v. Railroad Co.*, 64 Mo. 561; *Insurance Co. v. Fuller*, 81 Pa. St. 398. The courts of Wisconsin strictly adhere to this rule. *Congar v. Railroad Co.*, 17 Wis. 478, 485; *City of Watertown v. Robinson*, 59 Wis. 513, 17 N. W. Rep. 542; *City of Watertown v. Robinson*, 69 Wis. 230, 34 N. W. Rep. 139. The two cases last cited related to the charter now under consideration. In the first case service was made upon the city clerk and upon the chairman of the board of street commissioners while the board was in session, in the absence of the mayor, who could not be found after diligent search. The court, after referring to the provisions of the charter and the Revised Statutes on the subject, say: "The question whether the Revised Statutes control as to the manner of service is not a material inquiry here, because both the charter and general provision require the services to be made upon the mayor, but no service was made upon that officer, as appeared by the return of the sheriff. The principle is too elementary to need discussion that a court can only acquire jurisdiction of a party, where there is no appearance, by the service of process in the manner prescribed by law." In the last case (decided in 1887) service was made in the same manner as in the previous one, and the court say: "When the statute prescribes a particular mode of service, that mode must be followed *ita lex scripta est*. There is no chance to speculate whether some other mode will not answer as well. * * * This has been too often held by this court to require further citations. * * * When a statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. * * * The designation of one particular officer upon whom service

may be made excludes all others. * * * The temporary inconvenience arising from a vacancy in the office of mayor affords no good reason for a substitution of some other officer in his place, upon whom service could be made, by unwarrantable construction not contemplated by the statute." It is unnecessary to look further to see what the law of Wisconsin is on this subject. It is perfectly clear that by that law the service of process in the present case was ineffective and void.

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TURNBULL v. WALKER.

Queen's Bench Division. England, 1892.

67 Law Times Reports, 767.

On the 4th of May, 1888, the plaintiffs recovered a judgment against the defendants in the Supreme Court of New Zealand, Wellington District, for the sum of 764 l. and costs. This judgment, as to 244 l. was satisfied in New Zealand, but as to the remainder the plaintiffs allege it is still unsatisfied. The present action was brought to recover the sum of 633 l., the remainder alleged to be due upon this judgment of the New Zealand court, and the damages for the nonpayment of the above sum.

* * * * *

One of the defendants was on a visit to New Zealand early in the year 1885, and he opened negotiations with one O'Shea, with a view to shipments of wool being made by O'Shea from New Zealand to the defendants in England. On the 31st July, 1885, the defendants whose representative had then returned to England, wrote from England to O'Shea in New Zealand a letter, in which they said that if O'Shea agreed to certain terms proposed in the letter they would be prepared to accept bills against documents. The letter ended as follows:

"Should these terms suit, we will send you out necessary letter, but if not too late you can commence operations, and

this letter will authorise any bank to negotiate your drafts on the basis of the figures above named."

O'Shea made several shipments of wool and negotiated with the plaintiffs, who were not bankers, drafts on the defendants, which were accepted and paid by the defendants. The plaintiffs took those drafts on the faith of the letter of the 31st July. On the 19th Nov. 1885, the defendants wrote to O'Shea, limiting his credit to 5000 l. O'Shea got that letter on the 4th Jan. 1886, and afterwards, in fraud of both plaintiffs and defendants, negotiated with the plaintiffs drafts in excess of the limit, the plaintiffs being shown the letter of the 31st July and not the letter of the 19th Nov. The defendants refused to accept the drafts, and the plaintiffs brought an action in New Zealand, against the defendants claiming the amount of the drafts. The writ and statement of claim in that action were, by leave of the court in New Zealand, served on the defendants or some of them in England with notice that judgment would be given in default of defense. The defendants did not appear, and judgment in default of appearance was given and execution levied, and part of the judgment satisfied in New Zealand, for the balance of which the present action was brought on the New Zealand judgment. The defendants are not natives of New Zealand, nor have they or any of them ever been domiciled or resident there, nor was any of them there when the drafts in question were negotiated, or when the action was commenced, or since that time, nor has any of them in any manner submitted, or contracted to submit to the jurisdiction of the New Zealand court, unless the matters above stated can be held to amount to a submission or contract to submit to that jurisdiction, or to create an obligation to submit.

WRIGHT, J. (after stating the facts above set out) proceeded: It appears to me to be plain that no submission by the defendants to the jurisdiction of the New Zealand court, or contract or obligation is made out. There was no submission in fact. There was not even any contract made by the defendants through O'Shea, for he negotiated the drafts in fraud of his express instructions. The liability, if any, of defendants must depend on a representation or estoppel depending on their having enabled O'Shea, a native of New Zealand, and subject to its laws, to obtain credit as their agent on the faith of the letter of the 31st July. But, even if

there was a contract between the defendants and the plaintiffs made through O'Shea as the defendant's agent, I am clearly of opinion that this is not enough. In any particular case a court of a State may, firstly, have jurisdiction in such sense that in conformity with general jurisprudence and ordinary international law or usage the courts of other States will regard its judgments as binding, and will, with certain exceptions, enforce the judgment within their own States. Jurisdiction of this kind ordinarily depends on the allegiance of the party or his consent, or on some fact which is held to be equivalent to allegiance or consent. Or, secondly, the court of a State may have jurisdiction in such sense that its judgment will bind courts and persons and govern rights within that State, but will not be enforced by the courts of other States; or, what is another form of the same case, it may have given judgment without any jurisdiction, but by reason of lapse of time or otherwise there may be no means of questioning the judgment in the local courts. Or, thirdly, (though in strictness this is not a third case, but is one as to which doubts may often exist as to whether it ought to be treated as of the first or as of the second kind), the jurisdiction may exist locally by virtue of some local law which empowers or binds the local court to act as if it had jurisdiction in cases in which upon ordinary principles of jurisprudence it has none. Such are some of the cases provided for by such legislation as is now in England embodied in Order XI of the Rules of the Supreme Court, and by the practice or legislation of many States. * * * In the present action the only question argued was whether the jurisdiction exercised by the New Zealand court was of the first or the second kind, though I think it was assumed on both sides, and is probably the fact, that the jurisdiction was exercised under statutes or rules made or authorised by the New Zealand Legislature, and bringing the matter within the third case above stated. This, however, does not appear to me to help the plaintiffs. Such statutes or rules, if made or authorised by the Imperial Parliament, might bind the courts of this country to give effect to the judgment, but that kind of authority was not suggested, and merely local statutes or rules could not possibly give to the local court jurisdiction of the first kind in a case in which jurisdiction of that kind cannot otherwise exist. This appears to be involved in the judgments in *Russell v.*

Cambefort (61 L. T. Rep. N. S. 751; 23 Q. B. Div. 526). I think that on ordinary principles of jurisprudence the judgment of the New Zealand court was wholly without jurisdiction even within the colonial limits. No merely local statute could, in my opinion, enable the court to entertain the action against the absent Englishman, who was neither a native of New Zealand nor domiciled there, nor present there when the action was begun or at any time during its continuance, and who has not appeared or in any way submitted to the jurisdiction. It may be that for want of a right of appeal or otherwise the local effect of the judgment cannot now be avoided, but that in no way affects this court. It was, indeed, suggested that the facts that the defendants had an agent in New Zealand, and made a contract to be wholly or partly performed there, or did something which estopped them from denying such a contract, amounted to a submission to the jurisdiction; but the cases cited (*Buchanan v. Rucker*, 1 Camp. 62; 9 East, 192; *Cavan v. Stewart*, 1 Stark. 525) are far from supporting the contention. Some *dicta* may, indeed, be found, as in Lord Romilly's judgment in *Cookney v. Anderson* (32 L. J. Ch.) at p. 308, to the effect that, if a contract is made within the local jurisdiction of a court, that fact may of itself give jurisdiction over parties to the contract, but I doubt if there is anywhere any decision to that effect, and also whether the *dicta* mean more than that in such a case the contract must *prima facie* be construed according to the local law. *Schibsby v. Westenholz* (L. Rep. 6 Q. B. 155) appears to me to govern this case. The only difference between that case and the present one is that in that case the defendant had notice and knowledge of the proceedings and an opportunity of defending (p. 158), but had not been served with process, whereas in the present case the defendants were served in England with the writ or notice of it. But if there was no jurisdiction in the New Zealand court, that difference must be immaterial. I should add that the principles laid down in *Schibsby v. Westenholz* (*ubi sup.*) and *Russell v. Cambefort* (*ubi sup.*) are in accordance with the authorities collected in Story's Conflict of Laws, pp. 760-770, 808, &c.

*Judgment for the defendants.*²⁸

²⁸ The English rules are as follows:—

ORDER XI. *Service out of the Jurisdiction.*

1. Service out of the jurisdiction of a writ of summons or notice of

a writ of summons may be allowed by the court or a judge whenever—

(a.) The whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits), or the perpetuation of testimony relating to land within the jurisdiction; or

(b.) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action; or

(c.) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or

(d.) The action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of England; or

(e.) The action is brought *against a defendant not domiciled or ordinarily resident in Scotland* to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of contract—

(i) made within the jurisdiction, or

(ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or

(iii) by its terms or by implication to be governed by English law, or is one brought against a defendant not domiciled or ordinarily resident in Scotland or Ireland, in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction.

(f.) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or

(g.) Any person out of the jurisdiction is a necessary or a proper party to an action properly brought against some other person duly served within the jurisdiction.

(h.) The action is by a mortgagee or a mortgagor in relation to a mortgage of personal property situate within the jurisdiction and seeks relief of the nature or kind following, that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, re-conveyance, delivery of possession by the mortgagee; but does not seek (unless and except so far as permissible under sub-head (e) of this rule) any personal judgment or order for payment of any moneys due under the mortgage.

In this sub-head the expression personal property situate within the jurisdiction means personal property which, on the death of the owner thereof intestate, would form subject-matter for the grant of letters of administration to his estate out of the Principal Probate Registry; the expression mortgage means a mortgage charge or lien of any description; the expression mortgagee means a party for the time being entitled to or interested in property subject to a mortgage.

This procedure has been adopted in a number of the British dominions and similar procedure is familiar in countries not administering the English Common Law. See Piggott on Foreign Judgments and The

Practice as to Parties out of the Jurisdiction (2nd Ed.) where the English practice is fully explained (Chap. VIII), and the laws of British Colonies (Chap. XII) and of European nations (Chap. XIII), are summarized.

Compare Grubel v. Nassauer (1913), 210 N. Y. 149, where the court refused to recognize the validity of a German judgment obtained in Germany by publication against a German citizen outside the jurisdiction.

In Phillips v. Batho [1913], 3 K. B. 25, 29, the court said:—

"It is difficult to explain the position and practice of the English courts. Under our Order XI we constantly serve out of the jurisdiction, give judgment against absent foreigners, and enforce that judgment against their property within the jurisdiction. But when we are asked to enforce the judgment of a foreign court against an Englishman served in the same way, we decline to do so on the ground that such procedure is contrary to the principles of international law. The reason may be that our English procedure is imposed on us by statute, the justice of which it is useless to question, while the foreign procedure is not so imposed and is open to question. If the matter were open for consideration, it is clear to any one who compares our English procedure and the judgment of the Privy Council in Ashbury v. Ellis [1893], A. C. 339, with the judgment of Wright, J., in Turnbull v. Walker (1892), 67 L. T. 767, and of the Privy Council in Sirdar Gurdial Singh v. Rajah of Faridkote [1894] A. C. 670, that there is abundant room for argument."

In Smith v. Brady (1887), 68 Wis. 215, the court refused to recognize the validity of an Ontario judgment based on personal service in Wisconsin without appearance.

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(3) Substituted Service.

BRYANT v. SHUTE'S EXECUTOR.

Court of Appeals of Kentucky. 1912.

147 Kentucky, 268.

[Action in Kentucky upon a personal judgment by default rendered in Massachusetts. Service in the Massachusetts case was made by the nominal attachment of a chip as the property of the defendant and by leaving a copy of the writ at the defendants' last and usual place of abode. The court below rendered judgment for the plaintiff.]

SETTLE, J. * * * It is clear from the evidence and the opinions of the court of last resort of Massachusetts that the service upon the defendant Helen A. Bryant is a valid service, and will support a personal judgment so far as the laws and

judicial opinions of that state are concerned, and it remains to inquire whether such service is "due process of law" required by the Constitution.

In *Knowles v. Logansport Gaslight Co.*, 19 Wall. 58, 22 L. Ed. 70, the court said: "We do not mean to say that personal service is in all cases necessary to enable a court to acquire jurisdiction of the person. Where the defendant resides in the state in which the proceedings are had, service at his residence, and perhaps other modes of constructive service, may be authorized by the laws of the state. But in the case of nonresidents, like that under consideration, personal service cannot be dispensed with, unless the defendant voluntarily appears." * * * In *Earle v. McVeigh*, 91 U. S. 503, 23 L. Ed. 398, the validity of substituted service by posting or tacking the summons to the front door of a residence was recognized, but it was held that where the defendant had left his residence more than six weeks before, leaving no one at the house, it was insufficient. In *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, it was held that service against a nonresident by publication is insufficient to sustain a personal judgment, but there is nothing in the opinion that could be construed as holding or indicating that substituted service by leaving a copy at the residence of the defendant would be an invalid service for the purpose of personal judgment. * * *

While this court has been unable to find any case decided by the Supreme Court wherein the service by leaving the writ or summons at the defendant's residence without an attachment of property has been held valid, yet there are none to the contrary, and from what was said in the several cases cited we are led to the conclusion that such service upon a resident is sufficient and is due process.

In *Biesenthall v. Williams*, 1 Duv. 329, 85 Am. Dec. 629, a suit was brought to enforce a judgment obtained in the state of Ohio upon process served by leaving the writ at the residence of the defendant. Our court held the judgment valid and enforceable in this state. To the same effect, see *Guenther v. American Wheel Co.*, 116 Ky. 580, 76 S. W. 419, 25 Ky. Law Rep. 795. Substituted service against a resident by leaving a copy at the residence of the defendant has been held sufficient to sustain a personal judgment in the other states. *Continental Bank of Boston v. Thurber*, 74 Hun, 632, 26 N. Y. Supp. 956; *Elliott v. McCormick*, 144 Mass. 10, 10 N.

E. 705; *Hurlbut v. Thomas*, 55 Conn. 181, 10 Atl. 556, 3 Am. St. Rep. 43; *Lucas v. Wilson*, 67 Ga. 356; *Burbage v. Am. Nat. Bank*, 95 Ga. 503, 20 S. E. 240; *Moye v. Walker*, 96 Ga. 769, 22 S. E. 276; *Atchison County v. Challis*, 65 Kan. 179, 69 Pac. 173; *Abbott v. Abbott*, 101 Me. 343, 64 Atl. 615; *Park Land & Imp. Co. v. Lane*, 106 Va. 304, 55 S. E. 690; *Missouri Trust Co. v. Norris*, 61 Minn. 256, 63 N. W. 634; *Bickerdike v. Allen*, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782; *Sanford v. Edwards*, 19 Mont. 56, 47 Pac. 212, 61 Am. St. Rep. 482; *Walker v. Stevens*, 52 Neb. 653, 72 N. W. 1038; *Blake v. Smith*, 67 N. H. 182, 38 Atl. 16; *Rogers v. Jerman*, 3 N. J. Law, 527; *Harrison v. Farrington*, 35 N. J. Eq. 4; *Robbins v. Clemmons*, 41 Ohio St. 285; *Hunter v. Hunter*, 1 Bailey (S. C.) 646; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

It must, of course, follow that, if the statute is followed in the matter of making the service by leaving a copy at the residence of the defendant, the fact that the defendant did not receive actual notice, or that actual notice of the action was not thereby brought to him, does not affect the validity of the judgment. If it were allowed to do so, such process would be of no effect, and it would have been useless to prescribe it. *Hurlbut v. Thomas*, 55 Conn. 181, 10 Atl. 556, 3 Am. St. Rep. 43; *Lucas v. Wilson*, 67 Ga. 356. The court has been unable to find any decision, state or federal, which holds that such service against a resident is not sufficient to sustain a personal judgment, or that the judgment would be invalid because of the fact that that mode of process had proved ineffectual in the particular case to bring notice to the defendant.

Before it is effectual, however, as process, the statute must be strictly complied with. Where the statute requires it to be left at the defendant's residence or place of abode, it does not satisfy the statute if it is left at the defendant's place of business, or at the house of another, or at a house or hotel where the defendant is temporarily stopping, or in leaving it at his former dwelling after his removal therefrom, or in leaving it in defendant's berth in a steamer upon which he has taken passage, or in leaving it in a part of the house which he does not inhabit or frequent, or at any other place, and the judgment will be void. *Hitch v. Gray*, 1 Marv. (Del.) 400, 41 Atl. 91; *Smith v. Bryan*, 60 Ga. 628; *Stout v. Harlem*,

20 Ind. App. 200, 48 N. E. 235, 50 N. E. 492; *Winchester v. Cox*, 3 G. Greene (Iowa) 575; *Lambert v. Sample*, 25 Ohio St. 336; *Dyre's Case*, 1 Browne (Pa.) 299; *Mayer v. Griffin*, 7 Wis. 82; *Halsey v. Hurd*, Fed. Cas. No. 5,966; *Boyland v. Boyland*, 18 Ill. 551; *White v. Primm*, 36 Ill. 416; *Hennings v. Cunningham* (N. J. Sup.) 59 Atl. 12; *Kline v. Kline*, 104 Ill. App. 274; *Matter of Norton*, 32 Misc. Rep. 224, 66 N. Y. Supp. 317; *Craig v. Gibson*, 13 Gray (Mass.) 270; *Perry v. Perry*, 103 Ga. 706, 30 S. E. 663; *Fisk v. Bennett*, 69 Hun, 272, 23 N. Y. Supp. 471; *Phelps v. McCollam*, 10 N. D. 536, 88 N. W. 292; *Kibbe v. Benson*, 17 Wall. 624, 21 L. Ed. 741.

* * * * *

*Judgment affirmed.*²⁷

²⁷ The common law insisted on personal service, and this required personal delivery of the writ or a copy to the defendant himself; merely leaving a copy at his house or place of business was not sufficient. 3 Chitty Gen. Prac. (1836) 266-8. In 1832, by 2 William IV, C. 39, s. 3, it was provided that where a defendant could not be personally served, it should be lawful for the court to order a Writ of Distringas to be issued, which should be personally served if possible but otherwise left at the place where the Distringas should be executed. Pollock and Maitland call attention to the tedious forbearance of the common law. "Very slowly it turns the screw which brings pressure to bear upon the defendant." 2 Hist. of Eng. Law, 591. The distringas must be preceded by three attempts to secure personal service, and "it is advisable * * * to deliver at the defendant's residence to his wife or other member of his family or servant there, who would, under ordinary circumstances, be most likely to forward the communication to the defendant, a full statement of the particular object, and desire personally to serve the defendant (and this even with a copy of the process on the first attempt, though not absolutely necessary to be left until the last call) in order afterwards to show to the court that the defendant probably has received instruction through such relative of the object in view and that he wilfully avoids personal service." 3 Chitty Gen. Prac. (1836) 302.

The English tradition for personal notice is maintained under the present rules which authorize the court to make an order for substituted or other service by advertisement or otherwise when prompt personal service cannot be had. Three calls must be made, at reasonable hours and on different days, by appointment if possible, and full inquiry should be made at each call as to the whereabouts of the defendant, where he is likely to be found and when he is likely to return. Annual Practice, Order 10, Essential Proceedings. In framing the order "the primary consideration is as to how the matter can be best brought to the personal attention of the person in question himself,"—*Re McLaughlin* (1905) A. C. 347. Service by advertisement is ordered only when there is some reason for believing that it will come to the defendant's knowledge. Annual Practice, Order 10, note on "Order for Substituted Service of Writ."

Substituted service is a less violent departure from the common law conception of due process of law than constructive service by publication, and it was said in *McDonald v. Mabee* (1916), 243 U. S. 90, 92: "Mabee,

although technically domiciled in Texas, had left the state intending to establish his home elsewhere. Perhaps in view of his technical position and the actual presence of his family in the state a summons left at his last and usual place of abode would have been enough. But it appears to us that an advertisement in a local newspaper is not sufficient notice to bind a person who has left a state intending not to return."

44 (4) ~~Constructive~~ Service.
PENNOYER v. NEFF.

Supreme Court of the United States. 1877.

95 United States, 714.

FIELD, J. This is an action to recover the possession of a tract of land, of the alleged value of \$15,000, situated in the State of Oregon. The plaintiff asserts title to the premises by a patent of the United States issued to him in 1866, under the Act of Congress of Sept. 27, 1850, usually known as the Donation Law of Oregon. The defendant claims to have acquired the premises under a sheriff's deed, made upon a sale of the property on execution issued upon a judgment recovered against the plaintiff in one of the circuit courts of the State. The case turns upon the validity of this judgment.

It appears from the record that the judgment was rendered in February, 1866, in favor of J. H. Mitchell, for less than \$300, including costs, in an action brought by him upon a demand for services as an attorney; that, at the time the action was commenced and the judgment rendered, the defendant therein, the plaintiff here, was a non-resident of the State; that he was not personally served with process, and did not appear therein; and that the judgment was entered upon his default in not answering the complaint, upon a constructive service of summons by publication.

The Code of Oregon provides for such service when an action is brought against a non-resident and absent defendant, who has property within the State. * * *. The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be

deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse. *D'Arcy v. Ketchum et al.*, 11 How. 165. In the case against the plaintiff, the property here in controversy sold under the judgment rendered was not attached, nor in any way brought under the jurisdiction of the court. Its first connection with the case was caused by a levy of the execution. It was not, therefore, disposed of pursuant to any adjudication, but only in enforcement of a personal judgment, having no relation to the property, rendered against a non-resident, without service of process upon him in the action, or his appearance therein. * * *

* * * * *

Substituted service by publication or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability.

The want of authority of the tribunals of a State to adjudicate upon the obligations of non-residents, where they have no property within its limits, is not denied by the court below; but the position is assumed, that, where they have property within the State, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and the property of the non-resident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement, that the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. * * *

* * * * *

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.

* * * * *

It follows from the views expressed that the personal judgment recovered in the State court of Oregon against the plaintiff herein, then a non-resident of the State, was without any validity, and did not authorize a sale of the property in controversy.

HUNT, J., dissenting.

I am compelled to dissent from the opinion and judgment of the court, and, deeming the question involved to be important, I take leave to record my views upon it.

* * * * *

The result of the authorities on the subject, and the sound conclusions to be drawn from the principles which should govern the decision, as I shall endeavor to show, are these:

1. A sovereign state must necessarily have such control over the real and personal property actually being within its limits, as that it may subject the same to the payment of debts justly due to its citizens.

2. This result is not altered by the circumstance that the owner of the property is non-resident, and so absent from the State that legal process cannot be served upon him personally.

3. Personal notice of a proceeding by which title to property is passed is not indispensable; it is competent to the State to authorize substituted service by publication or otherwise, as the commencement of a suit against non-residents, the judgment in which will authorize the sale of property in such State.

4. It belongs to the legislative power of the State to determine what shall be the modes and means proper to be adopted to give notice to an absent defendant of the commencement of a suit; and if they are such as are reasonably likely to communicate to him information of the proceeding against him, and are in good faith designed to give him such information, and an opportunity to defend is provided for him in the event of his appearance in the suit, it is not competent to the judiciary to declare that such proceeding is void as not being by due process of law.

5. Whether the property of such non-resident shall be seized upon attachment as the commencement of a suit which shall be carried into judgment and execution, upon which it shall then be sold, or whether it shall be sold upon an execution and judgment without such preliminary seizure, is a

matter not of constitutional power, but of municipal regulation only.

To say that a sovereign State has the power to ordain that the property of non-residents within its territory may be subjected to the payment of debts due to its citizens, if the property is levied upon at the commencement of a suit, but that it has not such power if the property is levied upon at the end of the suit, is a refinement and a depreciation of a great general principle that, in my judgment, cannot be sustained.

* * * * *

45 Take

NELSON v. CHICAGO, BURLINGTON & QUINCY RAILROAD CO.

Supreme Court of Illinois. 1907.

225 Illinois, 197.

HAND, J. The appellant, Lars R. Nelson, on the 21st day of April, 1906, filed a *præcipe* in the office of the clerk of the Circuit Court of Kane county for a summons in an action on the case against the Chicago, Burlington & Quincy Railway Company, an Iowa corporation, and the Chicago, Burlington & Quincy Railroad Company, an Illinois corporation. A summons was issued against both companies and delivered to the sheriff of said county to serve, which summons was returned by said sheriff not served as to the railroad company, because the president or any other of the officers or agents of said railroad company with whom the statute provides a copy of the summons may be left to effect service of process on the company, could not be found by him in said county. The *præcipe* and summons were then amended and the case discontinued as to the railway company, and the railroad company was served with process by publication and mail, as in chancery cases, as is authorized by paragraph 5 of the Practice Act (Hurd's Stat. 1905, Chap. 110), and a declaration was filed against the railroad company.

* * * The railroad company entered a special appearance and moved to quash the service of process had upon it by publication and mail, which motion was sustained, and

the appellant electing to stand by the service of process and refusing to proceed further, the court dismissed the suit, and the appellant has prosecuted this appeal.

It is * * * contended by the railroad company that * * * if service of process by publication and mail is authorized by said paragraph 5 upon a defendant railroad company that has its principal office in this state in a suit where a judgment *in personam* is sought against the railroad company, the statute is unconstitutional and void, as such service of process, it is said, does not constitute due process of law.

* * * * *

The law provides for two methods of service of process; the one actual and the other constructive. Actual service of process is made by reading the original process to the defendant or by delivering to him a copy thereof; and constructive service of process, which is a substituted service of process, is made by leaving a copy of the process at the defendant's residence when he is absent, or by posting or publishing notice of the pendency of the suit, and mailing a copy of the notice posted or published to the defendant, if his postoffice address is known. It is held that the service of process, either actual or constructive, upon a nonresident defendant outside the limits of the state where the action or proceeding is pending will not authorize the rendition of a personal judgment or decree against a defendant, but that such service of process is sufficient upon which to base a decree changing the marital status in a proceeding for divorce, or a judgment or decree disposing of property situated within the jurisdiction of the court wherein the action or proceeding is pending. It is also held that each state may determine for itself in what method process may be served upon its citizens within its own boundaries, and while such legislation will have no force outside the state, service of process within the state in the manner pointed out in the statute regulating the method of obtaining such constructive service of process, if the method of service of process provided for is such as to amount to due process of law, as these terms are used in the State and Federal constitutions, will be sufficient to authorize the courts of the State within whose jurisdiction the service of process is had to pronounce a personal judgment or decree against a defendant so served

with process, although cases may arise in practice upon such constructive service of process where a personal judgment or decree might be obtained against a defendant without such defendant having received actual notice of the pendency of the action prior to judgment or decree. Constructive service of process, it is said, is authorized in a certain class of cases, such as when the defendant has gone out of the State, or when he cannot be found, or when he conceals himself so that process cannot be served upon him, as the result of necessity—that is, such constructive service of process is substituted for actual service of process when actual service of process cannot be had upon a defendant. In this case actual service could not be had upon the defendant although the suit was properly brought in the court from which the process was issued and the defendant was a resident of, and was in the State, and the question here is narrowed to this: Can the legislature provide a constructive or substituted service of process by publication and mail, in lieu of actual service of process, in a case where the process cannot be actually served upon the defendant in the county where the statute expressly authorizes the suit to be commenced, although the defendant resides and is in the State?

The case of *Bimeler v. Dawson*, 4 Scam. 536, was an action of debt upon a judgment rendered by the Court of Common Pleas of Stark county, in the State of Ohio, against Welch and Dawson. There was service of process upon Dawson only, and he pleaded *nul tiel record* and that he was not personally served with process. The record showed personal service upon Welch and service on Dawson by leaving a copy of the summons at his residence, and the rendition of a judgment by default against both defendants. The trial court held that for want of personal service upon Dawson the judgment was not evidence of indebtedness against him, and rendered judgment in his favor. Upon an appeal to this court the judgment was reversed, and in an opinion prepared by Justice Treat, on page 542, it was said: "The laws of the several states provide different modes of bringing parties into court. In some states personal service of process is required, while in other states that mode is not indispensable, but a party may be required to appear and defend an action on notice by publication or by the leaving of process at his residence. It is doubtless competent

for each state to adopt its own regulations in this respect, which will be binding and obligatory on its own citizens. We cannot doubt the right or power of the State of Ohio to provide that the kind of service which it appears was made in this case shall be sufficient to authorize its courts to take jurisdiction of the person of a defendant and proceed to hear the case and render judgment. A judgment thus rendered against one of its citizens would be binding and conclusive on him, for owing allegiance to the State, he is bound by its law and amenable to its judicial tribunals. That State, however, cannot in that way get jurisdiction over the people of other States. Its laws can only operate within its own territory and on its own citizens. They cannot be made to operate extra-territorially, or on the citizens of other States unless they go voluntarily within its limits."

And in *Welch v. Sykes*, 3 Gilm. 197, on page 201, it was said: "It is competent for each State to prescribe the mode for bringing parties before its courts. Although its regulations in this respect can have no extra-territorial operation, they are nevertheless binding on its own citizens."

In *Smith v. Smith*, 17 Ill. 482, on page 484, it was said: "A State may undoubtedly provide for bringing its own citizens or subjects before its tribunals by constructive notice, which may not in all cases come to the actual knowledge of the party; still the presumption is that he has actual notice, or might have such notice by the exercise of proper care and diligence."

* * * * *

What is due process of law in all instances is not easily defined, but as applied to this case it clearly means proceeding according to the course of the common law, and the common law has from time immemorial required that a defendant be personally notified of the pendency of an action, if he was within the jurisdiction of the court and could be found, before judgment or decree was rendered against him. The common law, however, never required actual service of process in all cases, but has always provided for a constructive service of process when actual service thereof could not be had, such as the leaving of a copy of the summons at the defendant's residence, and latterly a posting or publishing of notice of the pendency of the suit or proceeding, when the defendant was out of the State or upon due inquiry

could not be found, or when he concealed himself so that process could not be served upon him.

In *Bardwell v. Anderson*, 9 L. R. A. 152, the Supreme Court of Minnesota said (p. 154): "We think that from the earliest period of English jurisprudence down to the present, as well as in the jurisprudence of the United States derived from that of England, it has always been considered a cardinal and fundamental principle that in actions *in personam* proceeding according to the course of the common law, personal service (or its equivalent as by leaving a copy at his usual place of abode), of the writ, process or summons must be made on all defendants resident and to be found within the jurisdiction of the court. We do not mean that the term 'proceeding according to the course of the common law,' as used in the books, is to be understood as meaning, necessarily and always, personal or actual service of process, for although service by publication is of modern origin, there has always been some mode by which jurisdiction has been obtained at common law by something amounting to or equivalent to constructive service, where the defendant could not be found and served personally; but what we do mean to assert is, that the right to resort to such constructive or substituted service in personal actions proceeding according to the course of the common law rests upon the necessities of the case, and has always been limited and restricted to cases where personal service could not be made because the defendant was a nonresident, or had absconded, or had concealed himself for the purpose of avoiding service. As showing what means were resorted to as amounting or equivalent to constructive service, and how strictly it was limited to cases of necessity by both courts of common law and courts of chancery, reference need only be had to 3 Blackstone's Com. 283, 444."

While the authorities are not in entire harmony upon the subject, the Illinois cases and the greater weight of authority clearly establish, we think, the proposition that a personal judgment in an action at law may be rendered against a defendant residing in and who is in the State where the suit or proceeding is pending, who has been notified of the pendency of the suit by constructive service of process, where it appears actual service of process could not be had upon the defendant, if the constructive service provided for

was required to be had in such manner that the reasonable probabilities were that the defendant would receive notice of the pending action or proceeding before judgment or decree was rendered against him.

* * * * *

*Reversed and remanded.*²²

²² It might be questioned whether the facts bring this case under the rule laid down by the court as having the sanction of common law practice, for here the condition warranting constructive service, viz., that "actual service of process could not be had upon the defendant," is not really present, since personal service was entirely possible in some other county in the state. At common law, if service could not be had in one county the alias writ was sent into some other county where the defendant was thought to be. 1 Tidd's Prac. Ch. VIII. So that the common law contemplated personal service if possible within the realm and not merely if possible within the county.

The decision in this case is expressly confined to the case of "a defendant residing in and who is in the State where the suit is pending," but in the recent case of *Mabee v. McDonald* (1915), 107 Tex. 139, the Supreme Court of Texas, in a learned and exhaustive opinion, held that the State had the same power over such of its citizens as were absent from the State. *Mabee v. McDonald*, (*supra*) was reversed by the United States Supreme Court, *McDonald v. Mabee* (1916), 243 U. S. 90, but the brief opinion, written by Justice Holmes, goes off on an interpretation of the facts substantially different from that shown in the Texas opinion. The want of jurisdiction to render a personal judgment was expressly based on the fact that the defendant had left the state "intending not to return." In the Texas opinion such intention was not found, but the court assumed that he was only temporarily absent. What the Supreme Court of the United States held was that the technical domicile of an absent defendant in the state is not enough to authorize a personal judgment against him on service by publication when he has in fact left the state intending not to return.

In *Bardwell v. Collins*, (1890) 44 Minn. 97, quoted above, the statute authorized service of summons by publication, in actions to fore-close mortgages, as to *all parties to the action against whom no personal judgment was sought*. The court held (1) that such actions were not *in rem* but *in personam*, since they determined the rights and equities of the parties interested in the mortgaged premises; (2) that such actions were strictly judicial in character, proceeding according to the due course of the common law; (3) that it is a cardinal principle of "due process of law" that in actions *in personam* proceeding according to the course of the common law, personal service of process must be had upon defendants resident and to be found within the jurisdiction of the court; (4) the statute is unconstitutional in so far as it attempts to authorize service by mere publication upon resident defendants capable of being personally served.

See *Roberts v. Roberts* (1917), 135 Minn. 397, L. R. A. 1917C, p. 1140, and note at page 1143 on constructive service on resident in personal action.

See notes to *Bryant v. Chute's Ex'r.*, *supra*, as to the common law theory of service.

To prevent some of the injustice which so commonly results from

American systems of constructive service, California provides by statute that any person, firm or corporation may file with the county recorder a certificate as to the place where service may be made, and service by publication cannot be had until it first appears that such a certificate has not been filed or that the defendant cannot be found at the address given therein.—Cal. Civ. Code, § 1163 and Code Civ. Pro. § 412.

46 *False*

INDIANA & ARKANSAS LUMBER & MFG. CO. v.
BRINKLEY.

United States Circuit Court of Appeals, Eighth Circuit.
1908.

164 Federal Reporter, 963; 91 Circuit Court of Appeals, 91.

[Bill to remove a cloud from title, created by a sale under a decree of the chancery court of St. Francis county in an action brought under the Act of 1893 by the St. Francis Levee District to sell land to pay taxes. Complainant challenged the jurisdiction of the court on the ground, among others, that no warning order directed to any of the defendants in that action was ever made or published, but the order was directed only to "Brinkley Heirs, Heirs of R. C. Brinkley, Deceased." The complainant was one of the Brinkley heirs.]

Before SANBORN and HOOK, Circuit Judges, and AMIDON, District Judge.

SANBORN, Circuit Judge. * * *

The proceeding under the act of 1893, before its amendment, was not a proceeding *in rem*, or a proceeding in the nature of a proceeding *in rem*, as were the proceedings under the amendment of the act which were considered in *Ballard v. Hunter*, 204 U. S. 241, 27 Sup. Ct. 261, 51 L. Ed. 461, Id., 74 Ark. 174, 85 S. W. 252, but it was a suit in chancery in personam and it bound only the parties to it. * * *

The basic principle of the jurisprudence of the English-speaking nations is that no person shall be deprived of his life, liberty, or property without due process of law; that is to say, without notice and an opportunity to be heard before the decision respecting the justice of the disposition of his life, liberty, or property that is sought. Const. U. S. Amend.

14; Const. art. 2, § 21; 2 Kent's Comm. 13; *Alexander v. Gordon*, 101 Fed. 91, 96, 98, 41 C. C. A. 228. In the absence of legislative power to proceed otherwise, there is but one way to make a person a party to a suit or to direct to him an adequate notice of a proceeding to deprive him of his property or to bring his person within the jurisdiction of a court, and that is to direct the notice to him by his name and to serve it upon him in person. And where the authority is granted by a statute to notify him otherwise on certain conditions, those conditions must be fulfilled, the method prescribed must be substantially followed or the court fails to obtain jurisdiction of his person, and its decree against him is ineffectual and void. There was a provision of the statutes of Arkansas that, upon condition that it appeared in the complaint that the heirs of a deceased person or the owners of property to be disposed of in a suit were unknown, a warning order might be made by the clerk against such unknown heirs or owners. But there was no other provision in the legislation of Arkansas whereby the heirs of a deceased person might be brought within the jurisdiction of one of its courts in a personal action without making them parties to the suit by name. The expression of one method of obtaining constructive service of such parties is the exclusion of all others, and this legislation was a denial of authority to obtain jurisdiction of unknown heirs or owners by constructive service in any other way than that there prescribed. The plaintiff in the suit to enforce the levee assessment either knew, or he did not know, who the heirs of R. C. Brinkley were. If he knew, there was but one way in which he could bring them within the jurisdiction of the court, and that was by making them defendants by their true names both in his complaint and in his warning order, and by directing the order to them by those names, for there was no authority granted by statute, by the common law, or by the practice of the courts to obtain jurisdiction of a defendant, whose name was known, in a personal suit in any other way. There was no statutory or other authority to obtain jurisdiction of such a defendant in a personal suit by publishing a notice to a class of which he might be a member without naming him. If, on the other hand, the plaintiff did not know the names of those heirs, there was only one way in which he could bring them within the jurisdiction

of the court, and that was by averring that fact in his complaint and procuring a warning order directed to them as unknown heirs. He pursued neither course. He did not make the defendant, or the other heirs of R. C. Brinkley, deceased, defendants by their names, and the court acquired no jurisdiction of them if their names were known to him, and he did not allege in his complaint that their names were unknown to him, and the court acquired no jurisdiction of them if their names were not known to him. The inevitable conclusion is that where, in a suit *in personam* in chancery, the only authority to obtain jurisdiction of persons by publishing a warning order directed to heirs of a deceased person without naming them is conditioned by the appearance in the complaint of the averment that their names are unknown, the court acquires no jurisdiction of them by the issue and publication of such an order in the absence of the requisite averment.²⁹

²⁹ *Harness v. Cravens* (1894), 126 Mo. 233, is an interesting example of the strictness with which statutory methods of making constructive service are insisted upon. There the statute required: For publication against non-residents,—*Showing of non-residence and impossibility of service in the petition or affidavit, and an order of publication based thereon*; For publication against residents,—*Issuance of summons and return of not found, and an order of publication based thereon*. Where the defendant was sued as a non-resident, and a proper showing made by petition and affidavit, but instead of having the order of publication issued on such showing the plaintiff had a summons issued and returned not found and secured an order of publication based on such return, it was held that the service was void.

47
John

KENNEDY v. LAMB.

Court of Appeals of New York. 1905.

182 New York, 228.

VANN, J. The purchasers at the sale in this action, which was brought to partition lands in the borough of Brooklyn, refused to complete their purchase upon the ground that the title was defective. By an order, made at Special Term and affirmed by the Appellate Division, they were directed to comply with the terms of sale and they now appeal to this

court for relief from what they consider an unlawful command. They claim that the court which rendered the judgment in partition did not acquire jurisdiction of several persons, each a necessary party defendant, because they were not personally served with process and the effort to serve them by publication was void, owing to a vital defect in the affidavits upon which the order to publish was made.

From the affidavits presented to the justice who granted the order of publication, one made by the plaintiff and the other by his attorney, it appeared that six of the defendants resided in the State of New Jersey, four at Jersey City and two at Plainfield. The only attempt to show compliance with the command of the statute in reference to "due diligence to make personal service of the summons" was an allegation in the affidavit of the attorney that "the plaintiff will be unable with due diligence to make personal service of the summons within the State as appears by the affidavit of Peter J. Kennedy hereto annexed." The affidavit thus referred to contains nothing whatever upon the subject of diligence, discloses no effort to serve the summons in this state, and gives no reason for not making the effort, aside from the bare fact of non-residence. It does not appear that the summons had been issued or that it was placed in the hands of anyone for service upon the defendants named, and for aught that appears they could have been served in this state without difficulty. They were nephews and nieces of the plaintiff and had visited and corresponded with him "for several years past," as he stated in his affidavit. He did not state how recently they had visited him, when he last heard from them, nor where he himself resided. Four of them lived just across the state line and two of them but a short distance therefrom. All may have been engaged in business in the State of New York and in daily attendance there for that purpose, as is the case with so many residents of the State of New Jersey. The affidavit did not state that they were not in New York or that they were actually in New Jersey when the affiant swore to it.

An order may be made for service by publication upon a defendant who is a non-resident of the state, provided "the plaintiff has been or will be unable with due diligence to make personal service" within the state. (Code Civ. Pro. Sections 438, 439.) The bare fact of non-residence is not

enough to authorize the order, for the plaintiff must also show due diligence to make personal service, or state facts tending to show why personal service cannot be made. The statute now in force differs from the one which formerly governed the subject when some of the cases cited were decided, in that the latter authorized service by publication when the person to be served could not "after due diligence be found within the State." (Code of Pro. Section 135.) The old statute was satisfied with due diligence to find the defendant, while the present statute requires either due effort to serve, or sufficient reasons for not making the effort.

In the case now before us there was no attempt to make personal service and no reason was given for not trying to serve personally, except the fact of non-residence. Even if residence in a distant state or in a foreign country permits the inference that the person to be served cannot be found in this State, residence in an adjoining state, just across the line, with no evidence that the non-resident is not in business in this state, or that he does not sojourn here, and no explanation whatever for not trying to serve him here, is not sufficient. As was said by this court in *Carleton v. Carleton*, (85 N. Y. 313, 315): "It is a well known fact that many persons who are residents of one state have places of business and transact such business in a state different from that in which their residence is located. They are frequently in the latter state, and pass most of their time there. Such persons could be readily found in the state where they do business if due diligence was used for that purpose, and non-residence of itself does not necessarily show that they cannot be found within the state, or raise a presumption that due diligence has been used, or that it was not required."

In a later case it was said: "Where the proof of non-residence is clear and conclusive, and that the defendant is living out of the state and in a distant state, there may be strong reasons for holding that proof of diligence is not required;" and as it appeared that the defendant resided in Maryland, and that the summons, which had been duly issued and some effort made to serve it, could not be served owing to that fact, the affidavit was held sufficient. (*Kennedy v. New York Life Ins. & Trust Co.*, 101 N. Y. 487).

In *McCracken v. Flanagan*, (127 N. Y. 493), it appeared

that a summons had been issued against the defendant and "that defendant is a non-resident of this state, nor can be found therein, but has a place of residence at Matewan, in the state of New Jersey." After a careful review of the leading cases it was held that the affidavit, which was made when section 135 of the Code of Procedure was in force, was insufficient to give jurisdiction. The court said: "Some degree of diligence must be exercised to find the party, and what is a due degree depends upon circumstances surrounding each case, and the simple averments in the affidavit that the defendant is a non-resident and cannot be found within the state are not alone sufficient to support an order for the service of a summons by publication. Those facts do not imply that any diligence has been exercised to find and serve the defendant personally with process. It needs no argument to show that the averment in the affidavit that the defendant cannot be found in the state does not tend to prove the exercise of due diligence to find the defendant, for the statute in question not only requires that it be stated in the affidavit that the defendant cannot be found, but expressly requires the averment that he cannot be found after due diligence."

In *Fetes v. Volmer*, (28 N. Y. St. Rep. 317), the court said: "Though a non-resident, the defendant may be at the time temporarily in the state to the knowledge of the plaintiff, and within easy reach of personal service of the summons. No such proof was made by the plaintiff in this case. The affidavit of his attorney, upon which the order was procured, states only that the action has been commenced, that a summons has been issued, and that the two defendants named are non-residents of the state and that they reside at Marion, Washington County, Iowa. The affidavit was, in this respect, plainly insufficient and the county judge was without jurisdiction to grant the order."

While any evidence having a legal tendency to show compliance with the statute, even if inconclusive, would warrant the exercise of judgment and thus confer jurisdiction to make the order, in this case there was no evidence as to the use of diligence, or to excuse the omission of effort to serve in this state. Even if a judge reached a wrong conclusion upon the facts presented, so that his order would be set aside on direct attack by motion to vacate, still if he

had some legal evidence to act upon, the order would be protected from collateral attack after the entry of judgment. There was no evidence presented to the justice who made the order now before us which authorized him to act judicially or to decide that the plaintiff would be unable with due diligence to make personal service in this state. An affiant who simply repeats the words of a statute merely states his opinion upon a proposition to be proved. Proof requires that facts be stated from which the conclusion sought may be logically drawn. We find no case in this court and no well considered case in any court which sustains an order founded simply on proof of non-residence in an adjoining state with no effort made to find or serve, and no reason given why such effort if made would be useless.

The purchasers were entitled to a marketable title, free from reasonable doubt and they were justified in refusing to complete their purchase because the affidavits upon which the order of publication was based were insufficient to confer jurisdiction.

The order of the Appellate Division, as well as that of the Special Term should be reversed and the motion denied, with costs in all courts.

Order Reversed.

48
Take

(c) *Privilege from Service.*

PARKER v. MARCO.

Court of Appeals of New York. 1893.

136 New York, 585.

MAYNARD, J. The defendant is a resident of South Carolina and an action had been brought there against him in the Federal Circuit Court, by the plaintiff, who is a resident of this state. On April 6, 1892, the defendant came to the city of New York at the instance of the plaintiff to attend an examination of the plaintiff and his witnesses before a notary public, which by the agreement of the counsel for the respective parties had been set down for that date.

The plaintiff procured the defendant's assent to the examination upon the statement that he desired to be in readiness to try the cause at the ensuing April Circuit, to be held at the city of Charleston. When the time for taking the testimony arrived the defendant was informed by plaintiff's counsel that he had abandoned his intention to take the evidence as proposed, for the reason that on account of sickness in his, the counsel's family, the plaintiff would not be prepared to go to trial at the April Circuit, and he expected to be able to produce his witnesses in court when the trial should take place at a subsequent term. It was then late in the afternoon and the defendant returned to his hotel and remained over night, and the next morning started for his home in South Carolina. He was intercepted at the ferry by a process server, who served him with a summons in this action brought by the plaintiff in the supreme court of this state for the same cause of action at issue in the Federal Court in South Carolina. The defendant had no business in New York except that which related to the proposed examination. The defendant has appealed from an order of the General Term, reversing an order of the Special Term, which set aside the service of the summons upon the ground that, when served, he was privileged from service.

Under Section 863 of the Revised Statutes of the United States the plaintiff had an absolute right to take the testimony of his witnesses in this state to be used upon the trial of the action in South Carolina upon giving reasonable notice to the defendant. The compulsory character of the proceeding was not affected by the waiver of notice and the fixing of the time by the agreement of parties. (*Plimpton v. Winslow*, 9 Fed. R. 365.) The same section provides that a person may be required to appear and testify before the notary in the same manner as witnesses in open court, and section 915 of our own Code authorizes any state judge to issue a subpoena to compel the attendance of a witness in such a case. In the trial of the action the notary thus becomes the arm of the court, and, as was held *In re Rindskopf* (24 Fed. R. 542) represents the court *pro hac vice*.

The privilege of a suitor or witness to be exempt from service of process while without the jurisdiction of his resi-

dence for the purpose of attending court in an action to which he is a party or in which he is to be sworn as a witness is a very ancient one. (Year Book 13, Hen. IV., I. B. Viner's Abr. "Privilege.")

It has always been held to extend to every proceeding of a judicial nature taken in or emanating from a duly constituted tribunal which directly relates to the trial of the issues involved. It is not simply a personal privilege, but it is also the privilege of the court, and is deemed necessary for the maintenance of its authority and dignity and in order to promote the due and efficient administration of justice. (*Person v. Grier*, 66 N. Y. 124; *Matthews v. Tufts*, 87 id. 568.) At common law a writ of privilege or protection would be granted to the party or witness by the court in which the action was pending, which would be respected by all other courts. We cannot find that the power to issue such a writ has been abrogated by legislation, and it doubtless exists, and the writ may still be granted by courts possessing a common law jurisdiction; but while the granting of the writ is proper, it is not necessary for the enjoyment of the privilege, and the only office which it can perform is to afford "convenient and authentic notice to those about to do what would be a violation of the privilege, and to set it forth and command due respect to it." (*Bridges v. Sheldon*, 7 Fed. R. 44.) The tendency has been not to restrict but to enlarge the right of privilege so as to afford full protection to parties and witnesses from all forms of civil process during their attendance at court and for a reasonable time in going and returning. (*Larned v. Griffin*, 12 Fed. Rep. 592.)

Hearings before arbitrators, legislative committees, registers and commissioners in bankruptcy, and examiners and commissioners to take depositions, have all been declared to be embraced within the scope of its application. (Bacon's Abr. "Privilege"; *Sandford v. Chase*, 3 Cow. 381; *Matthews v. Tufts*, *supra*; *Hollender v. Hall*, 18 Civ. Pro. 394; 19 id. 292; *Thorp v. Adams*, id. 351; *Bridges v. Sheldon*; *Plimpton v. Winslow*; and *Larned v. Griffin*, *supra*.) It has even been extended to a suitor returning from an appointment with his solicitor for the purpose of inspecting a paper in his adversary's possession in preparation for an examination before a master, (*Sidgier v. Birch*, 9 Ves. 69) and

while attending at the registrar's office with his solicitor to settle the terms of a decree (*Newton v. Askew*, 6 Hare, 319); and while attending from another state to hear an argument in his own case in the Court of Appeals (*Pell's Case*, 1 Rich. L. 197.) No good reason can be perceived why the privilege should not be extended to a party appearing upon the examination of his adversary's witnesses, where the testimony is taken pursuant to the authority of law, and can be read upon the trial with the same force and effect as if it had been taken in open court. It is a proceeding in the cause, which materially affects his rights, and the necessity for his attendance is quite as urgent as it would be if the examination was had at the trial. But we do not think that the question of the necessity of his presence is material. It is the right of the party, as well as his privilege, to be present whenever evidence is to be taken in the action, which may be used for the purpose of affecting its final determination. It is essentially a part of the trial, and should be so regarded as far as it may be necessary for the protection of the suitor. There have been many analogous cases in the Federal Courts where the right to the privilege has been upheld. In *Bridges v. Sheldon*, (*supra*), the action was pending in the U. S. Circuit Court for Vermont. A reference had been ordered to a master to take and state an account. The master on motion of the plaintiff had made an order for the taking of a deposition before a commissioner in the state of Iowa. The defendant, while attending before the commissioner in Iowa, was served with process in a suit brought by the plaintiff for the same cause of action as in the Federal court. Judge Wheeler, in very strong terms, condemned the procedure, and held that the defendant was absolutely privileged from service, and that the conduct of the plaintiff in causing such service to be made was a contempt of court, and could be punished as such. It seems that in such a case a party has a two-fold remedy. He may move in the court, whose privilege has been violated, to punish the party in that court who has been guilty of such violation, or he may move in the court out of which the process has been improperly issued to vacate it, and the motion will be granted.

* * * * *

It may be assumed that the plaintiff acted in entire good

faith, and that his procedure was not a device to secure the presence of the defendant within the territorial jurisdiction of the courts of this state. In the view we take of the privilege of the defendant, the plaintiff's motive is of no importance.

The order of the General Term should be reversed, and the order of the Special Term affirmed, with costs.

All concur except GRAY, J., dissenting.

*Order reversed.*⁸⁰

⁸⁰ "Since the obvious reason of the rule is to encourage voluntary attendance upon courts and to expedite the administration of justice, that reason falls when a suitor or witness is brought into the jurisdiction of a court while under arrest or other compulsion of law. Such a suitor or witness does nothing to encourage or promote voluntary submission to judicial proceedings. He comes because he cannot do otherwise. That seems to be the basis for the exception to the general rule of privilege which is illustrated in cases where persons are brought into the jurisdiction of a court under extradition from other states or foreign countries."—*Netograph Mfg. Co. v. Scrugham* (1910), 197 N. Y. 377, 380. But where a witness came voluntarily from Germany to New York to testify, the service upon him after arrival in New York of a subpoena in the same action for which he came to testify as a witness, did not render his subsequent presence involuntary during the life of the subpoena so as to make him subject to service of process in another suit:—*Bunce v. Humphrey* (1915), 214 N. Y. 21.

In *Greer v. Young* (1887), 120 Ill. 184, the court held, on full consideration that the common rule of exemption applied only to arrest and not to the service of summons, and that it would not extend that rule. The court said: "The mere service of a summons upon a non-resident, when in another state for the purpose of taking depositions to be used in an action to which he is a party in his own state, imposes no greater hardship on him than to be served with process out of his own state when attending to any other kind of business. In either case he is usually afforded ample time to prepare his defense, if he has any. Parties thus circumstanced have no difficulty in getting a temporary postponement or continuance of the causes, when necessary to the attainment of justice, or to avert any serious loss or inconvenience." The court also held that any rule of exemption applied only to witnesses before a lawful tribunal having jurisdiction of the cause, which would include a master or magistrate or other person taking testimony under the order of a court in which the cause was pending, but it would not include a notary public, who, the court said, "can in no sense be regarded as an instrument or agency of the court in which the suit is pending."

SOFGE v. LOWE.

Supreme Court of Tennessee. 1915.

131 Tennessee, 626.

WILLIAMS, J. Sofge, plaintiff in error in this case, in 1913 brought suit in the United States District Court at Helena, Ark., against Lowe on the same cause of action attempted to be asserted in the pending case. Lowe was and is a resident of the state of Massachusetts, and went from there to Helena to attend a trial of the federal court case as a suitor and necessary witness in his own behalf.

While returning from that place and while passing through Memphis, Tenn., en route to his home, Lowe was served with process in this suit. He filed his plea in abatement on the ground that he was exempt from the service of such process while so returning from attendance upon court at Helena, and this plea was sustained by the trial judge. The Court of Civil Appeals has affirmed the judgment of the circuit court, and the case is before us on a petition for *certiorari*.

The point relied on and pressed by appellant Sofge is that the exemption from service of process is confined as to enforcement to the jurisdiction within which was held the court attended by Lowe; that only the courts of Arkansas, into which he was drawn by the Helena litigation, will concern themselves with his protection from the service of process.

* * * * *

The question whether such a suitor is entitled while passing through an intermediate state, in going from or returning to his home, to be protected from service in a suit begun therein, has been decided, it seems, in but two cases. In both of these the exemption was denied. The authority of these cases is weakened by the fact that in neither was the decision by a court of last resort.

The first case was that of *Holyoke, etc., Co. v. Ambden* (C. C.) 55 Fed. 593, 21 L. R. A. 319, decided by Carpenter, District Judge. There Ambden, a citizen of Vermont, was sued in Massachusetts while journeying through that state to attend court in Connecticut. It was there said:

"The second contention of the defendant is that the service of this writ is in violation of the policy of the law which exempts from service parties and witnesses going to and from court on the business of the court. An examination of the cases shows that it has been held that parties to a suit are exempt from arrest, and in some cases from suit by summons, while within the jurisdiction of the court on the business of the court, and that this exemption has in some cases been extended to witnesses. In none of them however, has it been held that a party or witness is exempt from service in any other jurisdiction than that in which his attendance as a party or as a witness is required. I cannot see any reason for further extending this rule. It is established by courts to protect their own process and their own suitors, by the assurance that the court in which the party has brought his action, or into which he has been summoned, * * * will not permit its own process, or that of other courts in the same jurisdiction, in another action, to embarrass the proceedings. It seems to me that evils greater than these sought to be remedied would arise if the courts of one state should assume so to guard and protect all the other courts in the country. The rule is in derogation of common right, and restrains the plaintiff from suing, lest a greater evil may arise than that involved in the temporary suspension of his right to bring his demand into a court of justice having jurisdiction to determine it. The rule therefore ought to be extended with great caution, and to extend it beyond the jurisdiction immediately concerned seems to me to be unnecessary and mischievous."

This federal decision was quoted and followed by the court of common pleas of Susquehanna county, Pa., in the case of *Cronk v. Wheaton*, 23 Lancaster Law Rev. 206, 15 Pa. Dist. Rep. 721, where it was said:

"The researches of diligent counsel have been unable to find and cite any case in any state in which it has been held that this privilege from arrest or summons on a civil process extends beyond protecting the party or witness in attendance upon a court of the state in which the process issued from which the exemption is claimed. * * *"

Notwithstanding these authorities, we are persuaded that the true rule was announced by the trial judge and the Court of Civil Appeals in the instant case.

In cases which have had under consideration the protection of a suitor or witness going from one county in a state to another and subjected to service in a suit in an intermediate county—a closely related point—it has been held that there existed the privilege of exemption. *Tyrone Bank v. Doty*, 2 Pa. Dist. R. 558, 12 Pa. Co. Ct. R. 287; *Hoffman v. Judge of Circuit Court*, 113 Mich. 109, 71 N. W. 480, 38 L. R. A. 663, 67 Am. St. Rep. 458.

A state court will, by way of comity, enforce the privilege of a witness or suitor who, while attending a federal court, has been sued in the state court. *Sewanee, etc., Co. v. Williams*, 120 Tenn. 339; *Powell v. Pangborn*, 161 App. Div. 453, 145 N. Y. Supp. 1073. See, also, *Plimpton v. Winslow* (C. C.) 9 Fed. 365, 20 Blatchf. 82.

* * * * *

The privilege of immunity from service rests upon grounds of public policy, and of such policy as it relates to a matter of supreme importance—the administration of justice. In order that causes may be fully heard and a just result reached, and that an orderly and unhampered administration of justice may be assured, the law has announced the rule of exemption. If parties to a pending case, or their witnesses, are liable to be thus sued, they may be intimidated and prevented from complying with the foreign court's mandate, if actually summoned or subpœnaed, or from attending voluntarily as is their privilege. It is against public policy to permit them to be deterred by fear of being subjected to suit while attending, or so going or returning.

The principle of public policy is common to Arkansas and Tennessee. Justice, in such connection, is to be conceived of as a thing integral and not partible by state or jurisdictional lines; all courts must be presumed to interest themselves alike in promoting and keeping unhampered its fair administration. The courts of this state cannot be unconcerned in respect of the embarrassment in that regard to be experienced by the courts of Arkansas if the courts of this and the other states which surround that state deny to suitors and witnesses returning to their homes from her courts this exemption from suit. Of what considerable avail is it that Arkansas extends her own protection, if the other states refuse any exertion of their sovereign power through their courts to the same end?

The courts of this state will see to it that their processes are not used to thus embarrass the administration of justice in a sister state, and we shall expect the courts of other states to rule in reciprocation. Thus, by a species of comity, a common end will be served. It may be that this cannot be demanded of us or of other courts, or asked to be extended except by way of that courtesy which is really comity. Reasons of convenience, expediency, and public interest prompt us to announce this doctrine for our state. A liberal interpretation in favor of the privilege is manifested in the authorities, state and federal, and we deem our rulings to be in accord with that trend.

* * * * *

Since the rule is based upon public policy in the protection of the administration of justice, and has been extended and liberalized from time to time on that account, the privilege is held not to be invokable unless the person's sole business in the foreign jurisdiction be to attend upon such litigation. If with that affair other business be intermingled the protection is gone. Further, under his plea in abatement, the burden is on the person sued to establish that his purpose, and only purpose, in the jurisdiction to or jurisdictions through which he was called to go or return was that incident to a particular pending litigation which called him from his home. *Finucane v. Warner*, 194 N. Y. 160, 86 N. E. 1118; *Chaffee v. Jones*, 19 Pick. (Mass.) 261; *Smythe v Banks*, 4 Dall. 329, 1 L. Ed. 854.

Content as we are with the rulings of the lower courts, the writ of *certiorari* is denied.

50 *amit*

GREENLEAF v. PEOPLE'S BANK OF BUFFALO.

Supreme Court of North Carolina. 1903.

133 North Carolina, 292.

CLARK, C. J., concurring. The defendant Morey was served with summons in this case while at a hotel in this State. He contends that because he was a lawyer, resident in another State, and was attending court in this State as

counsel in a cause therein pending, the service should be struck out. The proposition is a novel one in a land where equality before the law is the ruling principle and where special privilege to any class of our citizens is not only not recognized by law but is prohibited by the Constitution. A careful examination shows no ground for the alleged exemption of lawyers from service of summons. There is no precedent in England to sustain the proposition, and none in this country save a single case, a very recent one—*Hoffman v. Circuit Judge*, 113 Michigan, 109; 38 L. R. A. 663; 67 Am. St. Rep., 458—which holds that a lawyer, resident in the same State is privileged from service of a summons while attending the Supreme Court of the State or going or returning therefrom, but none of the authorities cited in that opinion sustain its contention. The reason given in the opinion is that while by statute in that State the prohibition of the arrest of counsel in a civil suit is restricted to the actual sitting of a court at which he is engaged, that this does not repeal the common-law exemption of counsel from service of summons. But, on the other hand, the most eminent lawyer which that State (Michigan) has produced, Judge Cooley, in a note to his work on Constitutional Limitations (5th Ed.), p. 161, says: "Exemption from arrest is not violated by the service of citation or declaration in civil cases." Besides, there was at common law no exemption of lawyers from service of process other than *arrest*, and the reason for the latter was that it would be an injury to clients whose cause had been prepared for trial by such counsel to suddenly deprive them of his services, but service of a summons does not have that effect.

In *Robbins v. Lincoln*, 27 Fed. Rep., 342 (United States Circuit Court for Illinois), it is well said: "Inasmuch as resident attorneys may be served with summons while in attendance upon court, an attorney from another State has no greater privilege." This is exactly in point here. It is well known that no lawyer in this State has ever in its history been privileged, or contended even that he was privileged, from service of summons while attending court. If he were, as the Constitution, Art. IV., sec. 22, now provides that "the courts are always open," no lawyer or judge could ever be served with summons. In England, Blackstone says (3 Bl. Com., 289), that lawyers could not be *arrested* on

civil process while in attendance upon court, but could be served with a bill, without arrest, which was equivalent to service of a summons. The same is stated in 8 Bacon's Abr. "Privilege" B., with the modification that if an attorney is sued with another (as in this case), "he is not privileged from arrest, even though it is during his attendance in court," the evident reason being to prevent class discrimination. The exemption of lawyers from arrest, it seems, has now been repealed in England. In this State the English privilege of exemption of lawyers from *arrest* has never been recognized. It is well known that one of the most distinguished lawyers and judges of this State, whose portrait now hangs on the walls of this chamber, was arrested and imprisoned for debt, and long prevented from attending upon court. This barbarous proceeding of imprisonment for debt, handed down from the common law, should have been repealed long before it was, but while it was in force our predecessors applied it impartially, and the bench did not hold their own members or their profession exempt. There was not at common law, and has not been in this State, any exemption of any one from service of summons, and the exemption from arrest under our statute is conferred only upon witnesses and jurors. The Code, secs. 1367 and 1735. And even witnesses and jurors are not exempted from service of summons, since such service would not deprive the court of their presence. There is no reason why lawyers should be privileged from either arrest or service of summons any more than other officers of the court, as sheriffs, clerks, criers and the like, and the legislative power has therefore seen fit to make the exemption apply only to witnesses and jurors, and, as to them, to make the exemption extend to freedom from arrest only.

As to non-residents, in *Cooper v. Wyman*, 122 N. C., 784 this Court held that non-resident witnesses and suitors coming into this State solely for the purpose of litigation were exempt from service while here for that purpose only. This was put upon the ground of necessity, because the State could not *compel* their presence, and that since no one else could fill their functions it was in the interest of justice to give them "a safe conduct." But this reasoning has not obtained in some States, notably Illinois, which holds that neither are exempt from service of summons. *Greer v.*

Young, 120 Ill. 184, citing authorities. In *Nichols v. Goodheart*, 5 Ill. App., 574, it was held that a defendant involuntarily in the State, by virtue of criminal process, is not exempt from service of summons, citing *Williams v. Bacon*, 10 Wend. (N. Y.) 636. Other States hold that the rule is restricted to witnesses only. *Shearman v. Gunlatch*, 37 Minn., 118. Other States extend the exemption to parties also since they have become competent as witnesses (*Mitchell v. Huron*, 53 Michigan, 541), and our State has adopted that rule, but restricts the exemption to those two—"non-resident witnesses and parties." An exhaustive brief of all the authorities, showing that the privilege extends only to non-resident witnesses and parties, will be found in the notes (eighteen pages) to *Mullen v. Sanborn*, 25 L. R. A., 721-738. No court whatever has in any case extended the exemption to non-resident lawyers. * * *

The United States Constitution, Art. I, sec. 6, prohibits the arrest of a member of the House of Representatives or a Senator during the session, except for treason, felony and breach of the peace. There is a similar provision as to the members of the Legislature in Nebraska. The numerous and uniform authorities that such privilege from arrest does not exempt from service of process without arrest are collected in a very recent and able opinion (1903) in *Berlet v. Weary*, 93 N. W., 238 (Neb.); 60 L. R. A., 609; and in *Rhodes v. Walsh*, 55 Minn., 542; 23 L. R. A., 632; *Gentry v. Griffith*, 27 Tex., 461. For a stronger reason this is so where, as in most States as well as in this, lawyers are not exempt even from arrest. In *Lyall v. Goodwin*, 4 McLean, 29, a service of a summons from a United States Court upon a judge of the State Supreme Court, in his own court and while actually on duty, was set aside because being a supposed indignity to the court and interference with its business. Even if this can be sustained and extended to counsel, neither the dignity of the court nor the despatch of business in this case could be interfered with by the service of summons upon Morey at the hotel.

Nor, in the nature of things, is there any reason why a non-resident lawyer, coming here for a consideration in the pursuit of his profession, should be exempt from the service of summons any more than a non-resident physician or minister or a member of any other calling. The plaintiff

sues for services rendered to the defendants in this State at their request. If Morey is exempt from service because here in the exercise of his profession, a "commercial tourist" is by the same right exempt from being served with summons in an action for a hotel bill incurred while prosecuting *his* calling. Indeed, his ground for exemption would be more plausible, for he is engaged in interstate commerce and the lawyer is not. Service of summons upon neither will interfere with the dignity of the courts or their despatch of business. Our State extends no preference to non-resident lawyers over those living here. The Code, secs. 18 and 19; *Manning v. Railroad*, 122 N. C., p. 828.

As far back as 1769 (10 George III., ch. 50), England passed a statute confirming the ruling of Sir Orlando Bridgeman in *Benyon v. Evelyn Tr.*, 14 Car., 2 C. B. Roll, over a century before (1661), and cited in *Knowles' Case*, 12 Mod., at p. 64 (1694), that the privilege which members of Parliament enjoyed of being exempt from arrest did not exempt them from being sued or from service of ordinary process without arrest. The privilege was deemed too invidious a class privilege even for that age and country, and the claim was denied by Parliament itself and the contention put at rest. *Cassidey v. Stewart*, 2 Man. & G. 437. * * *

Equally unfounded is the claim that service upon the other defendant, the officer of a corporation (*Jester v. Steam Packet Co.*, 131 N. C., 54), was invalid because made when he was attending a sale of land under a decree of court. Such sale may, like other acts, come before a court for review, but the sale itself is not a judicial proceeding, and no exemption from service of process extends to it. Such exemptions are restricted to non-resident witnesses and parties, and are permitted, not on their own account or for their own benefit, but for the benefit of the court in obtaining *evidence at a trial*, when the court cannot *compel* the presence of those who can testify to facts in issue in the litigation. This can have no application to the attendance of a party at a sale, under a decree in the cause, for his own convenience or benefit.

* * * * *

The judgment setting aside the service of summons must be reversed.

DOUGLAS, J., concurs in the above concurring opinion.

(d) *Return of Service.*

JONES v. BIBB BRICK COMPANY.

*Supreme Court of Georgia. 1904.**120 Georgia, 321.*

Motion to set aside judgment. Before Judge HODGES. City Court of Macon. October 17, 1903. [Judgment set aside. Plaintiff excepted.]

* * * * *

LAMAR, J. A summons of garnishment directed to the Bibb Brick Company was served, August 23, 1902, the return of the officer showing that he had served the summons on "Bibb Brick Co., by handing the same to John T. Moore, its secretary and treasurer." * * * The motion to set this judgment aside is verified by Moore, and does not deny that he was in charge of the office or of the business of the company in the county. * * * We are therefore to deal with a case in which the return of the officer, who had made good service, was incomplete and defective in its failure to allege that Moore, "secretary and treasurer," was "in charge of the office or business" of the garnishee at the time the summons was handed to him in person.

1-7. Process and service are essential. But the return, being only evidence of what the officer has done in serving the writ, is not jurisdictional. Still it is manifest that a court ought not to proceed without having a legal return of record to show that its process had been actually served, and that it had acquired jurisdiction over the person of the defendant. If there is an entire absence of a return, or if the return made is void because showing service on the wrong person, or at a time, place, or in a manner not provided by law, the court cannot proceed. *Callaway v. Douglasville College*, 99 Ga. 623. If, however, the fact of service appears, and the officer's return is irregular or incomplete, it should not be treated as no evidence, but rather as furnishing defective proof of the fact of service. The irregularity may be cured by an amendment which does not make or state a new fact, but merely supplies an omission in the statement as to an existing fact. Where there has been valid

service and no return, the deficiency may be supplied before taking further steps in the cause. If there has been service and a voidable or defective return, it may be amended even after judgment, so as to save that which has been done under service valid in fact but incompletely reported to the court. For in its last analysis it is the fact of service, rather than the proof thereof by the return, which is of vital importance. Ordinarily service is either good or bad. But process and return existing in writing may vary between void, voidable, and perfect. If either is void, the judgment predicated solely thereon is a nullity. Where process and return are not void, some classes of defects therein are cured by judgment. For many things are sufficient to prevent a judgment from being rendered which would be insufficient to set aside a judgment actually rendered. Hence the Civil Code, section 5365, declares that "a judgment cannot be arrested or set aside for any defect in the pleadings or record that is aided by verdict, or amendable as matter of form." This right to amend a "return" so as to make it conform to the facts is allowed on general principles and by our statute. If the officer is in commission and liable on his bond, he may make this amendment voluntarily. Civil Code, section 5116. If he is dead or out of commission, or refuses to make the return which the facts require, then the amendment may be ordered by the court *nunc pro tunc*. * * *

* * * In *Hargis v. E. T. Va. & Ga. Ry. Co.*, 90 Ga. 42, the return was attacked before judgment; there was no offer to amend, and no proof that the agent was in charge, or that service upon him would have bound the company. The court therefore properly declined to enter judgment against the garnishee. In *Southern Ry. Co. v. Hasan*, 103 Ga. 564, the original record shows that the process was void, and the garnishee attacked the judgment not on the ground that the return was defective but because it had never been served with a summons of garnishment. But none of these cases determine what would have been the effect of valid process and perfect service, with an incomplete or defective return where the judgment rendered thereon was attacked and the motion to set aside and evidence thereunder showed valid service in fact. Such was the case of *Third National Bank v. McCullough*, 108 Ga. 249, where the service was perfect, but the return failed to

recite that Hawkins, president, was in charge; and yet the judgment against the garnishee by default was allowed to stand, there being no allegation in the attack thereon that Hawkins was not in fact the agent of the bank, in charge of its affairs in the county. * * *

Under the authorities, therefore, it is evident that the defective return might have been amended to conform to the facts, and that such amendment when made would have related back so as to make the record complete and the judgment perfect. But it may be claimed that here the defect was never cured, since no amendment was ever made. None was necessary. Whatever may be the rule in ordinary cases, both the allegations and the silence of this motion make it certain that the garnishee had been duly served.

* * * * *

*Judgment reversed. All the justices concur.*³¹

³¹ Return is not jurisdictional, and an amendment may be allowed to sustain a judgment: *Schmidt v. Stolowski* (1905), 126 Wis. 55; *Herman v. Santee* (1894), 103 Cal. 519, overruling *Reinhart v. Lugo* (1890), 86 Cal. 395, 21 Am. St. Rep. 52, note; *Ferguson's Ad'm. v. Teel* (1886), 82 Va. 690; *Brown v. Atwater* (1879), 25 Minn. 520.

5-2
Circuit
BRADLEY MFG. CO. v. BURRHUS.

Supreme Court of Iowa. 1907.

135 Iowa, 324.

Action on a promissory note. The note was executed by Daniel Arnold to plaintiff, and on the back thereof appears the name of defendant Burrhus as guarantor of payment. Both Arnold and Burrhus were named as defendants in the petition, and Arnold was personally served with notice. As to Burrhus, it is the return of the serving officer that the notice was served "by leaving a copy thereof at the house of said A. P. Burrhus, in Liberty township, Buchanan county, with Mrs. Burrhus, his wife," etc. Arnold appeared and filed answer and counterclaim. Burrhus did not appear, and he was adjudged to be in default, and judgment was entered against him for the amount due on the note. In this situation,

plaintiff dismissed as to the defendant Arnold. Thereafter Burrhus appeared and moved that the default and judgment against him be set aside, on this, among other grounds: "That the court had no jurisdiction to enter judgment against this defendant; there having been no proper service and return of notice of the action upon him." With the motion, the defendants presented a joint answer denying liability on the note, and the defendant Arnold repleading, and insisting upon his counterclaim and demand for a judgment in his favor. The motion to set aside was sustained on the ground stated, and from such ruling plaintiff appeals. *Affirmed.*

BISHOP, J. The motion was supported by an affidavit to the effect that the residence of Burrhus at all the times in question was in the incorporated town of Quasqueton, a town situated within the boundary lines of Liberty township, in Buchanan county. The fact thus set forth was not denied by plaintiff, and on such affidavit, and the matters of record in the case, the motion was submitted. * * * Plaintiff filed resistance based on the grounds: First, that the return of service * * * was sufficient * * *; second, that defendant * * * had actual knowledge of the service of the original notice upon his wife. * * *

The first question, then, with which we have to deal is, stated generally: Did the court have jurisdiction in fact to render the default judgment? While the question is not altogether free from difficulty, we are agreed that it should be answered, as it was answered by the court below, in the negative. To begin with, it is clear that essential to authority to proceed to judgment there must be not only service of notice, but a return of service. 18 Ency. of Pl. & Pr. 905. Now, as provided by statute, one method of making service of notice is by substitution; that is, by leaving a copy at the usual place of residence of the defendant with some member of his family, etc., when the defendant is not found within the county of his residence. Code, § 3518. And in respect of the required return, it must state at whose house the copy was left, "and that it was the usual place of residence of the defendant, and the township, town or city in which the house was situated, the name of the person with whom the same was left," etc. Code, § 3519. These provisions of statute must be considered mandatory in character. The method of procedure is extraordinary in character, and allowable only because specifically

authorized; and, in common with other legislative acts which mark a departure from the ordinary, the provisions must be strictly construed in the sense, at least, that the operation thereof may not be abridged or extended by the courts. *Bell v. Stevens*, 116 Iowa, 451, 90 N. W. 87.

Now, it will be observed that on its face the return of service indorsed on the notice here in question made showing that all the requirements of the statute had been complied with. This being true, we have a case of false return, and not a case of defective or incomplete return, as argued by counsel for appellant. And the return is confessedly false, in that the place of residence of the defendant and the place of making service was therein incorrectly stated. From this, the question takes on this specific form: Is the failure of an officer to correctly state the facts respecting a substituted service made by him fatal to jurisdiction? As ground for question in the validity of a judgment, a direct attack upon the return of an officer is proper to be made under the rule of this court. *Wyland v. Frost*, 75 Iowa, 209, 39 N. W. 241; *Browning v. Gosnell*, 91 Iowa, 448, 59 N. W. 340. And it would seem that a denial of jurisdiction ought to follow where, under an attack coming thus, it is made to appear that the false statement was of and concerning any matter made material by the statute to perfect service. Under the statute, substituted service can be made in but one place, and that the place of residence of the defendant. If made elsewhere, it is void. And this was regarded of such materiality that the requirement was included that the officer must not only certify to the fact of service as having occurred at the place, but he must certify to the township, town or city in which such place is located and can be found. As said in *Le Grand v. Fairall*, 86 Iowa, 211, 53 N. W. 115: "The statute is the only authority for a substituted service, and the facts to justify it must appear." It is not enough, therefore, that the copy of the notice was left at the right place, and with a proper person. The return must show the facts, and show them truthfully. It is the return upon which authority to proceed depends, and as the court would not enter a judgment upon a false return, if advised in advance, it should be free to set aside, as between the parties, at least, when subsequently the falsehood is made to appear. * * * But counsel for appellant seem to think that the false statement of the return

should not be regarded as fatal, inasmuch as the town of Quasqueton was situated within the limits of Liberty township, and hence in the material sense the service was in that township. In view of the language of the statute, this cannot be accepted as correct. As we have seen, the statute demands strict compliance, and an officer is not at liberty to act otherwise than as directed either as to service or return. Now, towns and townships are distinct entities, and it must be considered that the Legislature had a purpose in requiring that a return must state specifically in what particular township, town, or city service was made. We need not stop for extended inquiry in respect of such purpose. It is enough that in authorizing an extraordinary proceeding the material requirements to valid action are set forth, and it is not for us to say that any one of these requirements so made material may be dispensed with without infraction of the legislative purpose and intention.

Coming to the second question as made in the case, it need only be said that, as the statute prescribes the method of bringing a party into the court, it can be done in no other way; and the cases are uniform to the effect that his knowledge, otherwise acquired, of the pendency of the proceedings, is matter of no moment. He is not chargeable until he becomes a party, and he can be made a party only by proper service of notice or by voluntary appearance.

On the considerations thus expressed, we reach the conclusion that the ruling of the trial court should be, and it is, affirmed.³³

³³ Return is jurisdictional:—*Albright-Pryor Co. v. Pacific Selling Co.* (1906), 126 Ga. 498; *Wood v. Callaway* (1904), 119 Ga. 801, where there was good service but the return did not show it; *Brown v. Langlois* (1879), 70 Mo. 226; *Johnson v. Delbridge* (1877), 35 Mich. 436; *Rosenberger v. Gibson* (1901), 165 Mo. 16; *Harris v. Sargeant* (1900), 37 Ore. 41.

53
Suther

SUTHERLAND v. PEOPLE'S BANK.

Supreme Court of Appeals of Virginia. 1910.

111 Virginia, 515.

KEITH, P. The People's Bank filed its bill in the circuit court of Dickenson county to enforce the lien of a judgment against J. E. L. Sutherland, Newton Sutherland, S. F. Sutherland, and S. J. T. Powers upon a note in which J. E. L. Sutherland was the maker and the others indorsers in the order named. Process was regularly served upon all of the defendants in person, except J. E. L. Sutherland, and as to him the sheriff's return states that on the 13th day of February, 1909, he executed "by leaving a copy of the within summons posted at the front door of his usual place of abode in Dickenson county, Va., he, the said J. E. L. Sutherland, not being found at his usual place of abode, and neither his wife nor any member of his family over 16 years of age being found at his usual place of abode on whom service of process could be had."

J. E. L. Sutherland has filed neither plea nor answer in the case, but his codefendants pleaded that the judgment to enforce which the bill was filed was obtained upon a negotiable note executed by J. E. L. Sutherland and indorsed by the other defendants in the order named, and that, if paid by any one of the indorsers, such indorser so paying it would be entitled to subrogation against the prior indorsers and against the maker of the note; that the said J. E. L. Sutherland has never been summoned as required by law to answer the bill; and that the return by the sheriff upon the process against the said J. E. L. Sutherland is false, because the said Sutherland has had no usual place of abode in said county at any time since the institution of this suit, all of which the defendants were ready to verify. "Wherefore, for as much as the said J. E. L. Sutherland is not yet before this court with these defendants so that satisfaction can be paid out of his property first, or complete justice be done all the parties defendant to said bill, these defendants pray judgment whether this court can or will take any further cognizance of the cause aforesaid, and pray judgment of the said writ and return thereon, and that the same be quashed. * * *

To this plea in abatement, which it is proper to say was filed within the time prescribed by law, the plaintiff demurred, and contends that the sheriff's return as to all it contains is conclusive, and cannot be contradicted by evidence *aliunde*; * * *

The court sustained the demurrer. * * *

The principal contention in this case arises upon the return of the sheriff on the process issued against J. E. L. Sutherland.

* * * * *

4 Min. Inst. pt. 1, p. 1042, states the law as follows: "The better opinion is believed to be that the officer's return upon process, although it be false, is still conclusive in the suit, the remedy for the party aggrieved by the false return being an action for damages against the officer and his sureties. It is no doubt a hardship upon one against whom a judgment is rendered upon such false return, he having had no knowledge of the pendency of the suit, and no opportunity to defend himself; but, on the other hand, it would occasion delays and hindrances in the administration of justice, which would work still greater mischiefs, if it were allowed to impeach the returns of sworn officers and so annul the proceedings founded thereon."

The question has been considered and decided in the following cases from the Supreme Court of West Virginia, a state whose statutes upon the subject are similar to, if not identical with, our own: *Rader v. Adamson*, 37 W. Va. 582, 16 S. E. 808; *McClung v. McWhorter*, 47 W. Va. 150, 34 S. E. 740, 81 Am. St. Rep. 785; *Talbott v. Southern Oil Co.*, 60 W. Va. 423, 55 S. E. 1009, where it is said that "if a return of service of a summons commencing a suit is sufficient on its face, such facts stated therein as it was the duty of the officer to set forth in it cannot be put in issue by either a plea in abatement or a motion to set aside a judgment by default. For reasons of public policy, contradiction of such returns is not permitted in any form, except upon allegations of fraud or collusion."

In 32 Cyc. p. 514, the law is thus stated: "The question of the conclusiveness of the return is one upon which there is an utterly irreconcilable conflict in authority. The English common-law rule, which is also the rule in many American states, is that, as between parties and privies, the return of

an officer is to be taken as true, as to all matters which are properly the subject of a return by the officer, and it can be controverted only in an action against the officer for a false return, unless it is contradicted by other matters appearing of record in the case, or unless the false return was procured or induced by plaintiff, or resulted from the mistake of the officer, except where the return forms the basis for a foreign judgment, in which case it is prima facie evidence only."

In *Tillman v. Davis*, 28 Ga. 494, reported also in 73 Am. Dec. 786, the syllabus states that "the sheriff's return of service on writ cannot be traversed by parties or privies, except for fraud or collusion"; and in the course of the opinion Judge Lumpkin says: "I have investigated carefully and traced the question to its fountainhead, and find it well settled that by the common law no averment will lie against the sheriff's return, and one reason assigned amongst others is that he is a sworn officer, to whom the law gives credit."

It is conceded by appellants that such is the law where, as in *Preston v. Kindrick*, 94 Va. 760, 27 S. E. 528, a bill was filed asking for relief against a decree by default, or, as in *Ramsburg v. Kline*, 96 Va. 465, where the relief was asked against a judgment by default; but it is earnestly contended that the law is otherwise where the attack is made upon the return of a sheriff in a pending suit by proper plea in abatement.

The cases which we have cited make no such distinction, and the reasons of public policy upon which they rest seem to apply equally to both classes of cases.

* * * * *

Upon the whole case we are of opinion that there is no error to the prejudice of appellants, and the decree of the circuit court is affirmed.

*Affirmed.*³³

³³ In *Miedreich v. Lauenstein* (1913), 232 U. S. 236, it was held that the rule making the sheriff's return conclusive was not a denial of due process of law.

A federal court sitting in a state which adheres to this rule, will not follow it: *Mechanical Appliance Co. v. Castleman* (1910), 215 U. S. 437.

54
~~False~~
CROSBY v. FARMER.
Supreme Court of Minnesota. 1888.

39 Minnesota, 305.

Appeal by the plaintiff from an order of the municipal court of St. Paul, setting aside a judgment by default.

MITCHELL, J. Judgment by default was rendered against defendant in the municipal court of St. Paul, upon the return of a police officer that he had served the summons upon defendant in the city of St. Paul, Ramsey county, by leaving a copy at his last usual abode, with a person of suitable age and discretion then resident therein. Subsequently the judgment was vacated, on motion of defendant made on affidavits showing that he was not and never had been a resident of Ramsey county, but at the time of the alleged service was and ever since has been a resident of Steele county. The plaintiff presented no counter-affidavits, but relied on the conclusiveness of the officer's return,—contending that it could not be impeached; that, if false, defendant's only remedy was by action against the officer.

This question has never been squarely decided by this court,—at least as to a return on original process. * * *

* * * The rule of the English common law is that, as between the parties to the process or their privies, a sheriff's return is conclusive, and that the court will not try the truth of it on motion to set aside the proceedings, or allow any averment against it to be taken in pleading; that, if false, the only remedy is against the sheriff by action. Com. Dig. tit. "Return" F 2 and G. The reason usually given for the rule is that it is necessary to secure the rights of the parties, and give validity and effect to the acts of ministerial officers. In England, process could only be served by the sheriff, who was the only ministerial officer known to the courts for that purpose. Moreover, under the common law practice which obtained there, it was almost impossible for judgment to be rendered against a party without actual personal notice to him. Under such a system, the rule might be convenient, and without much danger of working injustice.

But, under the practice which obtains in this and other states, most of the old safeguards have been removed; and

the necessity for modifying the rule, and adapting it to the changed condition of the law, has been often felt and frequently acted upon, especially in the case of *original* process by which the court acquires jurisdiction. In the district court a summons may be served by any person not a party to the action, and his affidavit of service is placed virtually on the same footing as the return of the sheriff. In the municipal court of St. Paul the summons may be served by any policeman. The remedy by action for false return, under such a system, would often be inadequate or wholly fruitless. Again, the manner of service has been in other respects so materially changed that actual personal service is unnecessary, and the officer making service must often return as to facts not within his personal knowledge, but in the determination of which he must frequently rely upon information received from others. For example, service may be made by leaving a copy of the summons at the house of defendant's usual abode, with a person of suitable age and discretion then resident therein. In case of corporations service may be made, not only on certain specified general officers, but also, in certain cases, upon a managing or general agent, or even upon an acting ticket or freight agent. In case of minors under 14 years, the service must be both on the minor personally, and also upon his father, mother, or guardian, or, if none, upon the person having the care or control of the minor, or with whom he resides, or by whom he is employed. How can a sheriff determine where a man resides, or who resides with him, or who is the ticket or freight agent of a railway company, or who has the care or control of a minor, or by whom he is employed, except upon information? And why should his return as to these facts be conclusive? If the officer makes a mistake, why should the defendant be compelled to allow the judgment against him to stand, and resort to his suit against the officer, instead of being permitted to apply in a direct proceeding in the action to set aside the false return? We can see no good reason why the plaintiff should have a sum of money to which he is not entitled, and the officer be compelled to pay the defendant a like sum for making what may have been an honest mistake. If somebody must suffer loss for the mistake, it is right it should fall on him who made it; but, if discovered in time to prevent loss to anyone, why should not the mistake be corrected on motion? There are very good

reasons why the return of a ministerial officer should be held conclusive in all collateral proceedings, but we can see none, either upon principle or considerations of policy, why it may not be impeached for falsity in direct proceedings in the action; assuming always, of course, that no rights of third parties have intervened. Any evils or inconvenience which can possibly arise from permitting this to be done would, in our judgment, be greatly outweighed by the injustice that would often result from prohibiting it. The general tendency, especially in states having a Code practice like ours, is to allow the return to be impeached by an affidavit, on motion or other direct proceedings to vacate. *Bond v. Wilson*, 8 Kan. 228; *Walker v. Lutz*, 14 Neb. 274, (15 N. W. Rep. 352); *Wendell v. Mugridge*, 19 N. H. 109; *Carr v. Commercial Bank*, 16 Wis. 52; *Stout v. Sioux City & Pacific Ry. Co.*, 3 McCrary, 1, (8 Fed. Rep. 794); *Van Rensselaer v. Chadwick*, 7 How. Prac. 297; *Wallis v. Lott*, 15 How. Prac. 567; *Watson v. Watson*, 6 Conn. 334; *Rowe v. Table Mt. Water Co.*, 10 Cal. 442.

Some of the cases seem to make a distinction between mesne and final process and the original process, like a summons, by which the court acquires jurisdiction of the defendant. We confess that we cannot see at present why there should be any such distinction; but, without deciding that question, we are of opinion that, upon a motion made in the action to vacate a judgment by default on the ground of no service of the summons, the return of the officer may be impeached by affidavits, as was done in this case.

*Order affirmed.*³⁴

³⁴ See *The Sheriff's Return*, by E. R. Sunderland, 16 Columbia L. Rev. 281, where the origin and present status of the rule prohibiting the falsification of the sheriff's return on direct attack are discussed. It is there shown that the great majority of the American states have more or less completely abandoned the common law rule that the sheriff's return could not be falsified.

SECTION 4. JURISDICTION OVER THE RES.

WOODRUFF v. TAYLOR.

*Supreme Court of Vermont. 1847.**20 Vermont, 65.*

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Quit

[Trespass for taking certain personal property. Defendant pleaded that he commenced a suit against one Phelps Smith in the court of King's Bench, in Montreal, Canada, and recovered a judgment, and the property in question was levied upon at his instance as the property of Smith and sold after due notice; that at the time of these proceedings it was the custom and law in Montreal that any person claiming any interest in property levied upon and sold on execution, must enter his appearance in court when the proceeds of the sale are returned, or be forever barred from asserting any title to said goods; that the present plaintiff did not appear in said court, and distribution of the proceeds was made to the present defendant and others. To this plea plaintiff replied that he was at all times mentioned therein a citizen and resident of the United States and that he had no notice of the proceedings. A demurrer to this replication was sustained.]

HALL, J. A second argument having been directed in this case, it has perhaps assumed an importance in the eyes of the counsel, which its intrinsic difficulties may not seem to warrant; but which may, nevertheless, justify a more extended opinion, than would otherwise have been deemed necessary.

The question raised by the pleadings is, what is to be the effect of the proceedings in the King's Bench in Canada upon one not personally amendable to its tribunal,—when those proceedings are used here, in another and foreign jurisdiction? It is insisted, in behalf of the defendant, that the record pleaded, in connection with the custom and law of Canada set forth in the plea, is to be considered as conclusive evidence, that the matter now in controversy between the plaintiff and defendant has been adjudicated by a competent tribunal, and that therefore the plea is a good bar to the action. This renders it necessary to inquire into the nature of those

proceedings, in reference to their sufficiency to constitute a record of estoppel.

Judgments, in regard to their conclusive effects as estoppels, are of two classes;—judgments *in personam* and judgment *in rem*. The judgment pleaded in this case cannot be supported as a judgment *in personam*, because the court rendering it has no jurisdiction of the person of the plaintiff, he being a citizen of another government and having no notice of the suit. As a proceeding against his person, the judgment was *coram non judice*, a mere nullity. This is too plain to need argument, and is, indeed, conceded by the counsel for the defendant, who insist, that it is an estoppel as a proceeding *in rem*,—that although not binding on the person, it is binding on the property in controversy and concludes its title. A judgment *in rem* I understand to be an adjudication, pronounced upon the *status* of some particular subject matter, by a tribunal having competent authority for that purpose. It differs from a judgment *in personam* in this, that the latter judgment is, in form as well as substance, between the parties claiming the right; and that it is so *inter partes* appears by the record itself. It is binding only upon the parties appearing to be such by the record and those claiming by them. A judgment *in rem* is founded on a proceeding instituted, not against the person, as such, but against or upon the thing or subject matter itself, whose state, or condition, is to be determined. It is a proceeding to determine the state, or condition, of the thing itself; and the judgment is a solemn declaration upon the *status* of the thing, and it *ipso facto* renders it what it declares it to be.

The probate of a will I conceive to be a familiar instance of a proceeding *in rem* in this state. The proceeding is, in form and substance, upon the will itself. No process is issued against any one; but all persons interested in determining the state, or condition, of the instrument are constructively notified, by a newspaper publication, to appear and contest the probate; and the judgment is, not that this or that person shall pay a sum of money, or do any particular act, but that the instrument is, or is not, the will of the testator. It determines the *status* of the subject matter of the proceeding. The judgment is upon the thing itself; and when the proper steps required by law are taken, the judgment is conclusive, and makes the instrument, as to all the world, (at least so

far as the property of the testator within this state is concerned,) just what the judgment declares it to be. This is one instance of a proceeding upon a written instrument, to determine its state, or condition; and that determination, in its consequences, involves and incidentally determines the rights of individuals to property affected by it.

But proceedings *in rem* may be and often are upon personal chattels, directly declaring the right to them. In such cases the proceeding is for the supposed violation of the property, so to speak, of some public or municipal law, or regulation, by which it is alleged the title of the former owner has become divested. The property being seized, a proceeding is then instituted against it, upon an allegation stating the cause for which it has become forfeited; upon which public notice is given, in some prescribed form, to all persons to appear and contest the allegation. It is by no means certain, that all persons having an interest in the property have actual notice of the proceeding; but if the thing itself, upon which the proceeding is had, be within the jurisdiction of the court, all persons interested are held to have constructive notice; and the sentence, or decree, of the court, declaring the state, or condition, of the property, is held to be conclusive upon all the world. A sale of the property, under such sentence, passes the right absolutely; and farther, in the case of judgments of courts of admiralty, they are also held to be conclusive evidence of the facts stated in the decree to have been found by the court, as the basis of the decree. And perhaps the judgments of municipal courts, acting *in rem*, within the sphere of their jurisdiction, would have the same effect.

These proceedings, that have been mentioned, are purely *in rem*. But, besides these, there is another class of cases, which may perhaps be considered, to some extent, proceedings *in rem*, though in form they are proceedings *inter partes*. An attachment of property in this state, where the court has jurisdiction of the property, but not of the person of the defendant, and a sale of it (or a levy upon it, if it be real estate,) on execution, is in the nature of a proceeding *in rem*. The judgment, if the defendant have no notice, would be treated as a nullity out of our jurisdiction, so far as the person of the defendant was concerned; though it would be held binding, as between the parties, so far as regarded the property, as a proceeding *in rem*. The defendant would not, I ap-

prehend, be allowed to recover back his property in another jurisdiction. The *status* of the property, as between the plaintiff and defendant, would be held to have been determined by the proceeding. But the proceeding would not in any way affect the *status* of the property as to any other persons, than the parties to the record and those claiming by them.

Our proceeding of foreign attachment partakes, perhaps still more, of the nature of a proceeding *in rem*; but its operation as such is also of a limited character. The suit is *inter partes*, and, as a proceeding *in rem*, it must be confined to such parties. A process is issued in favor of a plaintiff, declaring against his debtor residing in another government, and alleging, also, that another person here, named in the process and styled a trustee, has goods in his hands belonging to the plaintiff's debtor, or is indebted to him, and praying that the goods or debt found here may be declared forfeited to the plaintiff, or in other words, that the property here may be applied in payment of the plaintiff's demand. I conceive the court here has jurisdiction of the property in the hands of the trustee, or the debt due from him,—it being found in our jurisdiction,—and that the court may proceed upon it *in rem*. After publication, by which the debtor is constructively notified of the proceeding against his property, the court adjudicates upon the property and declares that it shall be delivered, or paid, to the plaintiff, to be applied upon his debt. I think such adjudication changes the *status* of the property, or debt, and deprives the principal debtor of all title to it; that such adjudication should be held binding and conclusive upon all the parties to the proceeding; that the foreign creditor of the trustee, having placed his property, or his credit, within this jurisdiction, should be bound by its forfeiture, declared by our courts; and that he should be barred, in any other jurisdiction, from prosecuting his claim against the trustee. But the operation of this proceeding *in rem* must be limited to the parties to it, and cannot in any manner affect the right or interest of any other person, having an independent and adverse claim to the goods, or debt, which was the subject matter of the suit. The court does not pretend to notify such adverse claimant, either constructively, or otherwise; nor does the proceeding profess to determine the rights of any other persons, than those who are parties of

record to it; and it can, consequently, affect the rights of no other persons.

The distinction between proceedings purely *in rem* and those of a limited character, which have been mentioned, I think is strongly and plainly marked. The object and purpose of a proceeding purely *in rem* is to ascertain the right of every possible claimant; and it is instituted on an allegation, that the title of the former owner, whoever he may be, has become divested; and notice of the proceeding is given to the whole world to appear and make claim to it. From the nature of the case the notice is constructive, only, as to the greater part of the world; but it is such as the law presumes will be most likely to reach the persons interested, and such as does, in point of fact, generally reach them. In the case of a seizure for the violation of our revenue laws, the substance of the libel, which states the grounds on which the forfeiture is claimed, with the order of the court thereon, specifying the time and place of trial, is to be published in a newspaper, and posted up a certain number of days; and proclamation is also made in court for all persons interested to appear and contest the forfeiture. And in every court and in all countries, whose judgments are respected, notice of some kind is given. It is, indeed, as I apprehend, just as essential to the validity of a judgment *in rem*, that constructive notice, at least, should appear to have been given, as that actual notice should appear upon the record of a judgment *in personam*. A proceeding professing to determine the right of property, where no notice, actual, or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court. *Bradstreet v. Neptune Ins. Co.*, 3 Sumn. 607.

The *limited* proceedings *in rem*, before mentioned, are not based on any allegation, that the right of property is to be determined between any other persons than the parties to the suit; no notice is sought to be given to any other persons; and the judgment being only as to the *status* of the property as between the parties of record, it is, as to all other persons, a mere nullity.

If we apply these principles to the record pleaded in bar in this case, I think it would be impossible to maintain, that, as to the plaintiff Woodruff, it was a proceeding *in rem*. There

was no allegation, that the *status* of the property, levied upon as the property of Phelps Smith, or the avails of it, when paid into court, was to be adjudicated as to him, and there was no notice, actual, or constructive, to him, to appear and make any claim to it. The judgment was rendered in a suit *inter partes*, in which Taylor was plaintiff and Phelps Smith defendant; and though it bound the property as between them, it could affect the rights of no other person. It is precisely the case of the levy of an execution, in this state, upon personal property, as that of the judgment debtor, of which property some third person claims to be the owner. If such third person were to bring trespass against the judgment creditor for making the levy, I do not perceive why such creditor, with the same propriety as the defendant in this case, might not plead his levy and sale in bar as a proceeding *in rem*. The record in this case, indeed, shows, that the levy was made in the presence of a *Recors*, which a levy in this state would not; but I apprehend the high standing or official character of the witnesses to a trespass would not purge its illegality, or bar a right of recovery.

But the record of the judgment in the King's Bench wholly fails to show, that the right of the plaintiff in this suit to the property was attempted to be adjudicated; and there is no averment in the plea, that it was adjudicated. The plea states, in substance, that, by the law of Canada, it would have been adjudicated, if the plaintiff had appeared in the court and made claim to the property. And by the facts set forth in the plea we are given clearly to understand, that it was not adjudicated, because the plaintiff did not so make his claim. It would therefore be impossible to maintain this plea, as furnishing evidence that the matter in controversy in *res adjudicata*, even if the plaintiff had had notice of the proceeding. If the plea could, under such circumstances, be sustained, even in the courts of Canada, it would not be because the matter had been adjudicated, but because the plaintiff, having neglected to have his claim adjudicated at the time and in the manner pointed out by the laws of that province, was thereby barred of any other remedy. The plea does not aver, that the property of the plaintiff, being found in the possession of Phelps Smith, in Canada, might for that reason, or for any other reason, be legally levied upon and sold as the property of Smith. It in effect admits, that the original levy

upon the plaintiff's property was wrongful, but proceeds upon the ground, that, by reason of the subsequent proceedings, the wrong cannot now be redressed. The original right of action of the plaintiff is conceded, but it is insisted, that, by something arising *ex post facto*, his remedy is gone. It is not a bar to the right that is relied upon, but a bar to the redress. This ground of defense would therefore seem to rest upon a local law of the province of Canada, which affects the plaintiff's remedy only, but which, by the well settled doctrine of the common law, can be of no avail, when a remedy is sought in another jurisdiction.

But it is unnecessary to consider farther, what might have been the effect of the defendant's plea, if the plaintiff, at the time, had been a resident of Canada; because it seems quite clear, that it can have no effect whatever upon the cause of action of one who was, during the whole proceeding, a resident citizen of another government, not subject to the law of the province, and who had no notice of the proceeding. Story's Conf. of Laws, 487.

The result is, that the judgment of the county court is reversed, the replication is held sufficient, and the case is remanded to the county court for the trial of the issue of fact.⁸⁵

⁸⁵ Quoted with approval in *Windsor v. McVeigh* (1876), 93 U. S. 274, 281.

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Galac

BANK OF COLFAX v. RICHARDSON.

Supreme Court of Oregon. 1899.

34 Oregon, 518.

BEAN, J. This is a suit to set aside a conveyance from A. C. and Laura R. Richardson to their minor children of certain lands in Benton county, on the ground that it was made for the purpose of defrauding creditors, and especially this plaintiff. The complaint avers, in effect, that on April 21, 1894, the plaintiff commenced three actions in the circuit court for Multnomah county—one against the defendant A. C. Richardson, another against him and his wife, Laura R. Richardson, and the third against him and one J. T. Dook—to recover

upon promissory notes of the respective defendants, and caused the real property in question to be attached in each of such actions; that such proceedings were had therein that the plaintiff recovered judgments against the defendants, wherein it was ordered that the property attached be sold, and the proceeds applied to the payment thereof; that a few days before the commencement of such actions, and after the indebtedness upon which they were based had accrued, the defendants A. C. and Laura R. Richardson, with intent to injure and defraud the plaintiff, and without any consideration, conveyed the premises in question to their minor children, who are made defendants in this suit. The answer puts in issue the material allegations of the complaint, and alleges that the conveyance referred to was made for a valuable consideration, and in payment of a debt due from the grantors to the grantees. At the time the several actions referred to in the pleadings were commenced and the judgments therein rendered, the Richardsons were nonresidents of the state, and service of the summons was had upon them by publication. The plaintiff, at the trial, to maintain the issues on its part, and to prove the existence of the several judgments and orders of sale as alleged, offered in evidence copies of the complaint, affidavit, and undertaking on attachment, writ of attachment and return thereon, affidavit and order for publication of summons, proof of publication and of deposit in the post office, and the judgment in each of such actions, to the admission of which the defendants objected for the reasons that (1) it does not affirmatively appear in either case, except in the affidavits for an order of publication, that a summons was issued at the time or before the writ of attachment; * * * These objections were overruled, and the records admitted in evidence, and of this ruling the defendants complain.

The argument in support of the first objection is that, the judgments in question having been rendered against nonresidents of the state upon service of the summons by publication, the facts essential to the jurisdiction must affirmatively appear upon the face of the record, and, since an attachment of the property of a nonresident is, under the doctrine of *Pennoyer v. Neff*, 95 U. S. 714, a necessary preliminary jurisdictional step in such cases, the record must affirmatively show, even on a collateral attack, that all the requirements of the

statute in reference to the issuance and levy of attachment have been strictly complied with; and, as the writ cannot regularly issue before the summons (*White v. Johnson*, 27 Or. 282, 40 Pac. 511), it is claimed that the judgments in question are void, because it does not affirmatively appear from any competent evidence that the summons had, in fact, been issued at the date of the writ.

1. If this question was here on appeal from the judgments of the circuit court of Multnomah county, we might not find it easy to affirm them on satisfactory grounds; but we occupy no such position. The records are introduced collaterally as evidence to sustain the allegations of the complaint in the suit now pending, and we cannot, therefore, disregard them, or refuse to give effect to the judgments, on any other ground than a want of jurisdiction in the court which rendered them. Any errors or irregularities in the records are of no avail in this proceeding unless they be such as show that the court had no jurisdiction. Our inquiry, therefore, must be confined to the question as to whether the error alleged affects the jurisdiction of the court, and in its consideration it is proper to bear in mind that there is no statute of this state making the seizure under an attachment or otherwise of the property of a nonresident an essential or necessary jurisdictional prerequisite in an action against him. We are not called upon, therefore, to consider the effect of the failure of the record in such an action to affirmatively show that all the statutory jurisdictional requirements have been complied with, although even in such case the presumptions in favor of jurisdiction will often be sufficient to sustain the judgment when collaterally assailed. *Applegate v. Mining Co.*, 117 U. S. 255, 6 Sup. Ct. 742.

2. The rule requiring the property of a nonresident in an action on a money demand to be seized under a writ of attachment, and thus brought under the control of the court, before any steps are taken looking to the publication of the summons, is wholly a judicial, and not a legislative, requirement.

3. By the ruling in *Pennoyer v. Neff*, *supra*, the proceedings in such an action, even if they conform strictly in every particular to the requirements of the statutes of this state, are ineffectual unless some property of the defendant in the state is brought, at the inception of the case, under the con-

trol of the court, and subject to its disposition by a writ of attachment or other process adopted for that purpose; and then only to the extent of adjudging that the property so seized is liable for the satisfaction of plaintiff's demand. In other words, the effect of that decision is that an action against a nonresident, who is not personally served with process within the territorial limits of the court, or does not appear in the action, is substantially and to all intents and purposes a proceeding *in rem*, and therefore the property to be affected by the adjudication must be brought under the control of the court in the first instance by an attachment, or some other equivalent act. The soundness of this doctrine is, of course, not to be questioned, but, in our opinion, its requirements are satisfied, and the court acquires sufficient jurisdiction of the *rem* to protect its proceeding from collateral attack, when the property of the defendant has been actually brought within the power and control of the court by a seizure under a lawful writ of attachment issued in the action, although there may be irregularities, or even error, in the attachment proceedings.

4. Under our system an attachment is merely auxiliary to the main action, and there is no difference in the proceedings thereon in an action brought against a nonresident, upon whom service is necessarily made by publication, and in one brought against a resident of the state, in which personal service is had. In either case the proceedings on attachment have nothing to do with the merits of the cause of action or the jurisdiction of the court to try and determine the controversy between the parties. If personal service is had, the cause becomes a mere action *in personam*, with the added incident that the property attached remains liable for any judgment the plaintiff may recover. But, if service is had by publication, and there is no appearance for the defendant, the action is practically a proceeding *in rem* against the attached property, the only effect of which is to subject it to the payment of the amount which the court may find due the plaintiff. Where no personal service is had, the *res* is brought within the power and control of the court by a seizure under a writ of attachment, but the right to adjudicate thereon is acquired only by the publication of the summons. It is the substituted service, and not the seizure, which gives the court jurisdiction to establish by its judgment a demand against

the defendant, and to subject the property brought within its custody to the payment of that demand. In other words, the authority to hear and proceed to judgment depends upon the service of the process and the actual seizure of the thing to be concluded by the judgment, and not upon the regularity of the proceedings by which the control of the property was acquired. When, therefore, the court has the *de facto* custody of the property by virtue of a *de facto* writ of attachment, and a right to determine whether such property shall be subject to the payment of plaintiff's demand by virtue of constructive service of process, it has full and complete jurisdiction in the premises, and subsequent errors or irregularities in the proceedings will not be available on collateral attack. A judgment founded on service of process by publication is, of course, ineffectual unless it is an adjudication concerning property which the court has in its custody under some lawful process, because there is nothing upon which it can operate; but where the property has been actually seized and brought within the control of the court by some process authorized by law, and the right to determine its liability for the demands of the plaintiff is subsequently acquired by publication, an error of the court in determining the status of the property or its liability, or the validity of the attachment, can, it seems to us, no more affect the jurisdiction under a statute like ours than an erroneous decision as to the amount of plaintiff's demand, or any other error in the case. *Van Fleet*, Coll. Attack, §§ 257, 838; *Paul v. Smith*, 82 Ky. 451; *Barelli v. Wagner* (Tex. Civ. App.) 27 S. W. 17; *Thompson v. Eastburn*, 16 N. J. Law, 100; *Diehl v. Page*, 3 N. J. Eq. 143.

5. There is much conflict in the authorities generally as to whether the statutory prerequisites to the issuance of writs of attachment are jurisdictional, and must affirmatively appear, to protect the proceedings from collateral attack, or whether, in the absence of any showing in the record to the contrary, it will be presumed that the steps necessary to vest the court with jurisdiction were taken. Mr. Waples states with apparent confidence that all the statutory requirements are jurisdictional, and are not to be presumed after judgment, even on a collateral attack, and cites a large number of cases which more or less directly support the text (Wap. Attachm. § 625); while Mr. Works, with equal confidence, says that, while there are authorities holding that such proceedings are

special, and that no presumptions in favor of the jurisdiction of the court can be indulged, "the clear weight of authority and reason is to the contrary" (Works, Courts & Jur. p. 547); and this seems to be the view of Judge Van Fleet, as will be seen by reference to the citation from his work on Collateral Attack, already made. An examination of the cases cited, however, will show that they are based largely, if not entirely, upon the peculiar provisions of the statute under consideration by the court, and it is therefore practically impossible to deduce from them any general rule upon the subject. And it is unnecessary for us in this case to attempt to do so. for, as we have already intimated, the necessity for an attachment, in the first instance, in an action brought in this state against a nonresident, is the outgrowth entirely of a decision of the supreme court of the United States, and not of any statute law or decision of this state; and we therefore feel justified in following the adjudications of that court to the effect, as we understand them, that the judgment of a superior court against a nonresident cannot be attacked collaterally for any defect in the attachment proceedings where such proceedings are not made, by statute, jurisdictional, unless the record affirmatively shows a want of jurisdiction.

In the leading case of *Galpin v. Page*, 18 Wall. 350, in which it is held that, where a judgment of a superior court relating to a matter falling within the general scope of its powers is produced, jurisdiction will be presumed in the absence of an affirmative showing to the contrary, but if, in rendering the judgment, the court was not proceeding according to the course of the common law, or the judgment is against a nonresident, who was not personally served within the territorial limits of the court, and did not appear in the action, the authority for its rendition must appear upon the face of the record, Mr. Justice Field says (page 371): "The qualification here made that the special powers conferred are not exercised according to the course of the common law is important. When the special powers conferred are brought into action according to the course of that law—that is, in the usual form of common-law and chancery proceedings—by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of

the court as in cases falling within its general powers."

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Again, in *Cooper v. Reynolds*, 10 Wall. 308, where a defect in an affidavit for a writ of attachment, as well as the premature issuing of the writ, was set up to defeat the title to land sold under a judgment in an action against nonresidents who had been served with summons by publication, it was held that jurisdiction of the *res* was attained by the levy of the writ, and that the errors and irregularities pointed out were of no avail on a collateral attack. Mr. Justice Miller, after discussing the essential principles underlying the jurisdiction of the courts in proceedings by attachment against nonresidents who are not served with process within the territorial limits of the courts, and do not appear in the action, says: "Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this, the court can proceed no further; with it, the court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into court the power of the court over the *res* is established. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but, the writ being issued and levied, the affidavit has served its purpose, and, though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon defendant's property." This case has been often quoted and approved by the supreme court, and is said in *Matthews v. Densmore*, 109 U. S. 216, 219, 3 Sup. Ct. 126, to be conclusive in regard to the validity of such proceedings when collaterally assailed. To the same effect, see *Harvey v. Tyler*, 2 Wall. 328; *Ludlow v. Ramsey*, 11 Wall. 581; *Grignon's Lessee v. Astor*, 2 How. 319.

6. The result of these cases is that the objection that it

does not affirmatively appear that a summons was issued in the action brought by the plaintiff against the Richardsons in Multnomah county at or before the issuance of the writ of attachment is of no avail in this suit.

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Affirmed.

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BAKER v. BAKER, ECCLES & CO.

Supreme Court of the United States. 1917.

242 United States, 394.

PITNEY, J. The Federal question presented in this record is whether the court of appeals of Kentucky gave such faith and credit to certain judicial proceedings of the state of Tennessee as were required by art. 4, § 1, of the Constitution, and the act of Congress passed in pursuance thereof (Act of May 26, 1790, chap. 11, 1 Stat. at L. 122, Rev. Stat. § 905, Comp. Stat. 1913, § 1519).

The facts are as follows: Charles Baker died in September, 1912, the owner of certain real and personal property in Hardin county, Tennessee, and of 270 shares of stock of Baker, Eccles, & Company, a Kentucky corporation, of the par value of \$27,000, and a claim of several thousand dollars against that corporation for surplus profits. He left a widow, Josie C. Baker, now plaintiff in error, and a mother, Augusta H. Baker, one of the defendants in error. He appears to have left no children or descendants, nor any considerable indebtedness, and the personal estate, if distributable according to the laws of Tennessee, would go entirely to the widow; if distributable according to the laws of Kentucky, it would go one half to the widow, the other half to the mother. The place of his domicile, admittedly determinative of the law of distribution, was in controversy.

Shortly after his death the widow applied to the county court of Hardin county, Tennessee, for letters of administration. The proceedings were *ex parte*, and her application was granted, the order of the court appointing her administratrix reciting that at the time of his death the residence of Charles

Baker was in that county. Afterwards, and in December, 1912, the widow presented to the same court a settlement of her accounts as administratrix, and an order was made reciting that it appeared from proof that Charles Baker died intestate, and at the time of his death was a resident of Hardin county, Tennessee, and that he left no children or descendants of such surviving, but left surviving his widow, the said Josie C. Baker, and under the laws of Tennessee she, as widow, was entitled to all of the surplus personal property; whereupon it was ordered that she, as administratrix, transfer and deliver to herself, as the widow of the deceased, all of the personal estate in her possession, including the stock in the Kentucky corporation, the certificates for which she held. Subsequently, and on December 28, 1912, the widow, individually and as administratrix, filed in the chancery court of Hardin county, Tennessee, her bill of complaint against Mrs. Augusta H. Baker, the mother, as a nonresident of Tennessee and a resident of the state of Kentucky. * * * Upon the filing of the bill an order of publication was made, citing Augusta H. Baker as a nonresident to make defense upon a day named, and, she having failed to appear, the bill was taken for confessed against her, and eventually a decree was made "that the said Charles Baker at the time of his death was a citizen of and had his domicile at Savannah, Tennessee, and that the complainant, as his widow, is his sole distributee, and as such entitled to all of the personal estate of the said Charles Baker, after payment of such debts as were owed by him at the time of his death," and also that the title to the stock of Baker, Eccles, & Company was in complainant, and that she was entitled to have a new certificate or certificates in her own name issued by the corporation in lieu of the certificates issued to said Charles Baker, and was entitled to receive from the corporation the amount of the accumulated profits and surplus and other amounts due from it to the decedent.

* * * * *

In June, 1913, the widow, individually and as administratrix of Charles Baker, began a suit in equity in the McCracken county circuit court, which resulted in the judgment now under review. Baker, Eccles, & Company was made defendant. The widow's petition, after setting up the orders and judgments of the Tennessee courts and alleging her sole owner-

ship of the personal estate of the deceased by virtue thereof, prayed that the corporation be required to transfer to her individually the 270 shares of stock adjudged to her by the Tennessee chancery decree, and also prayed judgment for \$11,429.17, the alleged indebtedness due from the corporation to her husband at the time of his death. Baker, Eccles, & Company filed an answer putting in issue all the averments of the petition. Mrs. Augusta H. Baker, the mother, came into the suit by an intervening petition, in which she averred that Charles Baker died a resident of the state of Kentucky, and that, under the laws of that state, she was entitled to one half of the shares of stock and of the debt sued for, * * * She further put in issue the validity of the orders and judgments in both the Tennessee courts, averring that so far as they determined that Charles Baker died a resident of that state, and that his widow was entitled to the whole of his personalty after payment of his debts, they were void, because neither of the Tennessee courts had jurisdiction to make such orders or judgments. The pleadings having been made up, evidence was taken on the issue of fact as to the domicile of Charles Baker at the time of his death. Upon this evidence, the records of the judicial proceedings above mentioned, and a showing of the pertinent Tennessee law, the case was submitted for hearing, and it was adjudged that the widow's petition be dismissed. The widow appealed to the Kentucky court of appeals, and that court * * * held that the judgments of both Tennessee courts were invalid as against the mother because entered without process of law as against her; and then, passing upon the question of fact as to the domicile of Charles Baker, found upon the evidence that he was domiciled in the state of Kentucky and his personalty was distributable according to the laws of that state, and affirmed the judgment, with a modification directing the lower court to enter a judgment that Charles Baker died a resident of Kentucky, that his mother and his widow were each entitled to one half of his personal estate situate in Kentucky at the time of his death, after the payment of his debts, that Baker, Eccles, & Company should cancel all certificates of stock issued to Charles Baker, and reissue one half of these to the widow and the other half to the mother, and that the lower court embody in the judgment such other matters as would, after the payment of debts, distribute

equally between the widow and the mother all other personal estate situate in Kentucky of which Charles Baker died possessed. 162 Ky. 683, L. R. A. 1917C, 171, 173 S. W. 109. To review this judgment upon the Federal question, the widow brings the case here upon writ of error.

No question is made by defendants in error but that the Tennessee courts had general jurisdiction over the subject matter, nor that the proceedings were in conformity with the Tennessee statutes respecting practice. The sole question is whether they were entitled, under the Constitution of the United States and the act of Congress, to recognition in the courts of Kentucky as adjudicating adversely the mother's asserted right to share as distributee in the personal property situate in Kentucky, or as conclusively determining the fact of the domicile of the decedent as affecting that right, in view of the failure of the Tennessee courts to acquire jurisdiction over her person or over the corporation, Baker, Eccles, & Company.

It is the fundamental contention of plaintiff in error that the personal estate of an intestate decedent is a legal unit, having its *situs* at the owner's domicile; that the title to the whole of it, wherever situate, is vested in the duly qualified domiciliary administrator, and not in the distributees, and that its distribution is governed by the law of the domicile of the deceased owner. *Wilkins v. Ellett*, 9 Wall. 740, 19 L. ed. 586, 108 U. S. 256, 27 L. ed. 718, 2 Sup. Ct. Rep. 641. Conceding that such is the general rule of law, it is so not because of any provision of the Federal Constitution, but only because the several states, or most of them, have adopted it from the common law into their respective systems. And the question remains, How is the fact of decedent's domicile to be judicially ascertained as a step in determining what law is to govern the distribution? Obviously, if fundamental principles of justice are to be observed, the ascertainment must be according to due process of law; that is, either by a proceeding *in rem* in a court having control of the estate, or by a proceeding *in personam* after service of process upon the parties to be affected by the judgment.

We have no concern with the effect of the Tennessee judgments upon the distribution of so much of decedent's personality as was situate within that state. The present action affects only the ownership of shares of stock in a Kentucky cor-

poration having no *situs* outside of its own state, so far as appears, and a claim of indebtedness against the same corporation. For the purpose of founding administration, it is commonly held that simple contract debts are assets at the domicile of the debtor, even where a bill of exchange or promissory note has been given as evidence. *Wyman v. Halstead* (*Wyman v. United States*) 109 U. S. 654, 656, 27 L. ed. 1068, 1069, 3 Sup. Ct. Rep. 417. The state of the debtor's domicile may impose a succession tax. *Blackstone v. Miller*, 188 U. S. 189, 205, 47 L. ed. 439, 444, 23 Sup. Ct. Rep. 277. It is equally clear that the state which has created a corporation has such control over the transfer of its shares of stock that it may administer upon the shares of a deceased owner and tax the succession. See *Re Bronson*, 150 N. Y. 1, 9, 34 L. R. A. 238, 55 Am. St. Rep. 632, 44 N. E. 707; *Re Fitch*, 160 N. Y. 87, 90, 54 N. E. 701; *Greves v. Shaw*, 173 Mass. 205, 208, 53 N. E. 372; *Kingsbury v. Chapin*, 196 Mass. 533, 535, 82 N. E. 700, 13 Ann. Cas. 738; *Dixon v. Russell*, 79 N. J. L. 490, 492, 76 Atl. 982; *Hopper v. Edwards*, 88 N. J. L. 471, 96 Atl. 667; *People v. Griffith*, 245 Ill. 532, 92 N. E. 313. The rule generally adopted throughout the states is that an administrator appointed in one state has no power *virtute officii* over property in another. No state need allow property of a decedent to be taken without its borders until debts due to its own citizens have been satisfied; and there is nothing in the Constitution of the United States aside from the full faith and credit clause to prevent a state from giving a like protection to its own citizens or residents who are interested in the surplus after payments of debts. All of which goes to show, what plaintiff in error in effect acknowledged when she brought her present action in a Kentucky court, that the Tennessee judgments had no effect *in rem* upon the Kentucky assets now in controversy. * * *

So far as the case for plaintiff in error depends upon the adjudication of domicile by the county court of Hardin county, Tennessee, for the mere purpose of appointing an administratrix, it is controlled by *Thormann v. Frame*, 176 U. S. 350, 44 L. ed. 500, 20 Sup. Ct. Rep. 446, and *Overby v. Gordon*, 177 U. S. 214, 227, 44 L. ed. 741, 746, 20 Sup. Ct. Rep. 603. But, it is pointed out, in this case the county court went beyond the bare appointment of an administratrix, and proceeded to a settlement and distribution of the estate. Moreover, plain-

tiff in error relies not merely upon this judgment, but upon the decree in the chancery court of the same county, which in form specifically determined her exclusive right to the Kentucky personalty. It results, however, from what we have already said, that this right could not be conclusively established by any Tennessee court as against a resident of Kentucky who was not served with process and did not appear therein, and that the Kentucky courts did not go counter to the Federal Constitution and the act of Congress in refusing to give faith and credit to the Tennessee judgments.

In many forms, and with much emphasis, the plaintiff in error presses the argument *ab inconvenienti*. Starting from the proposition that the entire personalty of an intestate decedent, wherever in fact located, is a unit, having its legal *situs* at the owner's domicile, and that its distribution ought to be in accordance with the law of that domicile, it is argued: How is it possible to judicially determine that domicile under the theory of the Kentucky court of appeals in the case of an intestate entitled to personalty in several states having different laws of distribution, and with parties claiming to be distributees residing in different jurisdictions? Assuming a lawful grant of administration in each state wherein part of the personalty is located and some of the possible distributees reside, how, it is asked, is any one of these administrators, or any one of the claimants of a share in the whole estate, to have the place of the intestate's domicile settled authoritatively and the lawful distributees ascertained? The answer is clear: Unless all possible distributees can be brought within the jurisdiction of a single court having authority to pass upon the subject-matter, either by service of process or by their voluntary appearance, it must in many cases be impossible to have a single controlling decision upon the question. In some cases, the ideal distribution of the entire personal estate as a unit may thus be interfered with; but whatever inconvenience may result is a necessary incident of the operation of the fundamental rule that a court of justice may not determine the personal rights of parties without giving them an opportunity to be heard.

Judgment affirmed.



HARRIS v. BALK.

*Supreme Court of the United States. 1905.**198 United States, 215.*

[Balk sued Harris in North Carolina for \$180. Both parties resided there. Harris pleaded in bar a judgment rendered against him as garnishee for the same debt in an action brought by one Epstein against Balk in Baltimore, Md.]

PECKHAM, J. The state court of North Carolina has refused to give any effect in this action to the Maryland judgment; and the Federal question is whether it did not thereby refuse the full faith and credit to such judgment which is required by the Federal Constitution. If the Maryland court had jurisdiction to award it, the judgment is valid and entitled to the same full faith and credit in North Carolina that it has in Maryland as a valid domestic judgment.

The defendant in error contends that the Maryland court obtained no jurisdiction to award the judgment of condemnation, because the garnishee, although at the time in the state of Maryland, and personally served with process therein, was a nonresident of that state, only casually or temporarily within its boundaries; that the *situs* of the debt due from Harris, the garnishee, to the defendant in error herein, was in North Carolina, and did not accompany Harris to Maryland; that, consequently, Harris, though within the state of Maryland, had not possession of any property of Balk, and the Maryland state court therefore obtained no jurisdiction over any property of Balk in the attachment proceedings, and the consent of Harris to the entry of the judgment was immaterial. The plaintiff in error, on the contrary, insists that, though the garnishee were but temporarily in Maryland, yet the laws of that state provide for an attachment of this nature if the debtor, the garnishee, is found in the state, and the court obtains jurisdiction over him by the service of process therein; that the judgment, condemning the debt from Harris to Balk, was a valid judgment, provided Balk could himself have sued Harris for the debt in Maryland. This, it is asserted, he could have done, and the judgment was therefore entitled to full faith and credit in the courts of North Carolina.

The cases holding that the state court obtains no jurisdic-

tion over the garnishee if he be but temporarily within the state proceed upon the theory that the *situs* of the debt is at the domicile either of the creditor or of the debtor, and that it does not follow the debtor in his casual or temporary journey into another state, and the garnishee has no possession of any property or credit of the principal debtor in the foreign state.

We regard the contention of the plaintiff in error as the correct one. The authorities in the various state courts upon this question are not at all in harmony. They have been collected by counsel, and will be found in their respective briefs, and it is not necessary to here enlarge upon them.

Attachment is the creature of the local law; that is, unless there is a law of the state providing for and permitting the attachment, it cannot be levied there. If there be a law of the state providing for the attachment of the debt, then, if the garnishee be found in that state, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff, and condemn it, provided the garnishee could himself be sued by his creditor in that state. We do not see how the question of jurisdiction *vel non* can properly be made to depend upon the so-called original *situs* of the debt, or upon the character of the stay of the garnishee, whether temporary or permanent, in the state where the attachment is issued. Power over the person of the garnishee confers jurisdiction on the courts of the state where the writ issues. *Blackstone v. Miller*, 188 U. S. 189-206, 47 L. ed. 439-445, 23 Sup. Ct. Rep. 277. If, while temporarily there, his creditor might sue him there and recover the debt, then he is liable to process of garnishment, no matter wher the *situs* of the debt was originally. We do not see the materiality of the expression "*situs* of the debt," when used in connection with attachment proceedings. If by *situs* is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the *situs* thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes. He is as much bound to pay his debt in a foreign state when therein sued upon his obligation by his creditor, as he was in the state where the debt was contracted. We speak of ordinary debts, such as the one in this case. It would be no defense to such suit for the debtor to plead that

he was only in the foreign state casually or temporarily. His obligation to pay would be the same whether he was there in that way or with an intention to remain. It is nothing but the obligation to pay which is garnished or attached. This obligation can be enforced by the courts of the foreign state after personal service of process therein, just as well as by the courts of the domicile of the debtor. If the debtor leave the foreign state without appearing, a judgment by default may be entered, upon which execution may issue, or the judgment may be sued upon in any other state where the debtor might be found. In such case the *situs* is unimportant. It is not a question of possession in the foreign state, for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of. Notice to the debtor (garnishee) of the commencement of the suit, and notice not to pay to his creditor, is all that can be given, whether the garnishee be a mere casual and temporary comer, or a resident of the state where the attachment is laid. His obligation to pay to his creditor is thereby arrested, and a lien created upon the debt itself. *Cahoon v. Morgan*, 38 Vt. 236; *National F. Ins. Co. v. Chambers*, 53 N. J. Eq. 468, 483, 32 Atl. 663. We can see no reason why the attachment could not be thus laid, provided the creditor of the garnishee could himself sue in that state, and its laws permitted the attachment.

There can be no doubt that Balk, as a citizen of the state of North Carolina, had the right to sue Harris in Maryland to recover the debt which Harris owed him. Being a citizen of North Carolina, he was entitled to all the privileges and immunities of citizens of the several states, one of which is the right to institute actions in the courts of another state. The law of Maryland provides for the attachment of credits in a case like this.

* * * * *

The judgment of the Supreme Court of North Carolina must be reversed, and the cause remanded for further proceedings not inconsistent with the opinion of this court.

Reversed.

HARLAN and DAY, JJ., dissented [without opinion].

DARNELL v. MACK.

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Take*Supreme Court of Nebraska. 1896.**46 Nebraska, 740.*

IRVINE, C. December 17, 1889, Thomas Wolfe commenced an action against Joseph Blahak and another, in the county court of Butler county, to recover the sum of \$282.60 on a promissory note. He caused an attachment to be issued against Joseph Blahak, on the ground of a fraudulent removal and sale of the latter's property. The attachment was levied on certain corn, as the property of Blahak. The summons in the case was, January 5, 1890, returned "Not found," and, down to the trial of the present action, no further steps had been taken in the attachment case. February 15, 1890, Mack, the defendant in error, commenced the present action in replevin against Darnell, the sheriff who held the corn under the writ of attachment. The case was tried in 1891 to the court, without the intervention of a jury, and there was a finding and judgment for the plaintiff, from which the sheriff prosecutes error.

The plaintiff claimed the property by virtue of a chattel mortgage from Blahak. The defendant undertook to justify under the writ of attachment. * * *

It is, however, contended that * * * there having been no service of process, either actual or constructive, upon the defendant in the attachment case, the attachment was void, and the officer therefore showed no right against the plaintiff. We presume that the finding of the district court was based on this theory, and such a finding was warranted by the cases of *Westcott v. Archer*, 12 Neb. 345, 11 N. W. 491, 577, and *Grebe v. Jones*, 15 Neb. 312, 18 N. W. 81. The course of the decisions in this state has been somewhat peculiar, and calls for attention.

Crowell v. Johnson, 2 Neb. 146, was an action of ejectment, in which the plaintiff claimed by deed from one Dawley, and the defendant by virtue of a sale made under a judgment in an action wherein the land had been attached as the property of Dawley. The court held that jurisdiction had been acquired by the levy of the order of attachment, and that a failure to publish notice,—the defendant being a nonresident,—

while it rendered the proceeding voidable, did not render it void. The title under the judicial sale was therefore sustained. In *Wescott v. Archer*, *supra*, the facts were the same, and the form of action the same. The majority of the court, without referring in any way to *Crowell v. Johnson*, held directly to the contrary,—that is, that the judgment was void because the published notice was defective. The chief defect in the notice was that it did not describe the property attached. Judge Lake dissented. In *Grebe v. Jones*, *supra*, the court had rendered judgment in an action in which land had been attached,—the defendants being nonresidents, the published notice not properly describing the lands attached. The district court, on motion, set aside the judgment. From that order, proceedings in error were prosecuted. The majority of the court, although that was a direct proceeding to vacate the judgment, and not a collateral attack, held that the notice was sufficient, and overruled *Wescott v. Archer*, in so far as it held a specific description necessary, but took occasion to express its continued belief that notice was necessary to the jurisdiction of the court. * * *

Judge Drake expressed himself, without qualification, in favor of the doctrine that, so far as the attached property is concerned, jurisdiction attaches by virtue of the levy of a lawfully issued writ, but that a judgment without service of process upon or notice to the defendant is erroneous, although not void. Drake, Attachm. § 436, *et seq.* In a later work (*Waples*, Proceedings in Rem, § 593 *et seq.*), the position seems to be taken that by the levy of the writ the court obtains lawful custody of the attached property, but is without jurisdiction to proceed to judgment. In 1 Wade, Attachm. §§ 6, 44, 45, the distinction between jurisdiction, so far as acquiring the lawful custody of the *res*, and jurisdiction for the purpose of rendering final judgment disposing of the *res*, is denied. The argument is largely in the form of a criticism of *Cooper v. Reynolds*, 10 Wall. 308. * * * In the two works cited, while the authors express opinions opposed to the authority of the court to proceed, they practically admit that the weight of authority is against their opinions, but hold that certain well-considered cases support their views. Of the cases cited by them, we find none which support the view that a judgment rendered in such proceeding is without jurisdiction, so far as it affects the attached property, except

Haywood v. Collins, 60 Ill. 328, and *King v. Harrington*, 14 Mich. 532. To these may be added *Wescott v. Archer*, *supra*. We will not burden the opinion by reviewing the other cases cited by them, to show their inapplicability. Some of them were direct proceedings to reverse such a judgment, where the question was one, not of jurisdiction, but of error in the proceedings. Others were where such a judgment had been rendered in one state, the attached property exhausted, and action brought in another state on the judgment as if it were one *in personam*. Still others were under statutes which fixed a definite time within which, after the issuance or levy of the attachment, process must be served upon the defendant, with a provision for vacating the attachment if this were not done. A valuable case of this class, although not cited by the text writers, is *Trust Co. v. Keeney*, 1 N. D. 411, 48 N. W. 341. On the other hand, we have, in the first place, *Cooper v. Reynolds*, *supra*, in which the supreme court of the United States, in an opinion by Mr. Justice Miller, clearly elucidated the peculiar character of actions accompanied by attachments, saying: "If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff." The court then proceeds to hold that the jurisdiction depends upon the lawful seizure of the property, and that subsequent defects may render the judgment erroneous, but not void. To the same effect is *Paine v. Mooreland*, 15 Ohio, 435; *In re Clark*, 3 Denio, 167; *Beach v. Abbott*, 6 Vt. 586; *Williams v. Stewart*, 3 Wis. 678; *Field v. Dortch*, 34 Ark. 399; *Hardin v. Lee*, 51 Mo. 241. * * *

Attachment is, it is true, in this state, a remedy merely ancillary to the personal action, where the defendant is within the jurisdiction of the court and lawfully summoned. At the same time, even in such cases, there is a distinction between personal jurisdiction, so as to permit an adjudication of the principal action, and jurisdiction of the attached property

for the purpose of placing it in the lawful custody of the court pending the main action. For the purpose of the attachment, an action is commenced when a petition is filed and a summons issued, with the *bona fide* intention that it shall be served (*Coffman v. Brandhoeffer*, 33 Neb. 279, 50 N. W. 6), although jurisdiction of the person of the defendant had not been then obtained. In the case of a defendant beyond the jurisdiction of the court, the action is analogous to a proceeding *in rem*. Substituted service cannot confer personal jurisdiction, and, although the requisites for such service be strictly pursued, jurisdiction attaches no further than to permit the court to subject the attached property to the satisfaction of any claim found due.

If a judgment rendered in such a case, without substituted service upon the defendant, is erroneous merely, as we now hold, and not void, then it follows that the property is throughout in the lawful custody of the court, and that the sheriff's possession under the levy of the attachment remains lawful, so long as the proceedings are pending. If, on the contrary, we should follow the doctrine of *Wescott v. Archer*, one of two courses must be taken: We must hold either that, because of the failure of the plaintiff to take proper steps to obtain substituted service, all the proceedings became void, and that the sheriff was, like the famous "six carpenters," a trespasser *ab initio*, or else that jurisdiction attached on the levy of the writ, and his custody was then lawful, and that it was lost at some point pending the proceedings. The first course would be as unreasonable as it would be unjust and impracticable. The sheriff, when he receives a valid writ of attachment, is bound to levy it. We cannot permit him to inquire then, for his own protection, whether the plaintiff will properly proceed with the subsequent stages of the case. We cannot subject him to liability for performing his clear duty because the plaintiff, entirely independent of his control, neglects such subsequent steps. Nor do we think that the second course is open. If the writ levied before process is served is valid, and if a judgment rendered in pursuance of such levy without process is absolutely void, there must be some point between levy and judgment at which jurisdiction is lost, and where it becomes the duty of the sheriff, without an order of the court, to surrender the attached property. Our statutes provide for no such procedure, and we know no

possible way in which the court can determine the point down to which jurisdiction over the attached property extends, and after which it is lost, unless we say that jurisdiction attaches for a reasonable time, to permit the plaintiff to publish notice. How is such reasonable time to be determined? An attachment is allowed (Code, § 198), not only when the defendant is a nonresident of the state, or has absconded or left the country to avoid service of summons, but also where he conceals himself so that a summons cannot be served upon him, and in such cases (Code, § 77) service may be had by publication. There may be many actions aided by attachment where the plaintiff is not only justified, but required, if he have a due regard for his oath, to make investigations, after the commencement of the action, to ascertain the whereabouts of the defendant; and in such cases the law never contemplated that the continuance of the court's jurisdiction should depend upon the hour or the day when the plaintiff elected between actual and constructive service, and proceeded to have process executed. There is in such case a plain remedy always open, where property is unreasonably detained in custody without taking steps to authorize a final adjudication. The court in such case may, on the motion of an interested party, or on its own motion, dismiss the case for want of prosecution; and, with the dismissal of the case, there is no doubt that the attachment would fall with it, and further jurisdiction over the attached property cease. In the case before us, no defect is pointed out in the institution of the suit, or the issuance or levy of the writ of attachment. While it had not proceeded to judgment, there was uncontradicted proof of an indebtedness to the attachment plaintiff on the cause of action alleged. We hold, therefore, that the sheriff was lawfully entitled to possession, as against the plaintiff, unless the plaintiff established the *bona fides* of his mortgage. Reversed and remanded.

POST, C. J., not sitting.³⁶

³⁶ Compare McDonald v. Mabey (1916), 243 U. S. 90, where the court said: "The foundation of jurisdiction is physical power."

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Brown ROLLER v. HOLLY.
Supreme Court of the United States. 1900.

176 United States, 398.

This was an action instituted July 14, 1894, by the plaintiff Roller in the district court of Limestone county, Texas, to recover a judgment against Stephen Holly and William Holly upon five promissory notes for \$228 each, dated January 1, 1890, payable to plaintiff, for the purchase price of a tract of 114 acres of land in that county, sold by him to them, and also to foreclose a vendor's lien upon the land to the amount of such notes.

BROWN, J. Briefly stated, the case is this: Roller, the plaintiff, who was a resident of Virginia, bought this land in January, 1887; gave a note in part payment for \$216.17, which passed into the hands of McClintic & Proctor, who brought suit thereon for a personal judgment against the plaintiff and for the foreclosure of a vendor's lien upon the land; served plaintiff with notice of the suit in Virginia, December 30, 1890, to appear in Texas January 5, 1891; and took judgment against him by default January 9, 1891, for \$276.65, and for a foreclosure of the lien. Upon a sale in pursuance of this foreclosure, March 3, 1891, the land was struck off to Williams and Jackson, and by them sold to Peoples.

Meantime, however, and on January 1, 1890, a year before the McClintic & Proctor suit was begun, plaintiff sold the land to the Hollys, who went into possession, and took from them five notes of \$228 each, and also reserved a vendor's lien, which he sought to foreclose in this suit. Williams, Jackson, and Peoples, who purchased the land under the sheriff's sale in the McClintic & Proctor suit, were made parties defendant, and now aver that the plaintiff's title passed to them, which plaintiff denies upon the ground that no process was served upon him within the state of Texas, or within a reasonable time before he was required to appear and answer.

The question in dispute, then, is whether a notice served upon the plaintiff in Rockingham county, Virginia, December 30, 1890, to appear in Limestone county, Texas, on January

5, 1891, to answer the foreclosure suit is due process of law within the meaning of the Fourteenth Amendment? The Hollys, who bought this land and went into possession a year before the McClintic & Proctor suit was begun, were not made parties to that suit, probably because the deed from the plaintiff to them was not on record in Limestone county at the time of the institution of the suit, and their rights are not involved here. It is conceded that the McClintic & Proctor judgment is invalid as a personal judgment against the plaintiff under the case of *Pennoyer v. Neff*, 95 U. S. 723, 24 L. ed. 569, and other cases in Texas of the same import.

1. The position of the plaintiff that, as there was no statute in Texas authorizing a suit against a nonresident to enforce an equitable lien for purchase money, and as there had been no seizure *in rem* of the lands, nor any notice to Roller's vendees, the Holly's who were in possession, the jurisdiction of the Texas courts could not attach, and the whole proceeding was void, is unsound.

* * * * *

In *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557, it was held directly that a state may provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which a nonresident defendant is brought into court by publication. It appeared in that case that a suit had been begun by a party alleging that he was the owner and *in possession* of the land in controversy, by virtue of certain tax deeds, against defendants claiming to have some title or interest in the lands by patent from the United States, which title, as was alleged, was divested by the tax deeds, and was unjust, inequitable, and a cloud upon plaintiff's title, and that the suit was brought for the purpose of quieting such title. The defendants were brought in by publication, and a decree entered in favor of plaintiff quieting his title. The question was whether that decree was a bar to an action in ejectment between the grantees of the respective parties to the proceedings to quiet title. In other words, as put by the court: "Has a state the power to provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant being a nonresident, is brought into court only by publication?" The question was answered in the affirmative. In delivering the opinion of the court Mr. Justice

Brewer observed: "The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is, What jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of nonresidents to such real estate? If a state has no power to bring a nonresident into its courts for any purpose by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a nonresident will remain for all time a cloud, unless such nonresident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable method of imparting notice. * * * Mortgage liens, mechanics' liens, materialmen's liens and other liens are foreclosed against nonresident defendants upon service by publication only. Lands of nonresident defendants are attached and sold to pay their debts; and, indeed, almost any kind of action may be instituted and maintained against nonresidents to the extent of any interest in property they may have in Kansas, and the jurisdiction to hear and determine in this kind of cases may be obtained wholly and entirely by publication." * * *

* * * If the plaintiff be in possession, or have a lien upon land within a certain state, he may institute proceedings against nonresidents to foreclose such lien or to remove a cloud from his title to the land, and may call them in by personal service outside of the jurisdiction of the court, or by publication, if this method be sanctioned by the local law.

In suits for the foreclosure of a mortgage or other lien upon such property, no preliminary seizure is necessary to give the court jurisdiction. The cases in which it has been

held that a seizure or its equivalent, an attachment or execution upon the property, is necessary to give jurisdiction, are those where a general creditor seeks to establish and foreclose a lien thereby acquired. Of this class *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931, is the most prominent example. In that case a plaintiff in an action for false imprisonment had attached the property of Reynolds in certain lands, which were sold upon execution to Cooper, who was put in possession by the sheriff. Reynolds, the original owner, brought ejectment against him, and it was held by this court that Reynold's title to the land had been divested by the attachment proceedings, upon the ground that in this class of cases, the levy of the attachment gave the court jurisdiction. But the object of such attachment is merely to give a lien upon the property which the courts may enforce; and if a lien already exists, whether by mortgage, statute, or contract, the court may proceed to enforce the same precisely as though the property had been seized upon attachment or execution.

It is true there is no statute of Texas specially authorizing a suit against a nonresident to enforce an equitable lien for purchase money, but article 1230 of the Code of Texas, * * * contains a general provision for the institution of suits against absent and nonresident defendants, and lays down a method of procedure applicable to all such cases. * * * Unless we are to hold it to be wholly inoperative, it would seem that suits to foreclose mortgages or other liens were obviously within its contemplation. In any event, this was the construction given to it by the court of civil appeals, and apparently by the supreme court of the state, and is obligatory upon this court as a construction of a state statute. *Battle v. Carter*, 44 Tex. 485; *Oswald v. Kampmann*, 28 Fed. Rep. 36, a Texas case; *Martin v. Pond*, 30 Fed. Rep. 15.

2. We are therefore remitted to the principal question in dispute between these parties, namely, the sufficiency of the notice given to the plaintiff of the McClintic & Proctor suit. In this connection our attention is called to certain articles of the Texas Code, the first one of which (art. 1228, Sayles' Tex. Civ. Stat.) provides generally for the service of process by giving five days' notice, exclusive of the day of service and of the return day.

* * * * *

From these requirements it appears that the time for service of process in the courts of Texas was five days, exclusive of the day of service and return, and that there is no distinction in this particular between defendants living in the town where the court is sitting and defendants living in other states, or even in a foreign country. In short, for aught that appears here, parties may be called from the uttermost parts of the earth to come to Texas and defend suits against them within five days from the day the notice is served upon them. * * *

* * * What shall be deemed a reasonable notice admits of considerable doubt. * * *

While, as before stated, there is but little in the way of judicial authority upon the question, in the statutes of the several states regulating proceedings against absent and non-resident defendants, there is a consensus of opinion, which is entitled to great weight in passing upon the question of the reasonableness of such notice.

* * * * *

It may be said in general, with reference to these statutes, that in cases of publication notice is required to be given at least once a week for from four to eight weeks, and in case of personal service out of the state, no notice for less than twenty days between the service and return day is contemplated in any of the states except Mississippi, where a personal notice of ten days seems to be sufficient. While, of course, these statutes are not obligatory here, they are entitled to consideration as expressive of the general sentiment of legislative bodies upon the question of reasonableness of notice.

Without undertaking to determine what is a reasonable notice to nonresidents, we are of opinion, under the circumstances of this case, and considering the distance between the place of service and the place of return, that five days was not a reasonable notice, or due process of law; that the judgment obtained upon such notice was not binding upon the defendant Roller, and constitutes no bar to the prosecution of this action.

FULLER, C. J. and BREWER, J., dissented [without opinion].

WINDSOR v. McVEIGH.

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 Omit

Supreme Court of the United States. 1876.

93 United States, 274.

FIELD, J. This was an action of ejectment to recover certain real property in the city of Alexandria, in the State of Virginia. It was brought in the corporation court of that city, and a writ of error from the court of appeals of the State to review the judgment obtained having been refused, the case was brought here directly by a writ of error from this court. Authority for this mode of procedure will be found stated in the case of *Gregory v. McVeigh*, reported in the 23d of Wallace.

The plaintiff in the corporation court proved title in himself to the premises in controversy, and consequent right to their immediate possession, unless his life-estate in them had been divested by a sale under a decree of condemnation rendered in March, 1864, by the District Court of the United States for the Eastern District of Virginia, upon proceedings for their confiscation. The defendant relied upon the deed to his grantor executed by the marshal of the district upon such sale.

The proceedings mentioned were instituted under the act of Congress of July 17, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."

In July, 1863, the premises in controversy were seized by the marshal of the district, by order of the district-attorney, acting under instructions from the Attorney-General. In August following, a libel of information against the property was filed in the name of the United States, setting forth that the plaintiff in this case was the owner of the property in question; that he had, since the passage of the above act, held an office of honor and trust under the government of the so-called Confederate States, and in various ways had given aid and comfort to the rebellion; that the property had been seized in pursuance of the act in compliance with instructions from the Attorney-General, and, by reason of the premises, was forfeited to the United States, and should be condemned. It closed with a prayer that process of monition

might issue against the owner or owners of the property and all persons interested or claiming an interest therein, warning them at some early day "to appear and answer" the libel; and, as the owner of the property was a non-resident and absent, that an order of publication in the usual form be also made. Upon this libel the district judge ordered process of monition to issue as prayed, and designated a day and place for the trial of the cause, and that notice of the same, with the substance of the libel, should be given by publication in a newspaper of the city, and by posting at the door of the court-house. The process of monition and notice were accordingly issued and published. Both described the land and mentioned its seizure, and named the day and place fixed for the trial. The monition stated that at the trial all persons interested in the land, or claiming an interest, might "appear and make their allegations in that behalf." The notice warned all persons to appear at the trial, "to show cause why condemnation should not be decreed, and to intervene for their interest."

The owner of the property, in response to the monition and notice, appeared by counsel, and filed a claim to the property and an answer to the libel. Subsequently, on the 10th of March, 1864, the district-attorney moved that the claim and answer and the appearance of the respondent by counsel be stricken from the files, on the ground that it appeared from his answer that he was at the time of filing the same "a resident within the city of Richmond, within the Confederate lines, and a rebel." On the same day the motion was granted, and the claim and answer ordered to be stricken from the files. The appearance of the respondent was by his answer. The court immediately entered its sentence and decree, condemning the property as forfeited to the United States, reciting that, the usual proclamation having been made, the default of all persons had been duly entered. The decree ordered the issue of a *venditioni exponas* for the sale of the property, returnable on the sixteenth day of the following April. At the sale under this writ the grantor of the defendant became the purchaser.

The question for determination is, whether the decree of condemnation thus rendered, without allowing the owner of the property to appear in response to the monition, interpose his claim for the property, and answer the libel, was

of any validity. In other words, the question is, whether the property of the plaintiff could be forfeited by the sentence of the court in a judicial proceeding to which he was not allowed to appear and make answer to the charges against him, upon the allegation of which the forfeiture was demanded.

* * * * *

That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case, the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence.

The law is, and always has been, that whenever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose. * * *

The position of the defendant's counsel is, that, as the proceeding for the confiscation of the property was one *in rem*, the court, by seizure of the property, acquired jurisdiction to determine its liability to forfeiture, and consequently had a right to decide all questions subsequently arising in the progress of the cause; and its decree, however erroneous, cannot, therefore, be collaterally assailed. In supposed support of this position, opinions of this court in several cases are cited, where similar language is used respecting the power of a court to pass upon questions arising after jurisdiction has attached. But the preliminary

proposition of the counsel is not correct. The jurisdiction acquired by the court by seizure of the *res* was not to condemn the property without further proceedings. The physical seizure did not of itself establish the allegations of the libel, and could not, therefore, authorize the immediate forfeiture of the property seized. A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit *in rem* only brings the property seized within the custody of the court, and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him. Where notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings, beyond that arising from seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation, or publication in some other form. The manner of the notification is immaterial, but the notification itself is indispensable.

* * * * *

The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction: they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. *Norton v. Meador*, Circuit Court for Cali-

fornia. Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases. * * *

The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. The statement of the doctrine by Mr. Justice Swayne, in the case of *Cornell v. Williams*, reported in the 20th of Wallace, is more accurate. "The jurisdiction," says the justice, "having attached in the case, everything done *within the power of that jurisdiction*, when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud." 20 Wall. 250.

It was not within the power of the jurisdiction of the District Court to proceed with the case, so as to affect the rights of the owner after his appearance had been stricken out, and the benefit of the citation to him thus denied. For jurisdiction is the right to hear and determine; not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and, therefore, could be no exercise of jurisdiction. By the act of the court, the respondent was excluded from its jurisdiction.

Judgment affirmed.

MILLER, BRADLEY and HUNT, JJ., dissented [without opinion].

CHAPTER II.

PROCEEDINGS BASED ON THE RECORD.

SECTION 1. SUMMARY JUDGMENT.

RAY v. BARKER.



Court of Appeal, England. 1879.

27 Weekly Reporter, 745.

Appeal of the defendant from an order of Pollock, B., and Hawkins, J., reversing an order of Stephen, J.

The action was brought to recover £62 17s., the price of certain articles of jewelry alleged to have been sold to the defendant.

The writ was specially indorsed, and the plaintiff on the 19th of May took out a summons under order 14, r. 1, to sign final judgment.

* * * * *

The master made an order that the plaintiff should be at liberty to sign final judgment unless the amount claimed was paid into court within a week to abide the event.

On appeal, Stephen, J., rescinded the master's order, and gave the defendant leave to defend unconditionally, and on further appeal the Exchequer Division rescinded the order of Stephen, J., and directed that the master's order should stand, the defendant to have four days to pay the money into court.

The defendant appealed.

* * * * *

BRAMWELL, L. J. I am of opinion that this appeal must fail. I believe order 14 to be a most useful one, but I cannot help thinking that it is considerably misunderstood. Courts of law, and of common law especially, are not only for the purposes of litigation, but are also debt collectors; and that,

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if not the most important, is a very important part of their functions. I think that this order was intended to facilitate the operation of the High Court of Justice in debt collecting; but it should be always remembered that the order should not be applied simply because it exists, but should be applied most carefully and only in very clear cases.

The words of rule 1 of the order are—"The court or judge may thereupon, unless the defendant, by affidavit or otherwise, satisfy the court or judge that he has a good defense on the merits, or disclose such facts as may be deemed sufficient to entitle him to be permitted to defend the action, make an order empowering the plaintiff to sign judgment accordingly."

Where it is doubtful whether the defendant has a good defense on the merits, or whether he has disclosed such facts as justify his defending, an order ought not to be made. Rule 6 of the same order says, "Leave to defend may be given unconditionally or subject to such terms as to giving security, or otherwise, as the court or a judge may think fit."

The only way to interpret these rules is, that under rule 1, leave to sign judgment may be either absolutely refused, or may be given subject to the condition of the defendant giving security, if the court or a judge thinks fit. Rule 1 should in fact be read thus: "The court or judge may thereupon, unless the defendant, by affidavit or otherwise, satisfy the court or judge that he has a good defense to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend the action either unconditionally or subject to such terms as to security or otherwise as the court or judge may think fit, make an order empowering the plaintiff to sign judgment accordingly." In other words, rule 6 is to be put in conjunction with rule 1, and rule 6 would then read thus: "Where the defendant discloses such facts as may be deemed sufficient to entitle him to defend the action, leave to defend may be given unconditionally, or conditionally on the defendant giving security or otherwise, as the court or judge may think fit."

If that is so, the first question here is whether such facts are disclosed as show the defendant has a good defense on the merits. I cannot say that they are. Then do they disclose such facts as are sufficient to entitle him to defend?

I have misgivings as to that, but the matter is doubtful.

* * *

The plaintiff ought not, therefore, to be allowed to sign judgment. As to whether his application to do so should be dismissed unconditionally or conditionally on the defendant giving security, all I can say is that the master and the judges of the Exchequer Division have exercised their discretion, and expressed an opinion that the defendant ought to give security, and I consider the case, both as to the law and the facts, so doubtful that I do not feel capable of overruling the opinion that they have expressed.

BRETT, L. J. It seems to me that the construction of order 14 r. 1, is that where the plaintiff can and does make an affidavit stating that in his belief there is no defense to the action, and applies for leave to sign judgment, there must be a summons calling on the defendant to show cause before the court or judge, and if the defendant by affidavit, or otherwise, satisfies the court that he has a good defense on the merits, then the court or judge would be bound not to make an order empowering the plaintiff to sign judgment accordingly; but the rule contains an alternative to "a good defense on the merits," viz., "or disclose such facts as may be deemed sufficient to entitle him to defend." That must mean something less than "a good defense on the merits," for if he shows that, not only must the defendant be entitled to defend, but he has an absolutely good defense. The facts, therefore, sufficient to entitle the defendant to defend, are facts clearly not a good defense on the merits but less, and if he shows such facts, then, it appears to me, that rule 6 gives the court or judge a discretion as to the terms on which he is to be allowed to defend, and that leave to defend may be given unconditionally, or subject to such terms as the court or judge may think fit.

* * * * *

*Appeal dismissed.*³⁷

³⁷ The first part of Order 14, Rule 1 is as follows:—

"Where the defendant appears to a writ of summons specially indorsed under Order 3, Rule 6, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action, and the amount claimed (if any), and stating that in his belief there is no defense to the action, apply to a judge for liberty to enter final judgment for the amount so indorsed, together with interest, if any, or for the recovery of land (with or without rent or mesne profits), as the case may be, and costs."

The cases in which a specially indorsed writ of summons may be used, as specified in Order 3, Rule 6, are actions for debt or liquidated damages arising on contract, bond, statute, guaranty or trust, and actions for the recovery of land by a landlord against a tenant whose term has expired.

The Michigan summary judgment act provides that in any action on contract, judgment or statute, the plaintiff may, upon the same showing as in English Order 14, have a judgment unless the defendant shall "make and file an affidavit of merits." Penalty for a false affidavit of merits made in bad faith is an award of double costs against such defendant. C. L. 1915, Sec. 12581.

The New Jersey act allows a summary judgment in the same cases, "unless the defendant by affidavit or other proofs shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend." Laws 1912, Chap. 231, Schedule A, Rule 57.

Similar statutes are found in several other jurisdictions. See Illinois Stat., Chap. 110, Sec. 55; Rule 73 of the Supreme Court of the District of Columbia, construed in *Booth v. Arnold* (1906), 27 App. D. C. 287.

63 SECTION 2. JUDGMENTS IN DEFAULT OF APPEARANCE OR PROCEEDING.

LAMPHEAR v. BUCKINGHAM.

Supreme Court of Errors of Connecticut. 1866.

33 Connecticut, 237.

Action on the 544th section of the statute with regard to corporations, (Revision of 1866, page 202,) which provides that in case the life of any passenger on a railroad who is in the exercise of reasonable care shall be lost by the negligence of the railroad company, the company shall be liable to pay damages not exceeding five thousand dollars and not less than one thousand dollars, to be recovered by the executor or administrator in an action on the statute, for the benefit of the husband or widow and heirs of the deceased.

The declaration alleged that Madison Lamphear, the intestate, on the 9th of March, 1865, was a passenger in the cars of the New Haven and New London railroad, which was in the possession and use of the defendants as trustees for the holders of the first mortgage bonds of the railroad company, and that, while the deceased was being transported across the Connecticut river by the ferry boat of the com-

pany in the night time, and while in the exercise of reasonable care, he fell overboard and was drowned, by reason of the negligence of the defendants in not providing proper guards at the ends of the boat to prevent passengers from going overboard, and from the defective and improper condition of the boat; claiming five thousand dollars damages.

The defendants demurred to the declaration, and the demurrer was overruled and the case heard in damages. Upon the hearing the court found the following facts.

On the 9th day of March, 1865, the defendants were trustees for the benefit of the holders of the first mortgage bonds of the New Haven and New London Railroad Company, and as such trustees, were legally in possession of the railroad, and its trains, cars, engines, ferry boats and other property, and were operating the road and carrying passengers thereon. On that day Madison Lamphear was a passenger on the railroad from New Haven to New London, and on his way lost his life by falling from the ferry boat into the Connecticut river, which boat was then run by the defendants in connection with the train at the crossing of the river between the towns of Old Saybrook and Old Lyme on the line of the railroad. At the time of the accident he was in the exercise of reasonable care and no fault of his contributed essentially and proximately to occasion his death. There survive him no widow or children, but two brothers and two sisters. The plaintiff at the time of the bringing of the action was his lawful administrator and still continues such. The defendants in the running of their train, and in the construction, condition, lighting and management of their ferry boat, were also at the same time in the exercises of reasonable care and skill and without material negligence or fault.

Upon these facts, under the pleadings, the court found the issue for the plaintiff, and if the law was so that the plaintiff could not recover a less sum in damages than one thousand dollars, then the court found for the plaintiff to recover that sum; but if the law was so that the plaintiff could recover a less sum than one thousand dollars the court found and assessed nominal damages only, and fixed the damages at fifty dollars.

The question whether, under the statute on which the action was brought, the court had power to assess the dam-

ages at a less sum than one thousand dollars, was reserved for the advice of this court.

BUTLER, J. * * *

3. The defendants insist, in the third place, that if the demurrer admits a statutory cause of action it admits no specific facts *as facts*, and therefore admits no statutory negligence, and no right except the *mere* right to recover *nominal damages*. This involves an inquiry into the nature and effect of a demurrer. There has been much discussion respecting them in this court and elsewhere during the last few years, and still they do not seem to be clearly understood. The defendants certainly have misapprehended them. The misapprehension has probably arisen from the inaccuracy of the usual expression, "a demurrer admits," &c. Strictly speaking a demurrer does not admit anything, and in order to express more clearly, and so that they cannot be misunderstood, the views held by this court, it seems necessary to recur to first principles.

Every action at law to redress a wrong or enforce a right, if properly instituted, is a syllogism, of which the major premise is the proposition of law involved, and the minor premise the proposition of fact, and the judgment the conclusion. Blackstone states it thus: (Com. Vol. 3, page 396:) "The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination or sentence of *the law*. It is the conclusion that naturally and regularly follows from the premises of law and fact, which stand thus:—against him who hath rode over my corn I may recover damages by law; but A. hath rode over my corn; therefore I shall recover damages against A." Usually the major premise is not set out in the declaration, but the proposition claimed is implied from or involved in the facts stated. The plaintiff in an action of tort, for instance, summons the defendant to answer, for that at a certain time and place he committed in a certain manner a certain wrong, to the plaintiff's damage, &c., and by so doing impliedly claims that the law is so that he is entitled on those facts to recover. To this syllogism the defendant must answer according to the rules of law. If he *expressly* admits on the record the law and the fact, both premises, he consents to the conclusion, the judgment, or as it is technically expressed, "*Confesses judgment*." If he declines or

omits to appear pursuant to the summons, or appearing declines or omits to answer when called upon to do so, he impliedly admits both propositions or premises to be true by his default, and judgment follows technically as a judgment by default, pursuant to a necessary rule of law stated broadly by Mr. Taylor (Ev. 669,) thus:—"Whenever a material averment well pleaded is *passed over* by the adverse party without denial, whether it be by pleading in confession and avoidance, or by traversing some other matter, or by demurring in law, or by suffering judgment to go by default, it is thereby, for the purpose of pleading if not for trial before the jury, conclusively admitted." So the defendant may traverse or expressly deny the facts or the minor premise, and will be held on the same principle to have admitted the major, and, if the minor is found true, judgment—the conclusion—is awarded on the verdict. And so he may deny the major premise, the proposition of law involved, by a demurrer, and failing thereby to deny and passing over the facts, if well pleaded and sufficient to constitute a premise, *he defaults* as to them, and thereby and by the same rule is holden to have admitted them; and if the issue in law is found true, final judgment passes for the plaintiff. The facts if well pleaded and sufficient are admitted, not because the demurrer admits them expressly or by force of any office it performs, but because the defendant has not denied and has defaulted them. A defendant therefore who demurs to a declaration admits, not by his demurrer but by his omission to deny them, all the material well pleaded facts alleged in it; and when his demurrer is overruled the case is in the same condition precisely that it would have been if he had suffered a default and not demurred. All the difference between the two is, that in one case he denied the major premise of law and it has been found true, and, the minor having been admitted by a failure to deny, both are to be holden true; in the other he denied neither, and therefore both are to be holden true.

The condition of a case before the court after demurrer overruled and after default being precisely the same, and the effect of demurring or defaulting being precisely the same in admitting the facts, the question as to both is answered by what the law is as to either. What then is the effect of a default? What facts does it admit? It has been said by

some writers and judges that it admits *the* cause of action, and by others that it admits *a* cause of action merely. Mr. Roscoe in his work on evidence states the proposition broadly thus—"Suffering a judgment by default is an admission on the record of the cause of action." The true rule is that it admits the cause of action *as alleged*, in full, or to some extent, according to the nature of the action. As it admits all the *material* facts well pleaded, if a distinct, definite, entire cause of action is set forth, which entitles the plaintiff to a sum certain without further inquiry, it admits the cause of action in full as alleged. If by the rules of law further inquiry is to be had to ascertain the amount due, or the extent of wrong done, and of the damage to be recovered, then it admits the cause of action, but not to the *extent alleged*, and subject to such inquiry. Thus, if it be debt on bond for a sum certain the whole is admitted, and no further inquiry is had, and so if assumpsit on a note or bill, and there are no indorsements entered on it, and the defendant does not move for an inquiry, the cause of action and the amount claimed are admitted. The note must be produced but need not be proved. *Breene v. Hearne*, 3 T. R., 301; *Roscoe Ev.*, 10 ed., 71. But in actions of tort for unliquidated damages a *different* rule is *necessarily* applied. In such actions the plaintiff does not declare for a specific thing but has an unlimited license in declaring, and may allege as much of wrong and injury, and demand as much damage as he will, and recover by proving any amount however small if sufficient to sustain an action. A defendant therefore in an action of tort is not holden to have admitted by his default the *extent* of the injury. It is assumed that, as the plaintiff may allege more than is true, he probably has done so, and the defendant by his default is considered as admitting the wrong to some extent, leaving that extent to be inquired into to enable the court to fix the damages, because such an inquiry is always and necessarily had in such cases. But he admits the wrong, and consequent right of the plaintiff to recover to some extent. By our practice this inquiry is not by writ of inquiry, or by reference, but made by the court on a hearing in damages. On that hearing, it results from the very nature of the inquiry, that any evidence tending to belittle or mitigate the inquiry complained of and admitted, and any evidence tending to aggravate it, is admis-

sible. If in proving the extent to which he was in default, the defendant prove that he was not in default at all, and that the injury occurred through the fault of the plaintiff, the plaintiff cannot complain. The evidence does not deprive him of his right to judgment; it merely shows that, as he is not in fact entitled to any damages, he can only have such as the law gives him by reason of the admission on the record. In the light of these elementary principles we may see how far the various *dicta* cited in the argument are true. One of them is that "a demurrer admits no facts as facts." That, as applicable to *chancery* practice, is true, for in *chancery*, when a demurrer is overruled, the respondent can answer over and show the averments to be untrue; but it is not true at law. It admits, or rather the party, by demurring only, admits, all or so much of the facts as facts as may be necessary to sustain a judgment. Again, it is said "a demurrer admits nothing as a rule of evidence." If any thing more was intended by the author of that expression than that it does not admit facts alleged in the declaration, so that they could be used as evidence on the inquest, reference or hearing in damages, it is an unintelligible and unfortunate expression. Of course on the inquest or hearing, where the object is to ascertain the *extent* to which the facts alleged are true, it would be absurd to offer the facts alleged in evidence, as fully *admitted* by the pleadings to be true, to *prove* themselves true. Such an inquiry would be senseless and unnecessary. Again, it is said that a demurrer admits the facts alleged for the sole purpose of testing their legal sufficiency. This too is an attempt to use at law a rule in *chancery*. In *chancery* practice as we have said, the facts are not admitted by being passed over, but are supposed to be true, for the purpose of testing their legal sufficiency. At law they are, each and all that are material, admitted to be true to some extent, as the basis of a final judgment. And so of the claim that "a demurrer admits a mere right to recover *nominal damages*." It admits no right. It admits or the party by demurring admits, the facts as true to some extent. The law bases the right and the judgment on the facts as admitted.

Applying these principles to this case, we are satisfied the plaintiff is entitled to recover the sum of one thousand dollars. The defendant by his demurrer and his omission

to deny the facts, admitted *the cause* of action and *every material element* of it, and negligence was one of them. If the damages had been fixed by the statute at a single sum of \$1,000 or \$5,000, no hearing in damages would have been necessary or proper. No evidence which the defendant could properly offer, and no fact which the court could properly find, would affect the right of the plaintiff to recover that sum. And this is true whether the statute be regarded as giving a new right of action or regulating the amount of damages and their disposition in an old one. The statute gives the court a discretion as to the amount of the damage above the sum of \$1,000 and up to \$5,000, and to that extent the court could properly inquire and were bound to inquire. It is of no importance that the court have found there was no negligence in fact. The existence of sufficient negligence to give a right of recovery on the statute, if it gives a new action, was a material fact, a material element of the cause of action, and was conclusively admitted. And so of every other material element of a cause of action under the statute which was alleged, for all the allegations necessary to bring the plaintiff's case within the statute and give him the right of action provided by the statute, were material, and were of course admitted by the omission to traverse them.

We advise judgment for the sum of \$1,000.

64
gals
BUENA VISTA FREESTONE CO. v. PARRISH.

Supreme Court of Appeals of West Virginia. 1891.

34 West Virginia, 652.

BRANNON, J. In 1889 the Buena Vista Freestone Company instituted an action before a justice in Cabell county against M. F. Parrish and H. M. Maloney to recover a debt due on a note for \$120. On the return-day of the summons the defendants appeared, and obtained a continuance. On the day to which the case had been continued the defendants appeared, and filed a plea that the note sued on, which had been filed with the justice, had been obtained by fraud, and

one of failure of consideration; but the plaintiff did not appear, and the defendants demanded and obtained a jury, which tried the case, and rendered a verdict for the defendants, and the justice rendered judgment for the defendants. * * * The plaintiff then obtained a writ of *certiorari* from the circuit court of Cabell county, and that court reversed the judgment of the justice. * * *

The only question in this court is whether there was any error committed by the justice justifying the circuit court in reversing his judgment; and this depends on these questions: What was the proper course for the justice when the plaintiff failed to appear, and the defendants filed their plea? Should he have allowed a jury trial, or should he have dismissed the case for failure of the plaintiff to appear and prosecute his suit, without prejudice to another suit? According to the practice in courts of record at common law, if the defendant appear and file his plea, and the plaintiff does not appear to reply to it, or do what is necessary to bring the cause to issue, there is judgment against him by *non prosequitur*. Where a defendant does not appear, there is judgment against him by default; or if he appears, and says nothing in defense, there is judgment against him by *nil dicet*; in both cases the judgment conceding to the plaintiff the relief called for by his action. Or, where he fails to answer any pleading of the plaintiff during the process of the pleading conducing to the issue, such judgment goes against him. In these cases he is taken to confess the allegation to which he makes no reply. It might seem that where the defendant files his defense, and the plaintiff fails to appear, the defendant ought to have the right to have his defense passed on by judgment, to give finality and rest to him, so that he may not be again harassed by a second suit; but the law contents itself with simply entering judgment of *non prosequitur*, commonly called in our practice "non-suit,"—a term here covering judgment by *non prosequitur*, *nolle prosequi*, and technical nonsuits, as also judgments of nonsuit entered under the statute at rules. 4 Minor, Inst. 865. That there is this difference between defendant and plaintiffs is settled. 3 Bl. Comm. 316, says: "Therefore, in the course of pleading, if either party neglects to put in his declaration, plea, replication, rejoinder, and the like, within the time allotted by the standing rules of the court,

the plaintiff, if the omission be his, is said to be nonsuit, or not to follow and pursue his complaint, and shall lose the benefit of his writ; or, if the negligence be on the side of defendant, judgment may be had against him for such his default." 4 Minor, Inst. 864 *et seq.*; 2 Tuck. Bl. Comm. 270; 2 Bouv. Law Dict. 303, "*Non Pros.*"

Speaking of default of the parties to prosecute or defend, 1 Bouv. Law Dict. 494, under the word "Default," says: "When the plaintiff makes default, he may be nonsuited; and, when the defendant makes default, judgment by default is rendered against him." This judgment as against defendant would be forever final; but the judgment of nonsuit against plaintiff would not be final, but would allow another suit. Com. Dig. "Pleader," E. 42, B. 11; Bouv. Law Dict. tit., "Judgment by Default," 7 Vin. Abr. 429; Doct. Plac. 208. Thus, had the case been in a circuit court, no jury trial could have taken place. All that the defense could have had was a nonsuit. * * *

It is true, this case was in a justice's court, and no formal pleadings are there required. Still, those courts are governed by some rule and method; and practice in them, where not otherwise provided, ought to be assimilated to ordinary legal procedure. * * *

For this error for failing to enter the only judgment to be entered,—one of dismissal for plaintiff's failure to appear,—and the trial of the case by a jury, and final judgment thereon, I think the circuit court properly reversed the judgment, and ought to have done so had there been no such motion before the justice. * * *

65

LEONARD v. SIBLEY.

Supreme Court of Vermont. 1904.

76 Vermont, 254.

Writ of error to review a judgment rendered for the defendants in error at the March term, 1903, Washington County, STAFFORD, J., presiding.

The assignments of error are: (1) That the court should

not have continued the original suit for assessment of damages, since the said suit was for a sum certain, the action being debt on judgment. (2) That the court should not have entered judgment against the defendants in the original suit at the September Term, 1902, since judgment by default had already been entered at the March term, 1889. (3) That the court should not have granted execution against the defendants at the September Term, 1902.

WATSON, J. This case is here on writ of error. The original action against the plaintiffs in error was by trustee process, with a declaration of debt on judgment, and was returnable to and entered in the county court at the December term, 1889. At that time the plaintiffs in error made no appearance, whereupon judgment was rendered against them by default, a claimant of the funds in the hands of the trustee entered in the suit, and a commissioner was appointed to determine and report to the court the liability of the trustee and the right of the claimant. The cause was then continued for the assessment of damages and as to the trustee and the claimant. It was so continued from term to term until the September term, 1902, when final judgment against the plaintiffs in error was ordered, with leave to take out execution forthwith. The damages were assessed, final judgment rendered, and execution issued accordingly.

The errors assigned are that, since the action was debt on judgment, it was for a sum certain, and that the continuation of the cause after the March term, 1889, for the assessment of damages, the rendering of judgment against the plaintiffs in error at the September term, 1902, the grant of leave to issue execution on said judgment, and issue of the same were contrary to and without authority of law. It is urged that when the judgment by default was rendered it was for a sum certain, to be computed by the clerk of the court, and that it was a final judgment. Also that the rendition of judgment at the September term, 1902, was error, for the reason that the former judgment was still in force, and at most nothing remained to perfect it but the assessment of the damages, which it is contended should have been inserted in the records *nunc pro tunc*. Was the judgment of 1889 final, or was it only interlocutory?

From the fact that a declaration is debt on judgment it does not necessarily follow that a judgment by default is

final. Under the common law of England, where the action was brought on a judgment, the plaintiff was generally considered entitled to a writ of inquiry, after a judgment by default, to recover interest by way of damages for the detention of the debt. 1 Tidd's Prac. (3d Am. Ed.) 573. Yet it was not the universal practice to award such a writ. In some instances a reference was made to the secondary or to the prothonotary to assess the damages, and in later years this seems to become the prevailing practice. *Holdipp v. Otway*, 2 Saund. 106, and notes; *Webb v. Webb*, 16 Vt. 636; *Smith v. Vanderhorst*, 1 McCord, 328, 10 Am. Dec. 674.

Black on Judgments, § 21, says: "A final judgment is such a judgment as at once puts an end to the action by declaring that the plaintiff has or has not entitled himself to recover the remedy for which he sues. * * * A judgment which is not final is called 'interlocutory.' That is, if the amount of the recovery or damages remain to be ascertained by a writ of inquiry or other judicial methods of computation, then the judgment is merely interlocutory until such amount is settled and entered on the record."

Bouvier's Law Dictionary says: "Interlocutory judgments are such as are given in the middle of a cause upon some plea, proceeding, or default which is only intermediate, and does not finally determine or complete the suit. Any judgment leaving something to be done by the court before the rights of the parties are determined, and not putting an end to the action in which it is entered, is interlocutory."

In *Collins v. Paddington*, 5 Q. B. 368, it is said by Baggallay, L. J., that where any further step is necessary to perfect an order or judgment it is not final, but interlocutory. By statutory provision, when judgment is rendered otherwise than on the verdict of a jury, the judges of the court may by themselves, by the jury in court, by report of the clerk, or by the report on oath of a person appointed by the court, ascertain the sum due. Rev. Laws 1880, § 1178; V. S. 1411. In the case under consideration the court directed an assessment by the clerk, and in connection therewith ordered that the cause be continued for assessment of damages, and as to the trustee and claimant. As regards the damages, the effect of this order was that they should be ascertained by the clerk at the term to which the case was thus continued, unless there should be a further continuance for the purpose,

After the damages were so assessed, it then devolved upon the court to give final judgment thereupon at such time as the circumstances of the case should require. Hence the action was not finally determined or completed in that respect. Further judicial action of the court was necessary to be directed to the question before final judgment could be entered of record.

Our holdings here are consonant to the rules of law governing the practice in actions by trustee process before laid down by this court. In such action the judgment against the principal defendant in the suit, even though it be for a sum certain, does not make a final end of the case as to him, so that an execution can issue against him before the case has been determined as to the trustee.

In *Jones v. Spear*, 21 Vt. 426, the action was *assumpsit* for money had and received, and the trial was by the court. At the trial the plaintiff sought to recover only on a promissory note for \$100, with interest. Judgment was rendered for the plaintiff to recover the amount due upon the note. At a subsequent term the trustee moved to be discharged for the reason that judgment had been rendered against the principal defendant, and that the suit was thereby ended, as to the defendant, at the former term. The motion was overruled and on exception by the trustee the case was heard in this court. Upon a careful consideration of the decisions of this court hitherto made bearing upon the question, it was held that the case was not ended as to the principal defendant, nor could he be considered as out of court, or disconnected with the case, by having judgment rendered against him; but that such judgment must lie until the case should be legally determined as to the trustee. It is not conceivable how a judgment by default in an action of debt on judgment can be more specifically for a sum certain than was the judgment in that case for the amount due on the note. See, also, *Hapgood v. Goddard*, 26 Vt. 401.

We think it clear that the judgment of 1889 was merely interlocutory; that, considering the status of the case as to the trustee and claimant, the continuance from term to term for assessment of damages was peculiarly fitting; and that at the September term, 1902, final judgment was properly rendered of that term. It is equally clear in practice in this state that, when final judgment against the principal debtor

has been entered, execution may issue thereon by special leave of the court while the action is still pending and undetermined as to the trustee. *Spring v. Ayer*, 23 Vt. 516; *Bank v. Beattie*, 32 Vt. 315.

The judgment is affirmed.³⁸

³⁸ *Damages*.—At common law the assessment of damages in default cases devolved upon the judge, and the jury, when called upon, served only to aid the conscience of the court:—*Deane v. Williamette Bridge Co.* (1892), 22 Ore. 167; *Dyson v. Rhode Island Co.* (1904), 25 R. I. 600; *Bruce v. Rawlins*, (1770), 3 Wils. 61; *Beardmor v. Carrington* (1764), 2 Wils. 244; *Raymond v. R. R. Co.* (1876), 43 Conn. 596.

Statutes sometimes authorize a default judgment for the amount claimed, without proof, in actions on contract for the recovery of money only. *Cooper v. Brinkman* (1888), 38 Kan. 442; *Schobacker v. Ins. Co.* (1883), 59 Wis. 86; *Cole v. Hoeburg* (1887), 36 Kan. 263.

66
FRENCH v. CENTRAL CONSTRUCTION CO.
Supreme Court of Ohio. 1907.

76 Ohio State, 509.

CREW, J. The motion to require plaintiff to elect whether he would prosecute his action against the defendant Edward S. Hatch or against the defendant the Central Construction Company was properly sustained by the court of common pleas. To maintain an action jointly against two or more defendants, whether such action rests upon contract or in tort, the plaintiff must allege and show a joint liability.
* * *

It is, however, suggested in argument by counsel for plaintiff in error that the misjoinder of parties defendant, if the fact of such misjoinder was to be relied upon in this case, should have been taken advantage of by demurrer in the court of common pleas, and it is claimed that, the question not having been there raised by answer or demurrer, defendants must be held to have waived their right to object on that ground, as well as any right they may have had to require plaintiff to elect whether he would prosecute his action against the defendant Hatch or against the defendant the Central Construction Company. The answer to this is

that the fact of misjoinder does not affirmatively appear on the face, or from the allegations, of plaintiff's petition, but such fact was, for the first time, disclosed by the evidence which was introduced on behalf of the plaintiff. The plaintiff having wholly failed by this evidence to establish or show a joint liability upon the part of the defendants for the wrongful and negligent act complained of, and it clearly appearing from the evidence offered that plaintiff's cause of action, if any he had, against the defendants or either of them, was a several and not a joint cause of action, the motion interposed by the defendant Hatch at the conclusion of the testimony, and after plaintiff had rested his case, asking that plaintiff be then required to elect against which of the defendants he would further proceed, was made in time, was well taken, and the same was therefore properly sustained, and an order was properly made by the court requiring the plaintiff to make such election. The plaintiff having refused to comply with or obey this order, the court, under the authority of subdivision 5 of section 5314, Rev. St. 1906, properly dismissed the action without prejudice. Said section provides as follows: "An action may be dismissed without prejudice to a future action. * * * (5) By the court for disobedience by the plaintiff of an order concerning the proceedings in the action."

Finding no error in this record to the prejudice of the plaintiff in error, the judgment of the circuit court will be *affirmed*.³⁹

³⁹ Compare *Thompson v. Selden* (1857), 20 How. (U. S.) 194. *Accord*, *Burdick v. Investment Co.* (1905), 71 Kan. 121; *Plummer v. Well* (1896), 15 Wash. 427.

SECTION 3. JUDGMENTS ON DEMURRER OR MOTION.

STATE v. PECK.

67
Take*Supreme Judicial Court of Maine. 1872.**60 Maine, 498.*

DANFORTH, J. This case has once been before the law court upon a special demurrer to the plaintiff's replication, 58 Maine, 123.

The demurrer was overruled, the replication held good, and the case sent back for final judgment, unless the defendants were permitted to withdraw their demurrer and plead anew under the provisions of the R. S., c. 82, § 19. At the term subsequent to the announcement of the decision, the defendants' counsel moved for leave to withdraw said demurrer, without the consent of the plaintiff and without complying with the provisions of the statute, and to plead to the issue. This motion was denied and judgment ordered for the plaintiff. To this the defendants except, and now claim the allowance of the motion as of right. If the judgment upon the issue as made up, should have been respondeat ouster, the defendants are right in their claim, otherwise not.

Previous to the several acts embodied in the revision above cited, on a general demurrer, final judgment would have been ordered by the law court, and entered as of the preceding, instead of at the following term. The demurrer was not to a plea in abatement but to a replication, which presented the full merits of the case. The party had his option to plead or demur. By electing the latter "he shall be taken to admit that he has no ground for denial or traverse." Stephen on Pl. 143.

The result of this principle is the well established rule, "that a demurrer admits all such matters of fact as are sufficiently pleaded." It must be conceded that the replication contains all the facts necessary to maintain the plaintiff's case, and the court have decided that it is sufficient in form. Hence a final judgment must necessarily follow. The authorities are to the same effect. Stephen, in his work on pleading, treating of judgments for the plaintiff says, on pages 104, 105,

"If it be an issue in law, arising on dilatory plea, the judgment is only, that the defendant answer over. * * * Upon all other issues in law, and in general all issues of fact, the judgment is that the plaintiff recover." Also in note on page 144, "On demurrer to any pleadings which go to the action, the judgment for either party is the same as it would have been on an issue of fact, joined upon the same pleading and found in favor of the same party." *Clearwater v. Meredith*, 1 Wallace, 25, 43; *McKeen v. Parker*, 51 Maine, 389; *McAllister v. Clark*, 33 Conn. 258, and in *Parlin v. Macomber*, 5 Maine, 413; *Inhabitants of Washington v. Eames*, 6 Allen, 417, final judgment was ordered by the law court. But without denying the correctness of these principles when applied to a general demurrer, it is contended that they are not applicable to a special one, and it is said that none of the authorities so lay down the law. While this may be true, it is also true that in *Parlin v. Macomber* above cited, the court applied the law to a special demurrer, and also in *Washington v. Eames*, though in Massachusetts, under their practice act, all demurrers must be special. No authority has been cited, or fallen under notice, in which any distinction between the two kinds of demurrer, in respect to the judgment, has been alluded to, which, to say the least, is a little singular if any such difference exists.

Nor are we able to perceive any such distinction from the principles involved.

* * * * *

40 "On demurrer in law, the justices may award damages for the party by their discretion, or award a writ to inquire of damages at their election." 7 Vin. Abr. 301.

The judgment for the defendant on a demurrer to a plea in abatement is that the writ be quashed.—*Cushman v. Savage* (1858), 20 Ill. 330.

68
Zake
MARTIN v. SHERWOOD.
Supreme Court of Errors of Connecticut. 1901.

74 Connecticut, 202.

PRENTICE, J. This action was originally brought against the defendant receiver. Upon the motion of the defendant

the town of Winchester was cited in as a codefendant. The defendant receiver then answered, incorporating in his answer a statement of facts in the form of a complaint charging liability upon the defendant town. The town thereupon demurred to both the complaint and said answer. This demurrer was sustained by memorandum filed July 13, 1900. In October a trial to the jury was had of the issues between the plaintiff and the defendant receiver, and a verdict for \$500 rendered in favor of the former. On December 15, 1900, the court rendered judgment for damages and costs against the defendant receiver, and also that the defendant town be dismissed from the case, with certain costs against said receiver. The receiver immediately filed his notice of appeal from said judgment, and thereupon proceeded to perfect his appeal. The defendant town pleads in abatement in this court, for the reason that the appeal proceedings, as against it, were not seasonably taken. It is contended—and this is the only contention urged in the brief in support of the plea—that the action of the court in sustaining the town's demurrer was a final judgment in its behalf, and that, therefore, the right of appeal therefrom was lost by failure to take any action looking to an appeal until some months later. This contention, we think, is not well founded. The court simply sustained the town's demurrer. This alone did not amount to final judgment dismissing the town from the case. It might furnish the foundation for such a judgment if amendment should not be made. The rights of the parties as against the town were not finally foreclosed by the ruling upon the demurrer. The town was still in court. The case against it was still open. Judgment might still be rendered against it upon amended pleadings. As a result of our statutes relating to the right of amendment, and under our modern practice, for reasons sufficiently indicated above, judgment does not necessarily, and as a matter of course, follow decisions upon demurrer. There is no judgment—not even a defeasable one, such as counsel for the town ingeniously suggests—until one is expressly rendered. In this case judgment was never asked for in the town's behalf until after the jury's verdict. The judgment word was never spoken until the judgment file of December 15th. Clearly, therefore, there was no final judgment in

favor of the town from which an appeal might be taken until that date.

The report of the state referee is accepted, and the plea in abatement overruled. The other judges concurred.⁴¹

⁴¹ If the demurrant does not ask leave to plead over after his demurrer is overruled, he is deemed to stand on his demurrer and final judgment will follow.—*Gammon v. Bunnell*, (1900) 22 Utah, 421 (on re-hearing, p. 428).

69
Gabe COBB v. WM. KENEFICK CO.
Supreme Court of Oklahoma. 1909.

23 Oklahoma, 440.

DUNN, J. This action was begun in the United States court for the Western District of the Indian Territory, at Muskogee, by the Wm. Kenefick Company, defendant in error, against S. S. Cobb, City National Bank of Wagoner, Ind. T., First National Bank of Wagoner, Ind. T., W. B. Kane, and J. W. Wallace, to enforce payment of two notes given by S. S. Cobb to the said company to cover a subscription made by him to secure the construction of a railroad to the city of Wagoner under the terms and conditions as shown by the pleadings. A demurrer to the liability charged against the other parties named who signed the notes was sustained by the court, from which no appeal was prosecuted. Hence they are eliminated from the case, and we have but to deal with the controversy existing between the appellant Cobb and the appellee. On the filing of the amended answer, plaintiff filed a motion for judgment on the pleadings, which was sustained by the court, from which appeal was prosecuted to the United States Court of Appeals of the Indian Territory, and the case now comes to us for review by virtue of our succession to that court.

* * * * *

As a preliminary question, counsel for appellant in their brief contend that such a motion as was filed by appellee, for judgment on the pleadings, is unknown to our Code.

While this is, strictly speaking, true, yet the practice is well established by the procedure adopted in the courts and meets nearly, if not quite, uniform approval. Black on Judgments, vol. 1, sec. 15; Ency. Pleading & Practice, vol. 11, pp. 1044, 1045; *Hutchison v. Myers*, 52 Kan. 290, 34 Pac. 742.

In the case of *Hutchinson v. Myers*, *supra*, Justice Johnston in the consideration thereof, speaking of the motion for judgment on the pleadings, has this to say:

"Complaint is next made of the action of the court in entertaining a motion for judgment upon the pleadings, and in allowing judgment against Hutchinson without testimony. The motion for judgment on the pleadings was equivalent to a demurrer to Hutchinson's answer, and is a common and permissible practice. If the averments of the petition were sufficient, and the answer did not allege a defense, and no amendment was asked for or allowed, plaintiff was certainly entitled to a judgment."

The general rule is stated in 23 Cyc. 769, as follows:

"This is a form of judgment not infrequently used in practice under the reformed Codes of Procedure. It is rendered on motion of plaintiff, when the answer admits or leaves undenied all the material facts stated in the complaint; but such a judgment cannot be given where the pleadings of defendant set up a substantial and issuable defense or where the suit is for unliquidated damages and the answer states matters in mitigation."

And, say the authorities, in the consideration thereof, "the pleadings objected to as insufficient will be liberally construed, and the motion will be denied, where there is any reasonable doubt as to their insufficiency." 11 Ency. of Pleading & Practice, 1047; *McAllister v. Welker*, 39 Minn. 535, 41 N. W. 107; *Kelly v. Rogers*, 21 Minn. 146; *Giles Lithographic & Liberty Printing Company v. Recamier Manufacturing Company*, 14 Daly (N. Y.), 475. In the case of *Malone et al. v. Minnesota Stone Company*, 36 Minn. 325, 31 N. W. 170, the court in the syllabus says: "Upon such motion every reasonable intendment is in favor of the sufficiency of the pleading objected to."

Now with this rule, requiring, as we have seen, the liberal construction of the answer filed in the case, the question arises: Do the complaint and the answer, taken together, considering those portions of the former admitted or un-

denied, in conjunction with the averments of the answer, leave the case in such a situation and present such a statement of facts as will justify an affirmance of this judgment? This question will necessitate an analysis of the pleadings filed, to the end that we may ascertain the precise facts shown thereby. If the complaint states a cause of action which is undenied by the answer, and there is no new matter pleaded in the answer under the rule above noticed, sufficient to deny plaintiff the right to the relief demanded, then the judgment should be sustained; otherwise it should be reversed. * * *

⁴² In *Sternberg v. Levy*, (1901) 159 Mo. 617, it is said that a motion for judgment differs from a demurrer in that it is not a part of the record and hence can be brought before an appellate court only by a bill of exceptions. This would seem to be a matter depending on local practice.

The admissions on such a motion are the same, and for the same purposes, as the admissions on a demurrer.—*Hale v. Gardiner*, (1921) 186 Cal. 661, 200 Pac. 598.

70 CONWAY v. SEXTON.

Supreme Court of Illinois. 1909.

243 Illinois, 59.

CARTER, J. This is a proceeding in the county court of St. Clair county to contest the election of trustees of a sanitary district. * * * The petition alleges that certain votes were counted for various of the five candidates on the Taxpayers' ticket which should have been counted for appellant, and that, if these votes so wrongfully counted had been properly counted for appellant, he would have been elected; and the appellant prays that there may be a recount of all the ballots, and that he may be declared duly elected trustee. Jones, Gray, and Sexton moved to dismiss the petition because the court was without jurisdiction, in law, to hear and determine the subject-matter of the petition, and because the petition was insufficient in that certain necessary persons were not made parties. On a hearing of these motions the petition

was dismissed, and judgment for costs entered against appellant. From this judgment this appeal was taken.

Under this statute five trustees were to be elected. Each candidate was opposed to every other candidate who was running for the office of trustee. Neither candidate was running for any particular one of the five places to be filled, but under the law the five candidates that received the highest number of votes at this election were elected to the five positions. It is quite possible, from anything that is shown in the record, that Gray, Jones, and Sexton, who were declared elected and who are parties to this proceeding, might have received more votes on the recount than either Tarlton or Leyden, and appellant might also have received more votes than Tarlton and Leyden, and yet, as the two latter were not made parties to this proceeding, the court could not declare petitioner elected. We think Tarlton and Leyden, as well as all other persons who were candidates for trustee at the election in question, should have been made parties.

Appellant, however, insists that this question should have been raised by a plea in abatement in the court below, and not by motion to dismiss. The defect of proper parties appears here on the face of the proceedings, and the court could determine from an inspection of the petition that certain necessary parties were not in court. The motion to dismiss under such a state of facts, is proper, even in common-law proceedings. *Holloway v. Freeman*, 22 Ill. 197; *Windett v. Hamilton*, 52 Ill. 180; *McNab v. Bennett*, 66 Ill. 157. Section 116 of the election law (Hurd's Rev. St. 1908, p. 929, c. 46) provides that a proceeding of this kind "shall be tried in like manner as cases in chancery." This court, in discussing this statute in *Dale v. Irwin*, 78 Ill. 170, said on page 175: "The proceeding to contest such an election is to all intents and purposes a chancery proceeding, and subject to all the rules governing them." * * *

In discussing the method of raising the question of the lack of parties in chancery proceedings in *Prentice v. Kimball*, 19 Ill. 320, 323, this court said: "It is the usual and better practice, where the want of proper parties is apparent on the face of the bill, to take advantage of it by demurrer or motion to dismiss, or, if not patent, by plea or answer. Where the parties omitted are mere formal parties, and not indispensable to a decision of the case upon its merits, it will

be too late to make the objection at the hearing; but where the rights of the parties not before the court are intimately connected with the matter in dispute, so that a final decree cannot be made without materially affecting their interests, * * * the objection may be taken at the hearing, or on appeal, or on error. Courts will, *ex officio*, take notice of such omission and rule accordingly." * * *

The motion to dismiss was therefore properly sustained, because proper and necessary persons, indispensable to a decision of the contest upon its merits, were not made parties to the proceeding. At the time this order was entered, May 13, 1909, it was too late, under the statute, to bring in new parties to the contest.

The motion to dismiss is not set out in full in the abstract. If it was so worded that it raised the insufficiency of the allegations of the bill, it could properly be treated as a demurrer. *Smith v. Kochersperger*, 173 Ill. 201, 50 N. E. 187; 2 High on Injunctions (4th Ed.) § 1706. So treated, the bill was insufficient for the further reason that, even if all its allegations are admitted to be true, it does not show that appellant would have been elected as one of the five trustees, even provided all of the votes he claims should have been counted for him were so counted; for, as has been heretofore stated, the petition does not set out how many votes were received by any of the candidates. It is quite possible, from anything found in the record, that the difference in votes between appellant and appellees was so great that the proper counting of the votes alleged to have been counted improperly would not have changed the result.

The conclusions reached herein on the questions already discussed make it unnecessary for us to consider and decide whether section 98 of the election law (Hurd's Rev. St. 1908, p. 928, c. 46) gives the county court jurisdiction to hear this election contest. This decision ends the contest, as it is now too late to make the proper persons parties within the 30 days provided by section 106 of the election law.

The judgment of the county court will be affirmed.

*Judgment affirmed.*⁴³

⁴³ "A motion to dismiss is the equivalent of a general demurrer, and may be made at the trial term if the petition is fatally defective, but such a motion cannot reach mere defects in pleading, such as may be cured by appropriate amendment."—*Minnesota Lumber Co. v. Hobbs*, (1904) 122 Ga. 20.

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Take SANDERS v. PIERCE.

Supreme Court of Vermont. 1896.

68 Vermont, 468.

THOMPSON, J. This is an action of trespass *vi et armis*, brought originally in the county court. The *ad damnum* of the writ is \$5. The defendant appeared, pleaded the general issue, and a trial by jury was had, resulting in a verdict for the plaintiff for \$8.32 damages. After verdict, and before judgment, the defendant moved to dismiss the suit for want of jurisdiction. His motion did not specify the precise ground upon which he based his claim that the county court had no jurisdiction of the action; but it alleged that such ground appeared from the writ, to which reference was made. The court below overruled this motion, to which ruling the defendant excepted. It is provided by V. S. § 1040, that a justice shall have jurisdiction of an action of this kind, where the matter in demand does not exceed \$200. *Id.* § 1009, provides that the county court shall have original and exclusive jurisdiction of all original and civil actions, except those made cognizable by a justice. From the provisions of these two sections of the statutes, it is apparent that the county court had no jurisdiction of this case. Jurisdiction cannot be conferred by the consent of the parties. The court before which a cause is pending will dismiss it, at any stage of it, when it is discovered that such court has no jurisdiction. An objection to jurisdiction over the subject-matter is never out of time. * * *⁴⁴

⁴⁴ Want of jurisdiction over the person is also ground for non-suit on motion.—*Graham v. Marks & Co.*, (1894) 95 Ga. 58, *Nye v. Liscombe*, (1838) 21 Pick. (Mass.) 263.

72 SECTION 4. DEMURRER TO EVIDENCE.

Sub ~~CAPELAND~~ v. NEW ENGLAND INSURANCE CO.

Supreme Judicial Court of Massachusetts. 1839.

22 Pickering, 135.

This was assumpsit on a policy of insurance, whereby the defendants insured the sum of \$2,500 on the brig Adams, at and from Wilmington to Jamaica and at and from thence to her port of discharge in the United States. It was alleged, that the vessel was totally lost upon a coral reef near the Isle of Pines, while on her voyage from Jamaica to Wilmington.

Plea, the general issue.

The plaintiffs, in order to maintain the issue on their part, introduced the policy, the register of the vessel, the written abandonment of their interest, and the depositions of three witnesses, which had been taken on behalf of the defendants, detailing the circumstances attending the loss of the vessel. They also examined a witness *viva voce*, and his testimony was reduced to writing. The defendants, "confessing all said evidence to be true, and admitting every fact and every conclusion which the evidence thus given by the plaintiffs conduces to prove," say that the matters thus shown in evidence are not sufficient in law to maintain the issue on the part of the plaintiffs, and pray judgment that the jury may be discharged from giving any verdict upon such issue, and that the plaintiffs may be barred from having their action against them. The plaintiffs joined in the demurrer.

* * * * *

MORTON, J. This is assumpsit on a policy of insurance on the brig Adams. It is alleged, that the brig was totally lost upon a coral reef near the Isle of Pines on the coast of Cuba. The admissions of the parties reduced the case to the simple question, whether the loss was caused by any of the perils insured against. To prove the affirmative the plaintiffs introduced the testimony of four witnesses, and here submitted their case. The defendants believing this evidence to be insufficient to support the action, demurred to it. The plaintiff joined in the demurrer; and the case has been argued upon the evidence thus brought before us.

* * * * *

There are undoubtedly cases, though they are rare, in which a demurrer to evidence may be safely and properly taken. Where all the evidence in a case consists of written instruments, and these are introduced by the party having the affirmative, his opponent may safely demur to the evidence, and be sure thereby to bring the merits of his case before the court. As it would be the province of the court to determine the construction and legal operation of the instruments, they would have, by the concession of the parties, all the materials necessary to enable them to determine the legal rights of the parties in the action. The facts being thus before them they, in applying the law to them, are in the exercise of their appropriate duty.

But a demurrer is not confined to written evidence. Where witnesses positively testify to certain definite facts, and there is no discrepancy between them, and no other evidence to be offered, a demurrer will properly bring these facts before the court, and enable them to judge whether they will sustain the action or defence which they are introduced to support.

But it not infrequently happens, that the plaintiff or party having the affirmative, attempts to support the issue on his part by indirect and circumstantial evidence. And when the positions are to be established by inferences from many other facts, it is difficult, if not impracticable, to admit a demurrer.

It may be well here to consider the effect of a demurrer to evidence. And we shall do it with the more care, because we apprehend, that it was not duly considered or perfectly understood by the counsel on either side. It seems to have been supposed to be an admission of the truth of the evidence; and the Court have been called upon, supposing it all to be true, to determine what inferences may be drawn from it, and whether it would be competent for the jury upon it to find a verdict for the plaintiffs. And it has been argued, that if we would set aside a verdict found for the plaintiffs on this evidence, we must render judgment for the defendants, on the demurrer.

But we think this is a mistaken view of the subject and fails to give to the demurrer its legal effect. It leaves it to the court to draw inferences from the circumstances proved and to judge of the *weight* of the evidence; which would be trenching upon the province of the jury. The effect of a demurrer to evidence, is not only to admit the truth of the

evidence, but the existence of all the facts which are stated in that evidence or which it conduces to prove. Hence that most acute and learned pleader, Mr. Justice Gould, says, that this demurrer, "though called a demurrer to *evidence*, is essentially a demurrer to the *facts shown in evidence*." Gould on Pleading, 47, 48, 49. As a demurrer to a declaration asks the opinion of the court upon the facts properly pleaded, so a demurrer to evidence asks their opinion upon the facts shown in evidence. In both cases the decision is purely a matter of law, and cannot involve any questions of fact on the evidence.

The true question always raised by this kind of demurrer is, not what it is competent for the jury to find, but what the evidence *tends* to prove. This view is fully sustained by a most clear and elaborate opinion given by the very learned Lord Chief Justice Eyre, in pronouncing the judgment of the House of Lords in the case of *Gibson v. Hunter*, 2 H. Blackstone, 187. This case contains a most lucid and able discussion of the whole subject. He says, the precise operation of a demurrer to evidence is, to take from the jury and refer to the judges the application of the law to the fact. In the nature of things the facts are first to be ascertained. Where the evidence is written or, if in parol, is positive, definite and certain, the party offering the evidence is bound to join in demurrer. But the reason of the rule "does not apply to parol evidence which is loose and indeterminate, which may be urged with more or less effect to a jury; and least of all will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. And yet if there be no demurrer in such cases, there will be no consistency in the doctrine of demurrers to evidence, by which the application of the law to the fact on an issue is meant to be withdrawn from a jury and transferred to the judges. If the party who demurs, will admit the evidence of the fact, the evidence of which fact is loose and indeterminate, or in the case of circumstantial evidence, if he will admit the existence of the fact, which the circumstances offered in evidence conduce to prove, there will then be no more variance, in this parol evidence, than in a matter in writing, and the reasons for compelling the party who offers the evidence to join in demurrer, will then apply, and the doctrine of demurrers to evidence will be uniform and

consistent." See also *Middleton v. Baker*, Cro. Eliz. 753.

This doctrine seems to be founded upon and well supported by the case of *Wright v. Pindar*, reported in Style, 34, and also in Aleyn, 18. * * *

The same principles are recognized by the Supreme Court of the United States, in *Young v. Black*, 7 Cranch, 565. Mr. Justice Story, in giving the judgment of the court, says, "the party demurring is bound to admit as true not only all the facts proved by the evidence introduced by the other party, but also all the facts which that evidence may legally conduce to prove."

* * * * *

In this case, *Fowle v. Common Council of Alexandria*, 11 Wheaton, 320, the learned judge says, "It is no part of the object" of a demurrer to evidence "to bring before the court an investigation of the facts in dispute, or to *weigh* the force of testimony, or the presumptions arising from the evidence. That is the proper province of the jury. The true and proper object of such a demurrer is to refer to the court the law arising from the facts. It supposes, therefore, the facts to be already ascertained and admitted, and that nothing remains but for the court to apply the law to those facts."

Judge Gould expresses the same doctrine in a little different language. He says, § 47, "The object of a demurrer is to bring in question on the record, the *relevancy* of the evidence on one side, and to make the question of its *relevancy*, the sole point on which the issue in fact is to be determined." He adds, § 51, "that evidence is always relevant to any issue it conduces *in any degree* to prove. And as its relevancy is the only point of which the court can judge, it follows, that it can never be safe for a party to demur to evidence which is clearly *relevant* to the whole issue, viz. which clearly conduces *in any degree* to prove the whole affirmative side of the issue."

The result of these authorities is, that a demurrer to evidence admits not only all the facts directly stated in it, but also all the facts which the evidence in any degree *tends* to prove.

Where the evidence consists of written documents or of direct and positive testimony of witnesses, there can be no difficulty in demurring to it and of raising the question of law on the facts. But where the evidence is circumstantial

or uncertain, leaving much to inference and presumption, it is not easy or safe to frame a demurrer upon it, or a rejoinder thereto. It will not be sufficient to demur to the evidence generally and leave the court to ascertain what it tends to prove, or what inferences may be drawn from it. But in reciting the evidence, in the demurrer, the party demurring must state distinctly the facts which the evidence tends to prove, and which he thereby admits, that the court may readily perceive the facts upon which they are to decide. '

Judge Gould, adopting the language of Lord Chief Justice Eyre, says, "Where the evidence is circumstantial, the party demurring must distinctly admit upon the record every fact and every conclusion, in favor of the opposite party, which the evidence conduces to prove; otherwise he is not bound to join in the demurrer, because without such admission the *weight* as well as the *relevancy* of the evidence would be referred to the court."

And Mr. Justice Story, in the case before cited, uses this language: "No party can insist upon the others joining in the demurrer, without distinctly admitting, upon the record, every fact and every conclusion, which the evidence conduces to prove." This is exactly the doctrine of *Gibson v. Hunter*.

Now in the case at bar, the defendants demur generally to evidence, which is circumstantial, loose and indeterminate. And so far from reciting the facts and conclusions which the evidence tends to prove, and which they intend to admit, they refer generally to all the evidence as it exists in the form of depositions, consisting of a great variety of interrogatories and cross interrogatories, and the answers to them, which are neither direct and positive nor consistent. This we think to be clearly irregular. To quote again the language of Judge Story, "The defendants have demurred, not to the facts but to evidence of facts, not to admissions, but to mere circumstances of presumption."

The evidence offered in this case tends to show, and undoubtedly does show, that the brig insured, in a squall, (not a severe one to be sure,) ran upon a coral reef and was totally lost. This proof, by itself, clearly would support the plaintiffs' action. But the defendants contend that the testimony of the same witnesses tends to show, that the vessel was run on shore intentionally or through the gross incapacity of the master. Now these are distinct substantive facts, which

the defendants wish to establish. It is true the evidence tends strongly, very strongly, to prove them. But the defendants cannot avail themselves of these grounds of defence on a demurrer to the evidence. If the plaintiff's evidence does not show a *prima facie* case, the defendants may demur. But if they wish to set up any facts in defence, they must resort to the jury to have them established. The depositions introduced by the plaintiffs were taken by the defendants, and thus the facts may be presented in an order and a form most favorable to the latter. The defendants too, by demurring, admit the facts which the evidence conduces to prove for the plaintiffs, and cannot avail themselves of such as it tends to show for the defendants. The plaintiffs, by joining in the demurrer, did not admit the truth of that part of the testimony which is favorable to the defendants, much less any inferences which may be drawn from it. If the defendants wish to set up any facts to exonerate or discharge them, they must look to the jury to establish them. The Court cannot examine, compare and weigh the different parts of the evidence. It would be performing a duty which the law has not imposed upon them, and which they uniformly refuse to accept from the agreement of the parties themselves.

Without going into a further examination of the evidence, we are fully convinced that the demurrer was not properly tendered, that the evidence did not present a proper case for a demurrer, that the plaintiffs ought not to have joined in it, but to have prayed the judgment of the court whether the defendants should be admitted to it.

The Court have an important discretion in allowing or disallowing demurrers to evidence. Although a demurrer is a matter of right and the opposite party may be compelled to join in it, when properly presented, yet he should always be careful to see that it contains the proper admissions before he joins in it. On the whole, we are satisfied that the demurrer was tendered and joined without fully examining and duly considering the nature and effect of the measure.

And we think, not as Lord Chief Justice Rolle said, "that both parties have misbehaved themselves," but in the language of the Supreme Court of the United States, "that the demurrer has been so incautiously framed, that there is no manner of certainty in the state of facts upon which any judgment can be founded. Under such a predicament, the

settled practice is to award a new trial, upon the ground that the issue between the parties has not been tried." This was done in the analogous cases of *Wright v. Pindar*, and *Gibson v. Hunter*, by the House of Lords, and in *Fowle v. Common Council of Alexandria*, by the Supreme Court of the United States.

*Venire facias de novo awarded.*⁴⁵

⁴⁵ "A demurrer to evidence cannot be made a part of the record by bill of exceptions. It is as much a part of the record proper as the demurrer to the pleadings or the verdict of the jury."—*Chesapeake & Ohio Ry. Co. v. Sparrow's Adm'r*, (1900) 98 Va. 630, quoting 6 Ency. Pl. and Pa. 457; *Loeffler v. City of West Tampa*, (1908) 55 Fla. 276; *Lindley v. Kelley*, (1873) 42 Ind. 294.

By the demurrer to the evidence the case is irrevocably taken from the jury and submitted to the court for final judgment.—*Galveston, Harrisburg & San Antonio Ry. Co. v. Templeton*, (1894) 87 Tex. 42; *Eberstadt v. State*, (1898) 92 Tex. 94; *Gluck v. Cox*, (1889) 90 Ala. 331; *Coleman v. Bennett*, (1903) 111 Tenn. 705. But this rule is sometimes changed by statute.—*Michigan*, C. L. 1915, Sec. 12628; *Kansas*, G. St. 1909, Sec. 5879; *Georgia*, *Levy v. Simmons*, (1871) 42 Ga. 53.

The demurrer to the evidence does not amount to an impairment of the constitutional right of trial by jury.—*Hopkins v. Railroad*, (1895) 96 Tenn. 409.

A request for a directed verdict is often loosely referred to as a demurrer to the evidence.—*Mathews v. Metropolitan St. Ry. Co.*, (1911) 156 Mo. App. 715; *Dunn v. Bozarth*, (1899) 59 Neb. 244; *County Comm'rs v. Wise*, (1891) 75 Md. 38.

Comparison with Special Verdict. "The case made for a demurrer to evidence is, in many respects, like a special verdict. It is to state facts, and not merely testimony which may conduce to prove them. It is to admit whatever the jury may reasonably infer from the evidence, and not merely the circumstances which form a ground of presumption. The principal difference between them is, that, upon a demurrer to evidence, a court may infer, in favor of the party joining in demurrer, every fact of which the evidence might justify an inference; whereas, upon a special verdict, nothing is intended beyond the facts found."—*Fowle v. Common Council of Alexandria*, (1826) 11 Wheat. (U. S.) 320.

Damages. "Where, the parties being at issue in assumpsit, a demurrer was joined upon the evidence, and the jury discharged, without assessing the damages; and afterwards judgment was given for the plaintiff, and a writ of inquiry of damages awarded; the court held, that though the same jury might have assessed the damages conditionally, yet it may as well be done by a writ of inquiry of damages, when the demurrer is determined; and the most usual course is, when there is a demurrer upon evidence, to discharge the jury without further inquiry."—1 Tidd's Prac. 575.

SECTION 5. JUDGMENT NON OBSTANTE VEREDICTO.

PLUNKETT v. DETROIT ELECTRIC RAILWAY CO.

*Supreme Court of Michigan. 1905.**140 Michigan, 299.*

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MONTGOMERY, J. Plaintiff, a city fireman, was pipeman on a hose truck, which was proceeding west on High street at 7:45 p. m., February 2, 1900, when it was struck at Hastings street by a north-bound Hastings street car belonging to defendant. Plaintiff was thrown and injured. Plaintiff brought this action to recover for the injuries sustained, and on the trial, under a charge submitting the question of defendant's negligence, and that of the contributory negligence of the plaintiff, to the jury, a verdict was rendered in favor of the plaintiff for \$2,500. Defendant thereupon entered a motion for judgment in its favor *non obstante veredicto*, for the reasons:

"*First.* For that under the evidence given in said cause a verdict should have been directed by the court in favor of the defendant at the conclusion of the trial thereof.

"*Second.* For that this court charged said jury, in substance and effect, that the said plaintiff by and through the persons with whom he was riding, was guilty of contributory negligence."

This motion was granted, and judgment *non obstante veredicto* was entered for defendant. Plaintiff brings error.

The defendant and the court below mistook the practice. At the common law, judgment *non obstante veredicto* could be entered only when the plea confessed the cause of action and set up matters in avoidance which were insufficient, although found true, to constitute a defense or bar to the action. The rule was later relaxed, and made to apply in favor of the defendant, so that it is now generally held that the defendant is entitled to a judgment *non obstante veredicto* when the plaintiff's pleadings are not sufficient to support a judgment in his favor. 11 Enc. Pl. & Prac. 912 *et seq.* So, too, if there be both a general and special verdict, and the latter be inconsistent with the former, judgment may, in some cases, be based upon the special verdict, disregarding

the general verdict. But we know of no case in which it is proper practice to enter a judgment *non obstante veredicto*, unless it appears on the *record* that the verdict of the jury cannot be supported as matter of law. In all other cases the proper practice is to move for a new trial, or review the case on writ of error and exceptions. There must be either a general or special verdict to support a judgment, or the pleadings must authorize its entry. This question is ruled by *Central Sav. Bank v. O'Connor*, 132 Mich. 578. See also, *Schmid v. Village of Frankfort*, 134 Mich. 619, and *County of Montmorency v. Putnam*, 135 Mich. 111. Counsel for appellant has presented the case upon the assumption that the circuit court had power to consider the question which he assumed to pass upon, and has pointed out that the court mistook the rule as to imputed negligence, and that his holding is at variance with the ruling of this court in *McKernan v. Railway Co.*, 138 Mich. 519.

Defendant's counsel contend that there are other reasons why the verdict should have been for the defendant. We must decline to enter upon a consideration of these questions.

The judgment is reversed, and the case will be remanded, that the plaintiff may move for judgment on the verdict. Plaintiff will recover costs.⁴⁶

⁴⁶ Damages are assessed on a writ of inquiry. 2 Tidd's Prac. 920.

"The writ of inquiry is directed to the sheriff of the county where the venue is laid....;.....the sheriff is commanded, that by the oath of twelve honest and lawful men of his county, he diligently inquire the same [plaintiff's damages], and return the inquisition into court." 1 Tidd's Prac. 573.

SECTION 6. ARREST OF JUDGMENT.

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PELICAN ASSURANCE CO. v. AMERICAN FEED AND GROCERY CO.*Supreme Court of Tennessee. 1909.**122 Tennessee, 652.*

BEARD, J. * * *

In the case at bar errors are assigned upon the action of the trial judge in admitting over objection incompetent testimony, in overruling a motion for peremptory instruction, in giving certain instructions to the jury, and failing to grant requests that were submitted. It will be observed that these errors if committed, occurred in the trial of the cause, and would have constituted grounds of a motion for a new trial, made in the court below, to the end that a retrial might be obtained, or, failing in this, then to preserve the same in the record, so that the ruling of the trial judge in declining the motion might be preserved to the plaintiff in error. *Railroad v. Johnson*, 114 Tenn. 633, 88 S. W. 169. Resting upon matters extrinsic to the technical record, they could only be preserved for review in this court by a properly filed bill of exceptions. If as is contended by counsel for plaintiff in error, they can here be made the subject of investigation, by reason of the motion in arrest having been overruled, then we can see no distinction between that and a motion for new trial; for the very errors that are now made the subject of complaint are those which would have been properly raised on this latter motion. It is apparent that, to secure a reversal on account of these errors, it would be necessary to look beyond the "face of the record" into the evidence introduced. This cannot be done. It is well settled by the authorities that a motion in arrest of judgment lies alone for some error which vitiates the proceeding, or is of so serious a character that judgment should not be rendered. It "can only be maintained for a defect upon the face of the record, and the evidence is no part of the record for this purpose." *Bond v. Dustin*, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835; *Van Stone v. Stillwell E. T. C. Co.*, 142 U. S. 128, 12 Sup. Ct. 181, 35 L. Ed. 961; 23 Cyc. 825.

Applying this rule of correct procedure to the present case, it follows that the judgment must be affirmed.

75 HUBBARD v. RUTLAND RAILROAD CO.

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Supreme Court of Vermont. 1907.

80 Vermont, 462.

ROWELL, C. J. Case for negligently injuring the plaintiff by a collision of trains, on one of which he was a passenger. Plea, the general issue, and trial by jury. Verdict and judgment for the plaintiff. The defendant conceded the right of recovery, but denied the claim for damages, both in character and extent, in manner and form alleged.

* * * * *

The defendant moved in arrest, for that "the verdict is largely based on facts not in issue under the declaration and concessions of the defendant made on trial and accepted by the plaintiff, and varies materially from the issue made on trial, and finds facts foreign to such issue, and is for entire damages, without discrimination between facts made material and immaterial by the issue, and is insufficient."

It is conceded that when the motion goes to defects in the pleadings, an inspection of the record alone is to govern, and that the evidence cannot be looked into. But it is contended that when the motion goes to defects in the verdict, as this motion does, the rule is different; that the verdict is a part of the record, but any defect in it is not apparent on its face; that it is not a pleading, and if a motion in arrest will lie for defects in it, it follows that it must be looked into to discover those defects, and that this necessitates an examination of the evidence upon which it rests.

That a judgment may be arrested for defects in the verdict is clear. But a motion for that purpose stands like a motion in arrest for defects in the pleadings, and like that, must be tested by what appears on the face of the record, of which the verdict is a part. Mr. Gould says, in speaking of Lord Mansfield's disapprobation of the rule, that when there are good and bad counts, and a general verdict for the plaintiff for en-

tire damages, without discriminating between the counts, no rule appears to be more clearly warranted by the original principles of the law than that the judgment, which is only an interference of law from the facts ascertained upon the record, must always be formed from the face of the record itself, and from that alone; and as the jury must be presumed to know nothing of the sufficiency or the insufficiency of counts, the conclusion seems perfectly just, in legal theory, that the damages are as likely to have been assessed in whole or in part on the bad count as on the good count. Gould's Pl. c. X, sec. 58, n. (7).

Mr. Tidd says that the only ground for arresting judgment at this day is, some matter intrinsic, appearing on the face of the record, that would render the judgment erroneous and reversible; for though it seems to have been otherwise formerly, yet it is now settled that judgment cannot be arrested for extrinsic or foreign matter not appearing on the face of the record, but that courts are to judge upon the record itself, that their successors may know the grounds of their judgment. 2 Tidd's Pr. *(918). * * *

The defendant contends, as we have seen, that if the testimony cannot be looked into when the verdict does not show the defect on its face, there can be no remedy in such a case by motion in arrest. And that is true if, as here, if anywhere, the defect appears only in the testimony, for that is not a part of the record, and the court must judge *upon* the record, and upon that alone. But the verdict being a part of the record, if the record as a whole shows the defect, it is enough. And it will show it, and must show it, if it is a defect that the law recognizes as ground for a motion in arrest. Thus, if the verdict varies substantially from the issue, as if, instead of finding the matter in issue, the jury finds something foreign to the issue, the judgment must be arrested, for the court cannot tell for which party judgment should be rendered. Here the verdict does not show the defect on its face, but taken with the rest of the record, which shows what the issue was, the record as a whole shows the defect on *its* face. The same is true when the verdict finds only part of the matter in issue, omitting to find either way another material part. These instances are sufficient to show how defects in a verdict not apparent on its face are made to appear for the purposes of a motion in arrest.

Judgment affirmed.

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NEWMAN v. PERRILL.

*Supreme Court of Indiana. 1880.**73 Indiana, 153.*

ELLIOTT, J. The questions presented by this appeal arise upon the ruling of the court sustaining the appellee's motion in arrest of judgment.

* * * * *

Appellant argues that, as the court had overruled demurrers to the complaint, it could not afterwards rightfully sustain a motion in arrest. We do not think that the court, by ruling wrongly upon the demurrers, precluded itself from afterwards ruling rightly upon the motion in arrest. If, when the motion was presented, the court deemed the complaint so clearly bad as not to be sufficient to sustain a judgment, it was right to arrest the proceedings at that stage, notwithstanding the fact that at an earlier stage the court had entertained a different opinion.

A complaint fatally defective is vulnerable to attack, even upon appeal, and there can certainly be no error in declaring a fatally defective complaint bad on motion in arrest, although demurrers may have been previously overruled. It is the duty of the court not to permit a judgment to be entered upon a complaint which is so clearly insufficient as to afford the judgment no foundation. There can be no valid judgment without a sufficient complaint, and, where a party's complaint is incurably bad, he cannot justly complain of any ruling which prevented him from obtaining a judgment based upon it.

* * * * *

*Judgment affirmed.*⁴⁷

⁴⁷ To the same effect see *Turnpike Co. v. Yates*, (1901) 108 Tenn. 428, 67 S. W. 69; *Field v. Slaughter*, (1808) 1 Bibb. (Ky.) 160; *Griffin v. The Justices*, (1855) 17 Ga. 96. In Iowa this practice is expressly authorized by statute. *Frum v. Keeney*, (1899) 109 Ia. 393, 80 N. W. 507.

The common law rule was contrary.—*Chicago & Alton R. R. Co. v. Clausen*, (1898) 173 Ill. 100. "The reason is, that the matter of law having been already settled, by the solemn determination of the court, they will not afterwards suffer anyone to come as *amicus curiae*, and tell them that the judgment which they gave on so mature deliberation is wrong; but it is otherwise after judgment by default, for that is not given in so solemn a manner." 2 Tidd's Prac. 918.

STATE EX REL. BOND v. FISHER.

*Supreme Court of Missouri. 1910.**230 Missouri, 325.*

[On January 16, 1904, Sallie Bond filed a suit against the relator, Henry W. Bond, in the circuit court of St. Louis, upon a foreign judgment rendered against him in the state of Tennessee. Henry W. Bond filed defenses to this action, and on June 21, 1907, the cause came on for trial. The court made a finding against the defendant, Henry W. Bond, whereupon, at the same term, he filed his motion in arrest of judgment, which motion was continued, and thereafter, on June 22, 1908, said motion was sustained, for the stated reason that the finding was not responsive to the issues. Neither party took any steps to appeal from or review this order of the trial court. Nothing further was done for a year, when the said cause was set for trial for the 5th day of October, 1909. Relator at once filed a motion to strike the cause from the docket, on the ground that the order in arrest of judgment had put an end to the cause, which motion was overruled. Relator then filed a petition in the Supreme Court for a writ of prohibition restraining the Hon. D. D. Fisher, judge of the circuit court of St. Louis, from proceeding further with said cause. A preliminary rule was issued requiring respondent to show cause why a permanent writ of prohibition should not issue.]

WOODSON, J. This is an original proceeding instituted in this court, seeking to prohibit the respondent, as judge of the circuit court of the city of St. Louis, from taking and further exercising jurisdiction over the parties to and the subject-matter involved in the case of Sallie Bond against this relator, pending therein.

* * * * *

I. There are but two legal propositions presented by this record for determination: First, what is the legal effect of an unappealed from order of the circuit court of this State sustaining a motion in arrest of judgment; and, second,

* * *

We will dispose of these propositions in the order stated. At common law an unconditional order sustaining a mo-

tion in arrest of judgment was a final disposition of the cause, that is, it prevented the rendition of a subsequent final judgment therein. But, if the order was made conditional upon an amendment, or such other action as would remove the cause of arrest, and the condition complied with, then a *venire facias de novo* should be awarded, in which case the order in arrest would not constitute a bar to the entry of a final judgment therein.

In Cyclopedia of Law and Procedure, vol. 23, p. 836, the doctrine is stated thus: "The granting of a motion in arrest of judgment prevents the entry of a final judgment in the cause, unless it is made conditional upon an amendment, or such other action as will remove the cause of arrest. And if it does not award a *venire facias de novo*, it operates as a discontinuance and dismisses defendant without day."

In Encyclopedia of Pleading and Practice, vol. 2, p. 820, the rule is stated in this language: "In civil cases the sustaining of a motion in arrest of judgment has the effect of putting an end to the case."

The rule is tersely and clearly stated by the Supreme Court of Pennsylvania in the case of *Butcher v. Metts*, 1 Miles 233, in the following language:

"An arrest of judgment is in effect nothing more than superseding a verdict for some cause apparent upon the record, which shows that the plaintiff is not entitled to the benefit of the verdict. It is often followed by a judgment for the defendant, that he go without day, but it is not of itself a judgment for the defendant. The court may, after an arrest of judgment, award a repleader or a *venire de novo* without a repleader. Which of these courses is the proper one, depends upon the nature of the defect for which the judgment is arrested. If it appears by the record that the plaintiff has no cause of action, the court will give judgment, after the arrest of judgment on the verdict, that the plaintiff take nothing by his writ, and that the defendant go without day. If issue be joined upon an immaterial point, there being a sufficient cause of action alleged in the declaration, the proper course is to award a repleader. If the pleadings be sufficient and the issue well joined, but the verdict is imperfectly found, it is usual to award a *venire de novo*; and this it is said may be done upon the motion of the defendant, without a motion in arrest of judgment.

"The *venire de novo* is an ancient proceeding of the common law. It was in use long before the practice of granting new trials. It follows, of course, upon the granting of a new trial; but as a distinct proceeding it is commonly adopted after a bill of exceptions or after a special verdict imperfectly found, but always for some cause apparent on the record, and if granted when it should not be, it is error, and the award of it may be reversed.

"A new trial, on the other hand, is commonly granted after a general verdict for some cause not apparent on the record, and it is not assignable for error. (*Hambleton v. Veere*, 2 Saund. 169 (n. 1); *Goodtitle v. Jones*, 7 T. R. 43, 48; *Witham v. Lewis*, 1 Wils. 48, 56; Com. Dig., tit. Pleader, R. 18; 1 Sellon's Practice, ch. 11, sec. 3 (C. D.); *Müller v. Ralston*, 1 Serg. & Rawle 309; *Ebersoll v. Krug*, 5 Binn. 53; *Lessee of Pickering v. Rutty*, 1 Serg. & Rawle 515.)

"In this case the fault was in the verdict. Of course it appears upon the record. A *venire facias de novo* is therefore proper.

"In regard to the objection that the defendant is no longer in court on this action, it should be observed that the judgment was arrested at this term, and no judgment has been entered for the defendant. He is therefore still in court and bound to take notice of the further proceedings in the cause. But if the term had been allowed to elapse after the arrest of judgment, and the cause had not been continued by a *curia adv. vult*, according to strict notions of practice, the action would have been discontinued, and the defendant without day in court. *Venire de novo* awarded."

And the Supreme Court of Indiana in the case of *Raber v. Jones*, 40 Ind. 1. c. 441, in discussing this question used this language: "The complaint does not aver that the judgment against the corporation was recovered upon the policy. It is a clear principle of pleading, that in declaring upon a statute, the averments must be sufficient to bring the case within the statute. The complaint was, therefore, radically defective, in not stating facts sufficient to constitute a cause of action, and the court properly arrested the judgment.

"When the judgment was arrested, however, there should have been an end of the case. No judgment for the defendant should have followed. The arrest of judgment ends the case. Each party pays his own costs, and the plaintiff is at liberty

to proceed *de novo* in a fresh action. 3 Bl. Com. 393, note u."

The case of *Kauffman v. Kauffman*, 2 Wharton (Pa.) 139, l. c. 147, announces the same doctrine.

The authorities seem to be uniform upon this proposition. The only modification that has been made of that common law rule is contained in section 804, Revised Statutes 1899. That section reads as follows: "When a judgment shall be arrested, the court shall allow the proceedings in which the error was, to be amended in all cases when the same amendment might have been made before trial, and the cause shall again proceed according to the practice of the court."

Under the provisions of this statute, the order of the court sustaining a motion in arrest of judgment does not necessarily result in a new trial, any more than it did at common law. Such an order has that effect only in those cases where the motion is sustained for an error which could have been cured by an amendment made before the trial occurred. This was so held by this court in the case of *Stid v. Railroad*, 211 Mo. l. c. 415, where Lamm, J., in speaking for the court, used this language: "Speaking with precision, a motion in arrest is not a motion for a rehearing. If granted, it does not necessarily result in a new trial. If an amendment be allowed, the cause by statutory command proceeds 'according to the practice of the court.' (R. S. 1899, sec. 804.)"

This construction of that statute is in harmony with the spirit of our legislation upon the subject of nonsuits and arrests of judgments, as expressed in section 4285, Revised Statutes 1899, which, insofar as is material, reads as follows; "If any action shall have been commenced within the time respectively prescribed in this chapter, and the plaintiff therein suffer a nonsuit, or, after a verdict for him, the judgment be arrested, or, after a judgment for him, the same be reversed on appeal or error, such plaintiff may commence a new action from time to time, within one year after such nonsuit suffered or such judgment arrested or reversed."

The only remaining matter to be determined in this connection is, was the motion in arrest sustained for an error which might have been cured by a timely amendment before the trial was had in the circuit court of the city of St. Louis? The order sustaining the motion in arrest specifically sets out the reason for the court's actions in that regard, namely, for the reason that the *judgment was not responsive to the issues*.

Clearly, this was not an error which could have been cured by an amendment before the trial was had in the circuit court of the city of St. Louis, within the meaning of said section 804, for the obvious reason that the judgment could not in the very nature of things have been rendered until after the trial was had therein. And since the order of the court sustaining the motion in arrest was unconditional, unappealed from, and the term at which it was entered having long ago elapsed, it became absolute and final, and, therefore, constitutes a complete bar to all further proceedings in said cause.

* * * * *

We are of opinion that the preliminary rule heretofore issued should be made permanent.

It is so ordered. All concur.⁴⁸

⁴⁸ *Waiver of right to ask for New Trial.* A motion in arrest of judgment is at common law a waiver of the right to ask for a new trial,—*Cincinnati, I., St. L. & C. Ry. Co. v. Case*, (1889) 122 Ind. 310; *Hall v. State*, (1903) 110 Tenn. 365; *Hall v. Nees*, (1862) 27 Ill. 411; *Craig v. Miss. Mills*, (1882) 12 Mo. App. 585,—as to grounds for new trial known at the time of the motion in arrest,—2 Tidd Pr. *913. *Contra*, *Jewell v. Blandford*, (1838) 7 Dana (Ky.) 472; *London v. Coleman*, (1878) 62 Ga. 146. In some states the two motions can be made together,—*Pope v. Latham*, (1833) 1 Ark. 66; *Contra*, *State v. Mann*, (1854) 13 Tex. 61. Compare *People v. Clement*, (Cal. 1894) 35 Pac. 1022.

CHAPTER III.

PROCEEDINGS BASED ON THE TRIAL OF ISSUES.

SECTION 1. CONTINUANCE.

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NEVEN v. NEVEN.

Supreme Court of Nevada. 1915.

38 Nevada, 541.

MCCARRAN, J. This was an action for divorce, commenced in the district court of Washoe county by respondent. Judgment having been rendered for respondent, a decree of the court was rendered in her favor, in accordance with the prayer of her complaint. Appeal is taken to this court from the order denying appellant's motion for a new trial.

One question only is presented to this court for determination, namely, Was it an abuse of discretion for the trial court to deny appellant's motion for a continuance of the trial of the case?

The record discloses that on the 21st day of March, 1914, the attorneys for the respective parties being in court, the trial of the case was, by consent of said attorneys, set for Thursday, the 26th day of March, 1914, at 10 o'clock a. m. It further appears that on the 26th day of March, 1914, at the hour at which the case was set for trial, the plaintiff appeared in court, with her attorneys and witnesses, to proceed with the trial. The defendant, at that time, through his attorneys presented the affidavit of a physician in furtherance of his motion for a continuance. The affidavit of the doctor was to the effect that appellant was in ill health and unable to be present at the trial. Upon motion of counsel for appellant, the case was continued, and on Saturday, the 28th day of March, 1914—calendar day in the district court—appellant and respondent and their respective attorneys being in court,

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the cause was, by and with the consent of all parties, set for trial for Saturday, the 4th day of April, 1914, at 10:30 o'clock a. m. of that day. On Saturday, the 4th day of April, 1914, at the hour set for the commencement of the trial, the plaintiff appeared in person and with her attorneys and witnesses. The defendant was not present, and one of his attorneys presented a telegram from defendant in furtherance of a verbal motion for continuance. The telegram, admitted and filed in furtherance of the motion, is as follows:

"Elko, Nev., Apl. 4, 1914.

"Sweeney & Moorehouse, Reno, Nevada: Detained here unavoidably. Guardianship matter Le Roy Neven.

J. H. Neven. 832AM."

The motion of appellant being resisted by respondent in the court below, the respondent herself took the stand and testified, with reference to appellant going to Elko, as follows:

"Q. Do you know what he went to Elko for? A. Well, some matter pertaining to the estate of Roy Neven. Q. His nephew? A. Yes. Q. Was it going to be heard in court, or did he just go to consult with attorneys? A. Well, he talked with me about it Thursday, and he said, 'Will you go up to Elko with me and have Judge Taber cross-question you?' I said, 'When?' He said, 'To-night. You can come back Friday night.' I said, 'No, I wouldn't take any chances on coming back Saturday night, because,' I said, 'you know our affair comes up Saturday.' I said, 'Is it necessary for you to go to-night?' He said, 'No, it is not; but I will have to go some time soon.'

The motion of appellant's attorney for continuance being denied, the court proceeded to the trial of the case. At the conclusion of the plaintiff's case, the attorneys for appellant again renewed their motion for a continuance. * * *

The motion for continuance was again denied, and no evidence being offered on behalf of defendant, appellant herein, the court rendered judgment for the plaintiff. Appellant later moved the court for a new trial, and, in furtherance of his motion, filed his affidavit setting forth the reason for his absence on the date of the trial of the cause. A portion of his affidavit is as follows:

"James H. Neven, being first duly sworn, deposes and says: That he is the defendant in the above-entitled action. That

on Thursday, the 2d day of April, 1914, defendant had very important business to attend to in Elko, county of Elko, Nev. That he took the train from Reno for Elko on the evening of Thursday, April 2d, with full intent and purpose of returning not later than Friday evening, April 3d. That he knew that the action above entitled as against him was set for trial at 10:30 o'clock a. m. of the 4th day of April, 1914. That he intended to go to Elko on April 2d and return to Reno on the evening of April 3d, so as to be ready for participating in the trial and defending himself in the aforesaid action on Saturday, April 4th, at 10:30 a. m. of that day. That upon his arrival in Elko he had certain conversations and business dealings with the attorneys of Le Roy Neven, whose estate during his minority was under the control of affiant as guardian, and his business dealings with these people, to wit, the attorneys for Le Roy Neven, was to enable them to fix up the accounts necessary to be reported by affiant and obtain the discharge of affiant as guardian of the said Le Roy Neven. That he had no purpose, design, or intent in going to Elko, Nev., to interfere with the trial of this cause in the court on the 4th day of April, but with good faith and with good intent he thought he would finish the business he had in Elko, Nev., and return on the evening of April 3d, so as to be ready for trial the morning of April 4th. That train No. 5 of the Southern Pacific Railroad Company from Elko, which is due in Reno at 8:50 a. m., April 4th, was 6 hours and 45 minutes late, rendering it impossible for defendant to appear in court and participate in defending said cause and having a hearing of said cause on the 4th day of April as aforesaid. That it was through no fault or neglect of this defendant that he was not present at the trial and would be prepared to defend the said action, but, by reason of the fact that train No. 5 was 6 hours and 45 minutes late, affiant did not arrive in Reno until after 3 o'clock p. m. of Saturday, April 4th. That realizing that he could not return by reason of the fact that the said train, over which he had no control, was 6 house and 45 minutes late, he (affiant) sent a telegram to H. V. Morehouse, one of his counsel, stating that he was unable to be present and was unavoidably detained, hoping thereby that his counsel (the said H. V. Morehouse) would be enabled to obtain a continuance of this cause at least for the purpose of taking the testimony

which would be offered by the defendant in person and by his witnesses."

It is needless for us to cite authority in support of a proposition that has become almost universally recognized: That a motion for continuance is addressed to the discretion of the court. The reason for this rule is manifest. The trial court is apprised of all the circumstances concerning the case, and the previous proceedings, and has before it the parties, from whose conduct and utterances it has opportunity to judge as to whether or not the motion is made in good faith, or as to whether or not deception and fraud are being perpetrated on the court with a view to delaying the proceedings. It is for these reasons that courts of review generally have taken a position that the action of a trial court, in granting or denying a motion for continuance, will not be reversed, except for the most potent reasons.

The rule has been laid down by some courts (and, in our judgment, advisedly so) that a greater degree of liberality should be accorded in matters of continuances in divorce cases than in any other civil actions; the reason for this being that the public, as well as the parties to the action, are interested in the result of the suit. However this may be, we concur in the expression of the Supreme Court of California, in the case of *Barnes v. Barnes*, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660, that a defendant must be held to the exercise of good faith and diligence, and cannot be heard to complain if the failure to present his defense results from an attempt to subordinate the business of the court to his own business engagements and convenience.

The statement of appellant, made in his affidavit, makes no attempt to establish that appellant was required, either by court process or the pendency of court proceedings, or even by urgent or imminent business engagements, to be in Elko either on April 2d, 3d, or 4th. The record fails to disclose that any proceedings were pending in any court in Elko, or elsewhere, in which appellant was directly or indirectly concerned. The most that can be said for the affidavit of appellant is that it attempts to set forth that he had very important business to attend to in Elko; that upon arrival in Elko he had certain conversations and business dealings with the attorneys of Le Roy Neven, whose estate, during his minority, was under the control of affiant as guardian; that his

business dealings in this respect with these people, to wit, the attorneys for Le Roy Neven, were to enable them to fix up the accounts necessary to be reported by affiant and obtain the discharge of affiant as guardian of said Le Roy Neven. Nothing in the affidavit indicates, even inferentially, that this business transaction with the attorneys of Le Roy Neven was a matter imminent, urgent, or pressing, or one which demanded or required the presence of appellant upon either the 2d, 3d, or 4th day of April, or, in fact, upon any other particular date. Nothing appears in the record which tends to contradict the testimony of Mrs. Neven, the respondent herein, wherein she states that she cautioned appellant, prior to his departure for Elko, and said, "Is it necessary for you to go to-night?" to which he replied, "No, it is not; but I will have to go some time soon." Counsel for appellant, in their brief, urge that this business in Elko was a court proceeding, in which appellant was an interested party, but this is nowhere supported by the record, nor even by the affidavit of appellant.

The record discloses that appellant was present in court on the 28th day of March, with his attorney; that on that date, by his consent, the case was set for trial on April 4th. If a visit to Elko was urgent or pressing, he should have brought such matter to the attention of the court, or at least made some effort to have this case set at a date more convenient to him; and even though it was a court proceeding in Elko at which, by reason of his interest therein, he was required to be present, if those proceedings had been set prior to the 28th day of March, he must have been cognizant of that fact, and should have urged that matter at the setting of this case. If it was a court proceeding in Elko, in which his presence was urgent, and the date of that proceeding was set after the 28th day of March, he was bound by the first notice of trial, and the requirement for his presence at the trial of this cause would have been reasonable ground for a continuance in the Elko proceeding. *Finar v. Fillmore et al.*, 1 Mich. N. P. 172.

It is unnecessary for us to dwell upon such rules and observations as have been made by either this or other courts upon the subject of the absence of witnesses as a ground for continuance in civil cases. Such rules and observations are not strictly applicable to the matter at bar. In this case, the absent witness was the party defendant himself; and he is

bound by a different rule from that which might be applicable if the absent witness were one in no wise interested in the suit, in that, as a general proposition, a stricter showing of good cause is required. Ruling Case Law, vol. 6, p. 551.

"A party who is a material witness in his own behalf," says the Appellate Court of Illinois, "must have his testimony ready for use at the trial, unless prevented from so doing by some obstacle which, by the exercise of reasonable diligence, he cannot overcome, and the obstacle should not be one which he has created by his own voluntary act. If he allows considerations of business or pleasure or even regard for his own health to call him away at a time when his suit is liable to be called for trial, and he thereby loses the benefit of his own testimony, he must, ordinarily, suffer the consequences." *Schlesinger v. Nunan*, 26 Ill. App. 525.

The expression of the Supreme Court of California in the *Barnes* Case, *supra*, was again referred to approvingly in the case of the *Estate of Kasson*, 141 Cal. 33, 74 Pac. 436, and is generally cited as a leading case upon the subject. Ruling Case Law, vol. 6, p. 551; Ann. Cas. 1914B, 360.

It must be observed that the telegraphic communication from appellant to his attorney, filed in the district court in furtherance of the motion for continuance on the 4th day of April, made no mention of the delayed train as being the cause of the absence of appellant. The telegram was filed at Elko at 28 minutes after 8 on the morning of the 4th day of April, and makes no intimation that appellant was or would be on the delayed train No. 5. It says: "Detained here unavoidably. Guardianship matter Le Roy Neven." If the lateness of train No. 5 had been the real cause of the absence or delay of appellant, it would have been a simple matter to make mention of that fact in the telegram. Moreover, in the motion for continuance made by the attorneys for appellant on April 4th, there was no mention of appellant being on this delayed train, or that he would arrive on the delayed train or within any reasonable time. A showing to this effect, made properly and in good faith, might have been at least a reasonable ground to warrant the trial court in continuing the hearing until the arrival of the defendant. But in the record we find no assurance given that the defendant would be able to attend the trial at any designated time.

The affidavit of appellant, filed in furtherance of his mo-

tion for a new trial, and made the basis of his appeal in this case, states that his object in sending this telegram was the hope that thereby his counsel would be enabled to obtain a continuance of this cause, at least for the purpose of taking the testimony which would be offered by defendant in person and by his witnesses. In this respect, the record discloses that no witnesses were in attendance upon the trial, by subpoena or other process of the court, on behalf of appellant. If, however, witnesses on behalf of appellant had been present at the time of trial, the absence of appellant would not have precluded his attorney from introducing such testimony, bearing upon the case, as might be adduced from those witnesses. The record discloses neither the presence of any witnesses on behalf of defendant, nor that any witnesses were placed upon the stand in his behalf, nor testimony of any kind or character offered, either in contradiction of the allegations of respondent's complaint or in support of appellant's cross-complaint. Moreover, the counsel for appellant who made his statement under oath in furtherance of his motion for continuance, at the conclusion of respondent's case, made no intimation that any witnesses were present on behalf of appellant.

From the record as it is before us, we find nothing that would support appellant's contention that it was an abuse of discretion for the trial court to deny the motion for continuance. It follows that the order denying appellant's motion for a new trial should be affirmed.

It is so ordered.⁴⁹

⁴⁹ *Agreement*. "A case may be postponed by the agreement of the parties acting for themselves, or through their attorneys, and with the consent of the court, but an agreement by the parties that the cause shall be postponed does not operate as a postponement, without the sanction of the court, and does not of itself bind the court."—*Moulder v. Kempff*, (1888) 115 Ind. 459, 462.

BEAN v. MISSOULA LUMBER CO.

*Supreme Court of Montana. 1909.**40 Montana, 31.*

BRANTLY, C. J. * * *

Contention is made that the court erred in refusing to grant to defendant a postponement of the trial because of the absence of one Wendorf, a witness who was expected to be present and testify in defendant's favor. The application was made upon affidavit by defendant's counsel. Besides setting forth the facts to which the witness would testify, the affidavit shows that the witness was a resident of the state of Idaho; that he was then in that state and had been for some months; that he was the only witness who could testify to the facts set forth; that the defendant expected to have him present, but that, after the cause was set for trial, counsel ascertained that he was ill at his home and was unable to attend; and that, if granted a postponement, he could secure the attendance of the witness in person. However meritorious the application may have been in other respects, it was properly denied, because it wholly failed to show diligence by defendant in its efforts to secure the evidence of the witness. The cause had been at issue for several months. The witness was a non-resident of the state of Montana, and beyond the jurisdiction of the court. If the defendant chose to rely upon his promise to attend—if he did make such promise—it did so at its own risk. Under the circumstances, the only safe course to pursue was to take the deposition of the witness. The refusal to grant a continuance was, under the circumstances, not such an abuse of discretion as to call for interposition by this court. The case of *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182, cited by counsel, is not in point. Though the application there made showed that the witness resided in the state of Kansas, it appeared that the defendant knew nothing of his whereabouts until within so short a time before the trial that it was impossible to take his deposition, and the postponement was asked in order that the defendant might be given time to take it.

* * * * *

Let the judgment and order be affirmed.

Affirmed.

CAMPBELL v. DREHER.

30 Court of Appeals of Kentucky. 1908.
John 33 Kentucky Law Reporter, 444.

LASSING, J. In a collision between appellee, a 16-year old boy, on a bicycle and appellant's automobile appellee was injured. Conceiving that his injuries were the direct result of appellant's negligence in operating his machine, appellee, through his father as next friend, instituted suit to recover damages. Appellant denied liability, and pleaded that the injuries, if any, to the boy were the result of his own carelessness and negligence. Upon the issues thus joined a trial was had, which resulted in a verdict in favor of appellee for \$500. To reverse this judgment this appeal is prosecuted.

Appellant relies upon four grounds: * * *; second, because the trial court erred in refusing him a continuance on his showing, made at the time of the trial, that the witness Dr. Geo. W. Leachman, was absent from the state, and that his testimony could not be procured at that time; * * *

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Appellant's second ground for reversal is not well taken for two reasons: First, it is not shown that he used any diligence whatever to secure the presence of this witness at his trial. The record shows that his answer was filed on the 15th day of December, 1906. The reply was filed on the 22nd day of December, 1906, completing the issues. The case was called for trial the 26th of March, 1907, or more than 90 days after the issues were made up. During all of this time, save about two weeks prior to the date of the trial, as shown by the affidavit, the witness, Dr. George W. Leachman, was within the jurisdiction of the court, and could have been subpœnaed, and his attendance procured. This was not done, and the fact that appellant did not know he was going to leave offers no excuse for his failure to have a subpœna issued for this witness at a time when he knew he was within the jurisdiction of the court and could have been served. The court did not err in refusing to continue the case because of the absence of this witness for the further reason that it is shown that his evidence would have been merely cumulative. He was in the automobile with the witness John Straus, and the facts to

which he would have testified, if present, as disclosed by the affidavit, were testified to by the witness John Straus. The ruling of the trial judge, in permitting this affidavit for continuance to be read as the deposition of the absent witness, was certainly as favorable to appellant as he could ask.

* * * * *

Perceiving no error in the conduct of the trial prejudicial to the rights of appellant, the judgment is affirmed.

PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS
RAILWAY CO. v. GROM.

Court of Appeals of Kentucky. 1911.

142 Kentucky, 51.

WM. ROGERS CLAY, Commissioner. Appellee, William Grom, brought this action against the appellants, Pittsburg, Cincinnati, Chicago & St. Louis Railway Company and Pennsylvania Railroad Company, to recover damages in the sum of \$1,999 for personal injuries, alleged to have been due to the negligence of the railroad companies while he was a passenger on their lines of railroad. The jury awarded him a verdict for the full amount sued for, and the defendants have appealed.

The facts, briefly stated, are as follows: Appellee bought a ticket from Louisville to Atlantic City and return. The accident occurred between Pittsburg and Altoona, in the State of Pennsylvania. At the time of the accident appellee was sitting in the middle of the sixth seat from the front end of the car. He was struck by some hard and heavy substance over the left eye. The frontal bone was fractured and his eye so seriously injured that the sight thereof is permanently impaired. At the time of the accident a freight train was passing. Just before and after the injury, witnesses heard something rattling against the side of the car. It sounded like a chain. Indentations were found on the side of the car which looked as if they had been made by an irregular object in the form of a chain. One of the witnesses saw the passing shadow of the object that struck appellee, and it looked like

a chain. Immediately after the injury several persons searched the car, and nothing was found therein which could have caused the injury. Appellant's testimony was to the effect that on the freight trains ordinarily used there are no chains in a position to be swung out so as to strike or enter a train on an adjacent track, and, even if there were such, they would hang by the side of the car by reason of their own weight, and would not swing out from the car by reason of the velocity of the train. The witnesses, however, had no knowledge of the condition of the particular train in question, and they admit, on cross-examination, that there were numerous chains in and about freight cars.

* * * * *

At the conclusion of the evidence for appellee, appellant's senior counsel filed his affidavit and moved for a continuance on the ground of surprise. In this affidavit counsel stated, in substance, that he had had sole charge of the defense of the action that was being tried; that theretofore he had made a most thorough investigation of the facts of the case and had had submitted to him full reports made by the agents of appellants as to all facts connected with the injury. He had never heard until the day before the trial that any attempt would be made to show that appellee was struck by a chain, when he was then informed in a general way by appellee's counsel that he would show that fact. In all the investigations made and in the reports submitted to him, it had never been suggested that the accident could have happened in that way. He was, therefore, taken completely by surprise, as were the appellants, by the evidence introduced by appellee, and he was not then prepared to rebut such evidence. He had taken the deposition of the train conductor, but did not ask him about a chain, because he had never heard it suggested or thought it possible that a chain could have anything to do with the accident. If allowed an opportunity to do so he could and would procure testimony of witnesses—all residing in the state of Pennsylvania—which would prove (1) that there were no marks on the car on which appellee was injured indicating that it had recently been struck by anything; (2) that all the persons who were in the coach and near appellee were asked by the conductor and brakeman as to the cause of the accident, and none of them could give any explanation of it, and none of them said anything about hearing a chain

or seeing a chain, and none of them suggested that a chain had anything to do with the accident; (3) that at the time there were no chains upon or attached to appellants' engine or cars, or forming any part of the equipment thereof that were long enough to reach into the window of a passenger coach on an adjacent track and strike a passenger, as appellee was struck; (4) that all chains connected with such equipment were, however, short chains, and in the event of their breaking they would drag on the ground, and could not swing out in a horizontal position so as to come in contact with a train on an adjacent track; that such a thing is a physical impossibility; (5) that "shortly after the accident to plaintiff the conductor caused telegraphic notice to be given of it and instructions were immediately given to inspect all westbound freight trains that had met plaintiff's train to see if anything was attached to or projected from them that could have caused the accident, and such investigation was made and nothing found to explain the cause of the accident;" that these facts could be established by the testimony of several witnesses (naming them) and could not be established by any witnesses living in the State of Kentucky. Did not anticipate, nor did the railroad companies anticipate, and no one could have reasonably anticipated, that appellee would attempt to prove that his injuries were caused in such an unusual or unheard-of manner as being struck by a chain. If the railroad companies had known in time that such proof would be offered, they could and would have met it by showing facts to the contrary.

The foregoing affidavit was not filed until appellants' motion for a peremptory instruction, at the conclusion of appellee's evidence, had been overruled. Before asking for a continuance on the ground of surprise, therefore, counsel for appellants first took the chance of appellee's failing to make out his case. Though apprised of the fact in a general way on the day before the trial that appellee would attempt to show that he was struck by a chain, he did not ask for a continuance of the case when it was called for trial. At the time of the trial the law of Pennsylvania was in proof. Counsel knew that under that law upon mere proof of injury, unaccompanied by any facts tending to show a collision or a defect of cars, track, roadway, machinery or other negligence appellee could not recover. The deposition of the conductor showed that there was absolutely nothing the matter with the

train on which appellee was a passenger. A search was made to find whether or not the object which had struck appellee was in the car, and nothing was found. Knowing the law of Pennsylvania, counsel should have anticipated that appellee would attempt to prove facts tending to show negligence in the operation or mechanical appliances of the passing train, as appellee could not recover by merely showing that he was injured by some object, without showing the source from which it came. Furthermore, counsel admits in his affidavit that immediately after the accident, the conductor caused telegraphic notice of the fact to be given, and instructions were immediately sent out to inspect all westbound freight trains that had met the train on which appellee was a passenger, to see if anything was attached to, or projected from them that could have caused the accident and such investigation was made and nothing found to explain the cause of the accident. This being true, counsel should have taken the depositions of witnesses acquainted with such facts, and should not have gone into the trial in the hope that appellee would fail to make out his case, and, in the event that he did make out his case, appellants would be granted a continuance and a further opportunity to prove facts which they could have established before the trial. We, therefore conclude that the court did not err in failing to grant the continuance asked for.

* * * * *

*Judgment affirmed.*⁵⁰

⁵⁰ The grounds upon which a continuance may be granted are infinitely varied. They include, beside surprise at the trial and absence or death of witness or party or attorney, want of preparation, pendency of another action, necessity for taking depositions, change in issues due to amendment, and such other matters as may show a reasonable and just ground for delay.

82 July

LOUISVILLE AND NASHVILLE RAILROAD CO. v. VOSS.

Supreme Court of Tennessee. 1902.

109 Tennessee, 718.

SHIELDS, J. This is an action for personal injuries, brought by the defendant in error against the plaintiff in error in the

circuit court of Lawrence county, resulting, on a trial, in a verdict and judgment against the plaintiff in error, which it has brought before this court for review.

When the case was called for trial in the circuit court, the plaintiff in error moved the court for a continuance on account of the absence of three witnesses, and in support of its motion presented a special affidavit, stating the names of the absent witnesses, the facts which plaintiff in error expected to prove by them, and all other facts necessary to constitute an affidavit showing good grounds for a continuance. The plaintiff below, conceding that the affidavit stated a good cause for a continuance, proposed to agree that the absent witnesses would testify as stated, and that the affidavit be read in evidence in behalf of the plaintiff in error on the trial of the case as the depositions of those witnesses, and thereupon the court refused the continuance, and required the plaintiff in error to go to trial. This action of the court is now assigned as error, the contention of the plaintiff in error being that it was entitled to have its witnesses before the court and jury in person, and that nothing short of a direct and absolute admission of the truth of the facts which it claimed its witnesses would testify to would authorize the court to deny it this right, and disallow its application for a continuance of the case. This contention is sound, and the action of the court in requiring plaintiff in error to go to trial upon the agreement of the plaintiff below that the witnesses would swear as stated in the affidavit, and that the affidavit be read as their depositions, was, nothing else appearing, reversible error. The plaintiff in error had the right to have its witnesses before the court, and nothing short of an absolute and unqualified admission of the truth of the facts proposed to be proven by the absent witnesses, by the opposite party, justified the court in refusing the continuance and requiring the plaintiff in error to go to trial.

* * * * *

⁵¹ *Accord*:—Murphy v. Murphy, (1861) 31 Mo. 322; Cheney v. Smith, (1871) 42 Ga. 50; Seward v. Mayor, (1896) 16 Del. 375; Horwitz v. La Roche, (Tex. Civ. App. 1908) 107 S. W. 1148.

Contra, requiring only an admission that the witness would, if called, testify as stated in the affidavit for continuance,—Pate v. Tait, (1880) 72 Ind. 450; Utley v. Burns, (1873) 70 Ill. 162; Crane v. Hall, (1915) 165 Ky. 827; Hartford Fire Ins. Co. v. Hammond, (1907) 41 Colo. 323; Goldstein v. Morgan, (1903) 122 Ia. 27; Terrapin v. Barker, (1910) 26

Okl. 93; State v. Bartley, (1892) 48 Kan. 421; Territory v. Emilio, (1907) 14 N. Mex. 147.

In many jurisdictions the rule is fixed by statute.

A distinction in this regard between civil and criminal cases has been asserted (See 4 Encyc. Pl. & Pr. 865 *et seq.*) but the cases do not seem to support it.

8 3
Gabe MAUND v. LOEB.
Supreme Court of Alabama. 1888.

87 Alabama, 374.

CLOPTON, J. The continuance of a case is in the discretion of the court, and such terms may be imposed, under the rule of practice, as to the court may seem proper. At the Fall term, 1888, of the Circuit Court, defendant obtained a continuance, upon payment of all the costs as a condition precedent, to be paid in ninety days, or judgment to go against him at the next term. The costs were not paid until the first day of the next term, and after the case was called for trial, which was more than ninety days from the time of the order. Defendant having applied for, obtained, and accepted the continuance, we must infer that he consented to the terms upon which it was granted. It was no excuse, that an itemized bill of costs had not been furnished, when it is not shown that defendant offered to pay the costs, or applied for such bill; and the court was not bound to accept payment after the expiration of the prescribed time, as a compliance with the condition upon which the continuance was obtained. The court was authorized to render judgment *nil dicit* against defendant. *Waller v. Sultzbacher*, 38 Ala. 318.

* * * * *

Affirmed.

SECTION 2. THE JURY.

(a) *The Right to a Jury Trial.*

STATE EX REL. RAILWAY CO. v. SLOVER.

*Supreme Court of Missouri. 1896.**134 Missouri, 607.*

[This was an application for a writ of prohibition to prevent the respondent from drawing a special jury, on the ground that the statute under which the respondent proposed to draw the special jury was unconstitutional because it provided identical methods for drawing both common and special juries. This, it was claimed, deprived the relator of its right to a special jury as at common law.]

GANTT, J. * * * Inasmuch as the learned judge of the circuit court conformed his practice to the statute, the only point for serious consideration is the constitutionality of the act itself. Has the legislature the power and right to define the qualifications of jurors, whether on the regular panels or summoned for a special case? Has it the right to prescribe and regulate the mode of selecting and summoning jurors? By "the right of trial by jury as heretofore enjoyed" in our organic law is meant that the people of this commonwealth shall not be denied the essential features of the jury system as understood and practiced at the common law, chief among which have been esteemed the right to have a jury composed of 12 men, that they should be unanimous in their verdict, that they should be impartial, and that the case triable by a jury at common law should continue to be so tried in this state. With these great essentials preserved, the legislature is not deprived of the power to regulate the manner of the selection or the qualification of jurors.

In *Vaughn v. Scade*, 30 Mo. 600, Judge Scott says: "The term 'trial by jury' was well known and understood at the common law, and in that sense it was adopted in our bill of rights. Of course, the nonessentials of that institution, such as concern the qualification of jurors, the mode of summoning them, and many other such matters, were left to the

regulation of law. The constitution is preserved in retaining the substance of that form of trial as it was known and practiced among those from whom we derived it."

Unquestionably, under the guise of regulation, legislation which, in effect, would destroy the great feature of the common-law jury, would not be tolerated; but no reason can be given why the people in their sovereign capacity may not improve the method of selecting a jury by excluding from the list those unfit by crime or immorality, or by repealing the freehold qualification of the common law, or any property qualification. Nor can we perceive how the impartiality of the jury can be lessened by the fact that the duty of selection is no longer confided to one man,—the sheriff or coroner,—but a list of all qualified citizens is placed in a box or wheel, well mixed, and the panel drawn therefrom by the clerk in the presence of the court or judge. It would seem, on the contrary, to insure absolute impartiality. The system removes all opportunity of packing a jury in the interest of either party or of permitting those who solicit the duty from disgracing the system. * * * In *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350, Mr. Justice Field, in discussing sections 1900, 1902, Rev. St. Mo. 1879, allowing the state in a murder case 15 peremptory challenges in St. Louis and only 8 in the counties of the state, said: "The constitution of Missouri, and, indeed, every state in the Union, guarantees to all persons accused of a capital offense or of a felony of a lower grade the right to a trial by an impartial jury, selected from the county or city where the offense is alleged to have been committed; and this implies that the jurors shall be free from all bias for or against the accused. * * * To secure such a body, numerous legislative directions are necessary, prescribing the class from which the jurors are to be taken, whether from the voters, taxpayers, and freeholders, or from the mass of the population indiscriminately; the number to be summoned from whom the trial jurors are to be selected; the manner in which the selection is to be made; the objections that may be offered to those returned, and how such objections shall be presented, considered, and disposed of; the oath to be administered to those selected; the custody in which they shall be kept during the progress of the trial; the form and presentation of their verdict and many other particulars. All these,

it may be said, in general, are matters of legislative discretion. But to prescribe whatever will tend to secure the impartiality of jurors in criminal cases is not only within the competency of the legislature, but is among its highest duties." See, also, *Com. v. Dorsey*, 103 Mass. 412; *State v. Wilson*, 48 N. H. 398.

Now, it is the historical jury of 12 that is guaranteed by the constitution and bill of rights, and we have seen that when the essentials are preserved, all other matters looking to their selection are confided to the legislature.

The special jury was not a matter of right at common law, but was within the discretion of the court; nor has it been, in this state, an absolute right, save when prescribed by statute. If it is competent for the legislature to change the qualifications and prescribe new methods for selecting the constitutional jury, how can it be maintained it may not also determine in what cases a special venire may be had, and how it should be selected; and what obstacle is there to the abolition of the special jury system absolutely?

The historical 12 was an absolute legal right. It was this "right" which our constitution secures; but a special venire was not a legal right, but rested in the discretion of the court, and hence has not passed into a constitutional right; and, in the absence of limitation upon the people in their legislative capacity, they can abolish the right to a special jury altogether. Whether we construe this act of April 1, 1891, as abolishing all distinction between common and special juries, or as conferring upon a party the right to a jury different from the regular panel, and special only in that sense, or as prescribing the qualifications and method of selecting a special jury when allowed by the court in its discretion, in neither case is it obnoxious to the charge of being unconstitutional. The right to an impartial jury does not vest in any suitor the right to select his own jury. We discover nothing in the act that is calculated to abridge or deny any essential of a jury trial as understood at common law, and hold that its various provisions were clearly within the province and discretion of the legislature. The writ of prohibition is denied.

BRACE, C. J., and MACFARLANE, BURGESS, and ROBINSON, JJ., concur. SHERWOOD, J., dissents.

BARCLAY, J., concurs, referring to his dissenting opinion

in the recent *Withrow* prohibition case from St. Louis (*State v. Withrow* [Mo. Sup.] 36 S. W. 43).⁵²

⁵² *Special Juries.* Blackstone says: "Special juries were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him. He is in such cases, upon motion in court and a rule granted thereupon, to attend the prothonotary or other proper officer with his freeholder's book; and the officer is to take indifferently forty-eight of the principal freeholders in the presence of the attorneys on both sides; who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel."—3 Com. *357.

In *King v. Wooter*, (1817) 1 Barn. & Ald. 193, 204, Lord Ellenborough said: "The practice certainly has been within the city of London to take such only as came within that description [merchants], and in counties, those who come within the description of esquires or persons of higher degree; that has been the mode in which the officers have at all times exercised their judgment as to the class from which special jurors are to be selected."

In the United States the manner of selection is usually regulated by statute,—*Atlantic & Danville R. R. Co. v. Peake*, (1890) 87 Va. 130. While the statutes are quite varied in their provisions, the general purpose is to obtain a specially selected list from which the parties are given a liberal right of exclusion. The Michigan statute, which is fairly representative of the type, is as follows, the sections being taken from C. L. 1915:—

Sec. 12615. When it shall appear to the circuit court that a fair and impartial trial will be more likely to be obtained in any cause pending therein, by having a struck jury, such court shall order a special jury to be struck for the trial of such cause.

Sec. 12616. The party obtaining such order, shall give notice eight days previously, of the time when he will attend before the clerk of the county in which the venue in such action is laid, for the purpose of having such jury struck.

Sec. 12617. At the time appointed the clerk of the county shall attend at his office, with the original lists of grand and petit jurors returned to him who are then liable to serve, and in the presence of the parties or their counsel, shall proceed to strike a jury as follows:

1. The clerk shall select from such list the names of forty-eight persons, whom he shall deem most indifferent between the parties, and best qualified to try the cause;

2. The party on whose application such struck jury was ordered, or his attorney shall then first strike out one of the said names and the opposing party or his agent or attorney, shall strike out another of such names, and so alternately until each party shall have stricken out twelve names;

3. If either party shall fail to attend at the time and place of striking such persons, or shall neglect to strike out any names according to the foregoing provisions, the clerk shall strike out such names for such party;

4. The clerk shall thereupon make out a list of the names of the twenty-four persons not stricken out, and certify the same to be the persons drawn to serve as jurors, pursuant to the order of the court, and shall deliver such list, so certified, to the sheriff of the county.

Sec. 12618. The sheriff shall summon the persons whose names are contained on the list so delivered to him by the clerk, in the same manner as other jurors are required to be summoned, and shall return the names of those summoned to the court, at which they are required to appear as jurors.

Sec. 12619. A jury shall be formed in the manner directed by law in respect to other juries, from the persons so summoned and appearing, who shall try the cause in which such struck jury shall have been ordered; but the court shall have the same power to excuse or discharge any such juror, as in other cases.

Sec. 12621. The expense of striking a jury shall be paid by the party applying for the same, and shall not be taxed in the costs of the suit, and the struck jurors shall be paid as in other cases.

See *People v. Dunn*, (1899) 157 N. Y. 528, for a careful consideration of the constitutional features of the struck jury act.

Unanimity. Many state constitutions allow a verdict by less than twelve. See the following: Calif., Art. 1, Sec. 7; Idaho, Art. 1, Sec. 7; Missouri, Art. 2, Sec. 28; Kentucky, Stat. 1909, Sec. 2268, authorized by Const. Sec. 248; Ohio, Art. 1, Sec. 5; Oklahoma, Art. 2, Sec. 19; South Dakota, Art. 6, Sec. 6; Nevada, Art. 1, Sec. 3; Texas, Art. 5, Sec. 13; Utah, Art. 1, Sec. 10; Washington, Art. 1, Sec. 21. The most usual provision is for a verdict by three-fourths of the jury. See *Maxwell v. Dow*, (1899) 176 U. S. 581, holding that the Utah provision did not offend against the Constitution of the United States. See also *Unanimity of Juries*, by Francis Lieber, 6 Am. Law Rev., N. S., 727. The advantages of less than unanimous verdicts are said to be two, viz., a reduction in the number of disagreements, and a reduced possibility of jury fixing.

In England the use of juries in civil actions has quite largely disappeared. Order 36, rule 2, provides that "In every action, cause, matter or issue, unless under the provisions of rule 6 of this Order a trial with a jury is ordered, the mode of trial shall be without a jury: *Provided* that * * * (b) the court or a judge may at any time order any action, cause, matter or issue to be tried by a judge with a jury or a judge sitting with assessors or a special referee with or without assessors." Rule 6, above referred to allows a jury, on application within 14 days after the close of the pleadings, in cases of fraud, libel, slander, malicious prosecution, false imprisonment, seduction and breach of promise. And there are certain other cases where a jury may be demanded. See *Annual Practice*, 1923.

TURNES v. BRENCKLE.

Supreme Court of Illinois. 1911.

249 Illinois, 394.

VICKERS, C. J. The appellant William J. Turnes, doing business as William J. Turnes Company, filed a bill in chancery in the circuit court of Cook county to establish and

enforce a mechanic's lien against certain real estate owned by appellee, Elizabeth Brenckle. * * * By an amendatory act (Amending Laws 1895, p. 225), which went into effect July 1, 1903, it is provided as follows: "And in event that the court shall find, in any proceeding in chancery, that no right to a lien exists, the contractor shall be entitled to recover against the owner as at law, and the court shall render judgment as at law for the amount which the contractor is entitled to, together with costs in the discretion of the court." Hurd's Rev. St. 1909, c. 82, § 27. The court below held the foregoing statute unconstitutional, and refused to enter judgment as at law for the amount that might be due appellant. The constitutionality of a statute being thus involved, the court below allowed an appeal direct to this court.

* * * * *

The constitutional provision relating to a jury trial does not apply to the trial of issues of fact in equitable actions. If it did, a court of equity could exercise no discretion but would be compelled to grant a jury trial, when demanded, in all cases where the same issue would be triable by a jury in a common law action. In *Barton v. Barbour*, 104 U. S. 126, the court, on page 133 (26 L. Ed. 672), said: "The argument is much pressed that by leaving all questions relating to the liability of receivers in the hands of the court appointing them persons having claims against the insolvent corporation or the receiver will be deprived of a trial by jury. This, it is said, is depriving the party of a constitutional right. * * * But those who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity." See, also, 24 Cyc. 111, and cases there cited.

Under the Constitution a party is entitled, as a right, to a trial by jury according to the course of the common law, and to a verdict which is not merely advisory but is binding upon the court upon controverted questions of fact. Whether the right to a jury trial exists in any given case depends upon the nature of the controversy rather than upon the form of the action. A statute passed by the Legislature of Florida

in 1889 (Laws 1889, c. 3884) provided "that courts of chancery shall entertain suits by any person or persons claiming any timbered lands in this state to enjoin trespasses on said lands by the cutting of trees thereon or the removal of logs therefrom, or by boxing or scraping said trees for the purpose of making turpentine, or by the removal of turpentine therefrom; and in such suits the said courts shall cause an account to be taken of the damage to the complainant from any of said trespassing before or after the institution of the suit, and decree payment of the amounts shown due upon such accounting by the defendant or defendants." The title of the act was "An act to extend powers of courts of chancery." Under this statute a bill was filed for an injunction to prevent trespassing upon timber lands and for the assessment of damages for trespasses already committed. The Supreme Court of Florida, in *Wiggins & Johnson v. Williams*, 36 Fla. 637, 18 South. 859, 30 L. R. A. 754, held that that portion of the act which authorizes the court to assess damages for trespass committed upon timber lands was unconstitutional and void because it deprived the defendant of a right to a jury trial in a matter wherein such right existed at common law previous to the adoption of the Constitution of that state. The constitutional provision of that state in relation to a right of a jury trial is similar to the corresponding provision of our Constitution. In the course of the opinion the Supreme Court of that state said: "A principle has been established in the jurisprudence of this country that new rights unknown to the common law procedure of trial by jury may be created, and provision made for their determination in the absence of a jury, without violating the constitutional provision we are considering. But, while it may be competent for the Legislature to create new tribunals without common law powers to adjudicate new rights without a jury, the mere change, in form, of an action, will not authorize the submission of common law rights to a court in which no provision is made to secure a trial by jury." In the same case it is further said: "A statute in Michigan provided that any person claiming title to lands through the Auditor General's deed, executed upon a sale thereof for nonpayment of taxes, may file a bill in chancery to quiet his title without taking possession thereof. It was claimed that the statute gave the right to file the bill

against one in possession of the land, although at the time of the adoption of the Constitution under which the act was passed trials of titles to lands were at law. It was held that the statute did not have such meaning, but, if it did, the Legislature was powerless to enact it. Judge Cooley, speaking for the court in *Tabor v. Cook*, 15 Mich. 322, said: 'The present is one of those cases where a right to a trial by jury existed when the Constitution was formed, and this right must therefore remain. Whatever proceeding the Legislature authorizes for the determination of adverse claims, the right of the party in possession to a jury trial must be kept in view and some mode pointed out by which he can demand it. In civil cases at law, including ejectment suits, provision is made by statute and rule whereby either party may obtain a jury; but there is no such provision for cases in chancery, and it is only in special cases, where the court desires the verdict of a jury for its own guidance, that issues in chancery can go before a jury at all. A defendant in chancery, therefore, cannot waive a jury by failing to demand it, because no mode is provided by which any such demand can be made, and a statute which should authorize a bill in the nature of an ejectment bill, without at the same time providing some means by which a jury could be had at the option of defendant, would be in palpable disregard of the provisions of the Constitution which we have quoted.' "

Our conclusion is that the statute under consideration is unconstitutional * * * for the reason that it deprives a defendant of the right to a trial by jury.

The court below properly dismissed the bill for want of equity, and its decree will be affirmed.

*Decree affirmed.*⁵³

FARMER and DUNN, JJ., dissenting.

⁵³ Compare *Grand Rapids & Indiana R. R. Co. v. Sparrow*, (1888) 36 Fed. 210, where a statute extending the jurisdiction of a court of equity to quiet title to unoccupied lands, was held valid and not subject to the objection made in *Tabor v. Cook*. See also *Ward v. Farwell*, (1881) 97 Ill. 593, pp. 611-614.

8 6 CAPITOL TRACTION CO. v. HOF.

Take Supreme Court of the United States. 1898.

174 United States, 1.

GRAY, J. On September 8, 1896, the Capital Traction Company, a street-railway corporation in the District of Columbia, presented to the supreme court of the District a petition for a writ of *certiorari* to a justice of the peace, to prevent a civil action to recover damages in the sum of \$300 from being tried by a jury before him.

* * * * *

The petition further averred that the only method in which Hof's claim against the petitioner could be tried by a jury according to the common law and the constitution was by removing his suit from the justice of the peace into the supreme court of the District of Columbia; that, if this was not done, the petitioner would be deprived of its constitutional right to a trial by jury. * * *

* * * * *

3. "Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of 12 men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books.

* * * * *

A trial by a jury of 12 men before a justice of the peace, having been unknown in England or America before the Declaration of Independence, can hardly have been within the contemplation of congress in proposing, or of the people

in ratifying, the seventh amendment to the constitution of the United States.

5. Another question having an important bearing on the validity and the interpretation of the successive acts of congress concerning trial by jury in civil actions begun before justices of the peace in the District of Columbia is whether the right of trial by jury secured by the seventh amendment to the constitution is preserved by allowing a common law trial by jury in a court of record, upon appeal from a judgment of a justice of the peace, and upon giving bond, with surety, to prosecute the appeal, and to abide the judgment of the appellate court.

The question considered and decided by this court in *Callan v. Wilson* (1888) 127 U. S. 540, 8 Sup. Ct. 1301, though somewhat analogous, was essentially a different one.

* * * * *

All the other cases cited at the bar in which the constitutional right of trial by jury was held not to be secured by allowing such a trial on appeal from a justice of the peace or from an inferior court were criminal cases. *Greene v. Briggs* (1852) 1 Curt. 311, 325, Fed. Cas. No. 5,764; *Saco v. Wentworth* (1853) 37 Me. 165; *In re Dana* (1872) 7 Ben. 1 Fed. Cas. No. 3,554.

On the other hand, the authority of the legislature, consistently with constitutional provisions securing the right of trial by jury, to provide, in civil proceedings for the recovery of money, that the trial by jury should not be had in the tribunal of first instance, but in an appellate court only, is supported by unanimous judgments of this court in two earlier cases, the one arising in the District of Columbia, and the other in the state of Pennsylvania. * * * *Bank of Columbia v. Okely* (1819) 4 Wheat. 235, 246; *Livingston v. Moore* (1833) 7 Pet. 469.

A long line of judicial decisions in the several states, beginning early in this century, maintains the position that the constitutional right of trial by jury in civil actions is not infringed by a statute which sets the pecuniary limits of the jurisdiction of justices of the peace in actions at law higher than it was when the particular constitution was adopted, allows a trial by jury for the first time upon appeal from the judgment of the justice of the peace, and requires of the appellant a bond, with surety, to prosecute the appeal, and

to pay the judgment of the appellate court. The full extent and weight of those precedents cannot be justly appreciated without referring to the texts of the statutes which they upheld, and which have not always been fully set forth in the reports.

The leading case is *Emerick v. Harris* (1808) 1 Bin. 416, which arose under the statutes of Pennsylvania. * * * The provincial statute of March 1, 1745, gave a justice of the peace jurisdiction of actions to recover the sum of 40 shillings and upwards, and not exceeding £5, and authorized any person aggrieved by his judgment to appeal to the court of common pleas, "first entering into recognizance, with at least one sufficient security, at least in double value of the debt or damages sued for, and sufficient to answer all costs, to prosecute the said appeal with effect, and to abide the order of the said court, or in default thereof to be sent by *mittimus* to the sheriff of the county, by him to be kept until he shall give such security, or be otherwise legally discharged." 1 Dall. Laws Pa. 304, 307. The statute April 5, 1785, enlarged the summary jurisdiction of a justice of the peace to sums not exceeding £10, and, for the avowed purpose of conforming to the constitution of the state, gave an appeal to the court of common pleas, upon the like terms as by the statute of 1745. And the statute of March 11, 1789, conferred upon the aldermen of the city of Philadelphia the jurisdiction of justices of the peace. 2 Dall. Laws Pa. 304, 305, 660. The statute of April 19, 1794, extended the jurisdiction of justices of the peace, as well as of the aldermen of Philadelphia, to demands not exceeding £20 with a right of appeal, after judgment, if the amount exceeded £5, to the court of common pleas, "in the same manner, and subject to all other restrictions and provisions," as in the statute of 1745. 3 Dall. Laws Pa. 536-538. In support of a writ of *certiorari* to quash a judgment for £11, 6s. rendered in the aldermen's court of Philadelphia upon default of the defendant, it was argued "that the constitution, by directing that trial by jury should be as heretofore, and the right thereof remain inviolate, had interdicted the legislature from abolishing or abridging this right in any case in which it had existed before the constitution; that a prohibition to do this directly was a prohibition to do it indirectly, either by deferring the decision of a jury until one, two, or

more previous stages of the cause had been passed, or by clogging the resort to that tribunal by penalties of any kind, either forfeiture of costs, security upon appeal, or delay; that the power to obstruct at all implied the power to increase the obstructions until the object became unattainable; and that, the instant the enjoyment of the right was to be purchased by sacrifices unknown before the constitution, the right was violated, and ceased to exist as before." But the supreme court of Pennsylvania held that the statute of 1794 was a constitutional regulation of judicial proceedings by legislative authority. 1 Bin. 424, 428. See, also, *McDonald v. Schell* (1820) 6 Serg. & R. 240; *Biddle v. Com.* (1825) 13 Serg. & R. 405, 410; *Haines v. Levin* (1866) 51 Pa. St. 412.

Soon after the decision in *Emerick v. Harris*, a similar decision was made by the supreme court of North Carolina. * * * *Keddie v. Moore* (1811) 2 Murphy, 41, 45; *Wilson v. Simonton* (1821), Hawks, 482.

[The court then quoted from *Morford v. Barnes* (1835) 8 Yerger (Tenn.) 444, 446, and *Beers v. Beers* (1823) 4 Conn. 535, 538-540, to the same effect.]

In *Steuart v. Baltimore* (1855) 7 Md. 500, the court of appeals of Maryland, speaking by Judge Eccleston, said: "In the third section of the old bill of rights, it was declared 'that the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law.' Notwithstanding this, the legislature passed laws at different times, extending the jurisdiction of justices of the peace in matters of contract, and giving jurisdiction in matters of tort where they had none previously. These laws, of course, made no provision for trials by jury except on appeal to the county courts, and yet they were constantly acquiesced in, and not considered as being repugnant to the bill of rights." The court then referred to *Morford v. Barnes*, *Beers v. Beers*, and *McDonald v. Schnell*, above cited, and added: "These cases fully establish the principle that, where a law secures a trial by jury upon an appeal, it is no violation of a constitutional provision for guarding that right, although such law may provide for a primary trial without the intervention of a jury. This is upon the ground that the party, if he thinks proper, can have his case decided by a jury before it is finally settled." 7 Md. 511, 512.

To the like general effect are the following: St. Ky. Jan. 30, 1812, §§ 4-6 (2 Moreh. & B. Dig. pp. 893, 894); *Pollard v. Holeman* (1816) 4 Bibb. 416; *Head v. Hughes* (1818) 1 A. K. Marsh. 372; *Feemster v. Anderson* (1828) 6 T. B. Mon. 537; *Steamboat Co. v. Foster* (1848) 5 Ga. 194, 208; *Lincoln v. Smith* (1855) 27 Vt. 328, 361; *Lamb v. Lane* (1854) 4 Ohio St. 167, 180; *Norton v. McLeary* (1858) 8 Ohio St. 205, 209; *Reckner v. Warner* (1872) 22 Ohio St. 275, 291, 292; Cooley, Const. Lim. (6th Ed.) 505; 1 Dill. Mun. Corp. (4th Ed.) § 439.

* * * * *

⁵⁴ Many courts hold that a right of appeal to a court employing a common law jury safeguards the constitutional right to a jury trial in criminal cases.—*Zelle v. McHenry*, (1879) 51 Ia. 572; *Sprague v. Inhabitants of Androscoggin County*, (1908) 104 Me. 352; *Jones v. Robbins*, (1857) 8 Gray (Mass.) 329; *State v. Tate*, (1915) 169 N. C. 373; *Brown v. Epps*, (1895) 91 Va. 726.

In *Callan v. Wilson*, (1887) 127 U. S. 540, the court quotes with approval the statement made in *Dillon on Municipal Corporations* (Vol. 1, Sec. 433) that "violations of municipal by-laws proper, such as fall within the description of municipal police regulations, as, for example, those concerning markets, streets, water-works, city officers, etc., and which relate to acts or omissions that are not embraced in the criminal legislation of the state, the legislature may authorize to be prosecuted in a summary manner, by and in the name of the corporation, and need not provide for a jury trial."

BROWN v. CIRCUIT JUDGE.

Supreme Court of Michigan. 1889.

75 Michigan, 274.

CAMPBELL, J. Relator represents that in April, 1888, a bill in chancery was filed in Kalamazoo county by Sarah E. Field, to set aside a deed made to relator by Thomas B. Lord, who was father of both parties, upon the grounds generally set up in such cases, of fraud, undue influence, and incapacity. Issue being joined, the complainant made claim under the statute of 1887 for a trial by jury. This demand was allowed, and certain issues were submitted, which to some extent covered the charges, but not in a very tangible way, and the jury gave answers to the specific questions. The

circuit judge, acting entirely on these answers, made a decree in favor of complainant, cancelling the deed, and refused to exercise his own judgment in the case. A *mandamus* is asked to require him to set aside the decree, and to hear the cause and decide it himself. It is due to the circuit judge to say that he took this course to enable the validity of the statute to be passed upon in this court, inasmuch as this question has been raised in several parts of the state, and needs to be settled in order to procure uniformity of practice.

* * * * *

The statutory provision now in controversy consists of a recasting of a section of the old Compiled Laws, intended to give an opportunity of trial in open court. * * * In 1887 this section was sought to be radically changed by converting a chancery hearing to something meant to resemble a trial at law. * * *

As Michigan had a long territorial experience, its judicial system naturally became fashioned in close analogy to that of the United States, and so recognized and perpetuated in their essentials the classification of legal and equitable rights as involving the necessity of separate administration in important particulars. The constitution of the United States recognized the division of ordinary civil jurisprudence into cases at law and cases in equity, and it has been held by the supreme court of the United States that this recognition puts it beyond the power of congress to make any serious change in that classification. * * *

The statute of 1887 (Laws 1887, p. 358) undertakes to provide that "either party shall also be entitled to the right to a jury, to be demanded in the same manner as in a suit at law, and the verdict of such jury on any question of fact shall have the same force and effect in the circuit [court] in chancery, and in the supreme court on appeal, as the verdict of a jury in an action at law." * * *

When any matter becomes involved in a chancery suit, the necessities of justice and equity require that all persons and all things concerned in the controversy shall be brought before the court to have their respective interests charged or protected, and to end the controversy once for all. Specific relief is generally required, and usually more or less of the defendants have conflicting interests to a greater or less ex-

tent, which require different issues and different treatment; and these difficulties frequently become known or developed during the course of the investigation.

* * * * *

When a case is tried by a common law jury one verdict settles the whole issue, and, unless set aside, furnishes the complete basis of a judgment which cannot in anything depart from it; and there is and can be no issue which the jury do not dispose of. The judgment follows as a matter of course, and, if taken to an appellate court, the verdict cannot be altered, and must stand completely good or completely bad. A verdict on part of the issues and a disagreement on the rest, is no verdict. It is not possible to have one verdict in a suit in equity which shall decide the whole controversy. * * *

This leads to the inquiry whether it is competent for legislation to bring about any such radical changes as are here attempted. We think it is not. The decisions of the United States supreme court before referred to do not bind state practice, but they nevertheless to some extent indicate the real difficulty. That tribunal did not decide that under the United States constitution there could be no change in equitable procedure, because the whole body of chancery practice has been repeatedly amended and simplified by that court. Their rulings mean neither more nor less than that there are various kinds of interests and controversies which cannot be left without equitable disposal without either destroying them or impairing their value. It is within the power of a legislature to change the formalities of legal procedure, but it is not competent to make such changes as to impair the enforcement of rights. In rude times, when there is no business, and no variety of property rights, very simple remedies are sufficient. But where the ordinary remedies have become inadequate to deal with more extended or peculiar interests, such as multiply in all civilized countries, different methods and different tribunals become necessary. The universally recognized basis of equitable jurisprudence found in statutes and constitutions, as well as in the reports and text-writers, is the inadequacy of the common law to deal with these subjects. A principal basis of that inadequacy was the nature of the tribunal passing on the facts. In common law issues fact and law can be readily separated;

but in the great majority of equity proceedings it is impossible to make any such separation. The functions of judges in equity cases in dealing with them is as well settled a part of the judicial power, and as necessary to its administration, as the functions of jurors in common law cases. Our constitutions are framed to protect all rights. When they vest judicial power they do so in accordance with all of its essentials, and when they vest it in any court, they vest it as efficient for the protection of rights, and not subject to be distorted or made inadequate. The right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury. Whatever may be the machinery for gathering testimony or enforcing decrees, the facts and the law must be decided together, and when a chancellor desires to have the aid of a jury to find out how facts appear to such unprofessional men, it can only be done by submitting single issues of pure fact, and they cannot foreclose him in his conclusions unless they convince his judgment.

The very wise provision of our constitution, which by section 5 of article 6 directs the legislature to abolish distinctions between law and equity proceedings, is carefully worded, and requires it to be done only as far as practicable. It does not blend legal and equitable interests, although no doubt it does favor the removal of such distinctions between those as are nominal, rather than real. The purpose of the constitution has been very liberally carried out, and there is now hardly any distinction left that is merely formal. But the clause referred to was suggested, as all men know, by the then recent attempts in other states to abolish systems of procedure which had become overtechnical, and provide forms of remedy of a more simple character. In doing this the distinction in name between legal and equitable remedies was abolished. But it very soon became manifest to all jurists that the class of rights which, for want of a better definition, were loosely called "equitable," and which had only been included under that name because the common law methods were not adapted to enforce them, differed from other rights in their essential nature, and not in form only, and that, by whatever name they were called, they could only be efficiently protected and made available by the means known as "equitable."

* * * Juries cannot devise specific remedies, or safely deal with complicated interests, or with relief given in successive stages, or adjusted to varying conditions. Theory amounts to nothing in the history of jurisprudence. The system of chancery jurisprudence has been developed as carefully and as judiciously as any part of the legal system, and the judicial power includes it, and always must include it. Any change which transfers the power that belongs to a judge to a jury, or to any other person or body, is as plain a violation of the constitution as one which should give the courts executive or legislative power vested elsewhere. The cognizance of equitable questions belongs to the judiciary as a part of the judicial power, and under our constitution must remain vested where it always has been vested heretofore.

The case in which relator seeks our interference has never been heard by the court as it should have been, and a *mandamus* must be allowed to direct the circuit judge to rescind his decree, and allow the case to be brought to a hearing before the court for final disposal on pleadings, and on proofs to be properly taken. The other justices concurred.⁵⁴¹

⁵⁴¹ Compare *In re Atchison* (1922) 284 Fed. 604, where a statute requiring a jury in contempt cases was held unconstitutional, and *The Nyack* (C. C. A. 1912) 199 Fed. 383, where a statute providing for a jury trial in admiralty cases was construed so as to make the verdict only advisory on appeal, with a suggestion of doubt as to its binding effect on the trial court.

88 (b) *The Jury Panel.*

ULLMAN v. STATE.

Supreme Court of Wisconsin. 1905.

124 Wisconsin, 602.

Plaintiff in error was duly informed against as having on the 3rd day of August, 1902, at Dodge County, Wisconsin, made an assault on Ida Ullman with a loaded revolver with intent her, the said Ida Ullman, to kill and murder. In

due time and form he entered a plea of not guilty, and was tried in October, 1903, in the circuit court for Dodge county.

* * * * *

MARSHALL, J. Before the impaneling the jury for the trial was commenced, counsel for the accused said he desired to "file a challenge to the array of jurors," accompanying such statement by presenting a paper in that regard, which was placed on file. Such paper was not incorporated into the bill of exceptions, neither does the bill show in any formal way the grounds of the challenge. The proceedings had in respect to the matter show pretty clearly what such grounds were. The point is made by the attorney general that such a challenge must be made in writing, stating specifically the grounds thereof, and that the writing must be embodied in the bill of exceptions in order to enable this court to review the decision of the trial court in respect thereto. If that be correct, whether the decision overruling the challenge to the array was proper or not, is not before us.

At common law a challenge to the array was required to be made in writing, stating specifically the grounds relied on. An issue of law or fact was then formed in respect thereto, which was tried by the court, if one of law, and by triers appointed by the court, if of fact. Under our statutory system for selecting and returning jurors there is no challenge to the array in the strict common law sense. The Code was designed to be as complete for the trial of criminal as for the trial of civil cases. It makes no provision for a challenge to the array, or for any equivalent proceeding. One is liable to fall into confusion in respect to the matter by failing to note the fact that most of the decisions in this country in Code states, where it is said that a challenge to the array must be in writing, are based on statutory requirements. In Iowa, where there is an express provision for a challenge to the entire panel, it is said that the common law challenge to the array does not exist. *State v. Davis*, 41 Iowa, 311. It is said in cases decided in New York, California, Texas, Michigan, Minnesota, Mississippi, and other states that might be mentioned, that a challenge to the array must be in writing, but it will be found on investigation that such decisions merely follow statutory requirements. The ancient method of trying is-

issues of fact raised on such challenge is obsolete. All issues, whether of law or fact, on an objection to the entire panel of jurors are now triable summarily by the court, whether the making of the challenge is regulated by statute or is a mere matter of practice regulated by the court. Trial courts have inherent authority, and it is their duty, to permit and give consideration to objections seasonably and properly made to the entire panel of jurors, based upon grounds specifically stated, which, if true, indicate that the statutory method of selecting jurors was prejudicially departed from. The motion or objection may properly be, as it commonly has been in this state under the Code, called a challenge to the array. *State v. Cameron*, 2 Pin. 490; *Conkey v. Northern Bank*, 6 Wis. 447; *Perry v. State*, 9 Wis. 19. But that does not imply that it must be regarded as having all the common law characteristics. It has only such of them as are appropriate to our judicial system. It is said in 12 Ency. Pl. & Pr. 426: "At common law a challenge to the array was required to be in writing, and where this requirement has not been abrogated by statute the rule of the common law is still in force," citing authorities from seven states, in each of which, however, the matter is regulated by statute.

There is neither any statute nor rule of court nor decisions in this state regulating definitely the practice as to objecting to the entire panel of jurors. The right to make such an objection, however, has always been recognized, and exists by well established practice. It makes no very great difference how the question of the validity of the panel is raised so long as the grounds thereof are brought definitely to the attention of the court. It may be in the form of an objection to the entire panel, or a motion to quash the return thereof, or be made in the set phrase of a challenge to the array. Mere form is of little consequence when not necessary by statute. The spirit of the Code, generally speaking, is that the substance of things only is material. If it were the practice to make the objection only in writing and to denominate it by any particular name, and the trial court were to permit a violation thereof and entertain the matter nevertheless, unless it appeared that the adverse party was prejudiced thereby the error would be regarded as harmless under sec. 2829, Stats. 1898.

While it is good practice to make a challenge to the array, so called, in writing, since there is no statute requiring it to be so made, and a stenographer is now a part of the regular machinery of a trial court, who is expected to take down accurately everything that occurs in the course of a trial, the reason, in the main, for the common law rule as to the manner of presenting the challenge, no longer exists. It should therefore be deemed entirely sufficient if the challenge is stated definitely at the bar of the court and taken down by the stenographer.

It was early held here in harmony with the common law rule that the grounds of a challenge to the array should be specifically stated. *Conkey v. Northern Bank*, 6 Wis. 447. That should be regarded as the settled practice. Though the trial court has some discretion as to how specifically the grounds of challenge must be stated, the statement should be sufficiently full and definite to inform the trial court and the adverse party reasonably of the precise departures from the legal requirements relied upon. The right of challenge should be exercised before commencing to impanel the jury, otherwise it should be deemed waived. 12 Ency. Pl. & Pr. 424. No departure from that rule is permissible except for extraordinary reasons.

In this case the practice as to the time of making the objection, motion, or challenge and the manner thereof, except in that the specific grounds relied on do not appear in the bill of exceptions, the writing in respect thereto being absent therefrom, was proper. The practice of the court also in treating the grounds assigned for the challenge, not admitted by the adverse party, as at issue and summarily trying the issues, was proper. Since such grounds were not formerly stated, taken down by the stenographer, and preserved in the bill, and the writing filed was not so preserved we might properly omit consideration thereof. However, since it appears that the questions raised by the challenge were fully tried and the grounds with reasonable clearness appear from the evidence, we have concluded to treat the matter.

The evidence taken upon the trial of the issues involved in the challenge indicates that the grounds relied on were as follows: First, whereas the statute provides that the jury commissioners shall furnish the clerk of the circuit court

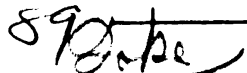
one list of names of persons qualified to serve as jurors, to be drawn from the body of the county, each commissioner proposed and furnished a partial list, and such lists were treated as satisfying the statute. Second, the commissioners did not furnish the clerk of the circuit court a complete list of names verified or certified in proper form. Third, the clerk did not make a copy of the lists filed and deliver the same to the commissioners or any one of them. Fourth, the names furnished to the clerk as aforesaid were not written upon separate slips of paper, and the slips folded and put into a box by the clerk or his deputy, as the law requires. The facts appear to be these: Each commissioner made a list and submitted it to the three for consideration. They approved of such three lists, which in the aggregate included the requisite names, as the one list which the statute required, and delivered the same to the clerk of the circuit court. Such clerk did not make a copy of the lists so furnished and deliver the same to at least one of the commissioners, as the law requires, but each of the commissioners, to the knowledge of the clerk, preserved a copy of the list proposed by him. The law does not require the commissioners to make any verification or formal certification of the list furnished to the clerk. While neither the clerk nor his deputy wrote the names of the persons appearing upon the lists furnished, as aforesaid, on separate slips of paper, and it is not certain that either one of them folded the slips after the names were written thereon, and placed the same in a box in the presence of the commissioners, as the law requires, the names were so written by a person acting under the direction of the clerk in his presence and in the presence of the deputy and the commissioners, and the slips were then by the direction of the clerk, in his presence and in the presence of the commissioners, either by the deputy clerk or the person who wrote the names, placed in the box. The names so written upon slips of paper and put in the box were the identical names on the list furnished by the commissioners. There is an entire absence in the record of any showing or prejudicial departure from the letter of the statute. The mere fact that each commissioner proposed a list of names for a part of the entire list to be agreed upon, and the several partial lists were approved and in that form handed to the clerk, instead of the three lists being trans-

ferred to one and in that form delivered, is of no consequence whatever. The fact that the physical acts of writing the names on slips of paper and folding such slips ready for the box and putting them therein, if such be the fact, in the whole, is likewise of no consequence, since it appears that such person acted under the immediate direction of the clerk, in his presence and in the presence of the commissioners, and there is not only no indication that there was any prejudicial departure from the statute in the matter, but there is conclusive affirmative evidence to the contrary. The general rule as to irregularities in executing the statutory method for selecting jurors is that they are to be deemed immaterial, unless it appears probable that the person seeking to take advantage thereof may be prejudiced thereby. Proffatt, Jury Trial, Sec. 154; Thompson & Merriam, Juries, Sec. 134; 12 Ency. Pl. & Pr. 277.

The point is made by the attorney general that in any case the challenge to the array was waived by the failure to object to the jury as a whole, reliance being placed on *Jackson v. State*, 91 Wis. 253, 267, 64 N. W. 838. The rule invoked has never been, and it seems cannot reasonably be, applied to objection to the entire panel of jurors. It only goes to objections to individual jurors. When an exception is once properly saved to a ruling on an objection to the entire panel of jurors it will be available upon a subsequent review of the final result without further calling the matter to the attention of the trial court.

* * * * *

By the Court.—Judgment is affirmed.



LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY
CO. v. SCHWAB.

Court of Appeals of Kentucky. 1907.

127 Kentucky, 82.

CARROLL, J. Appellee, alleging that she was injured in a collision between a freight train operated by appellant Louisville, Henderson & St. Louis Railway Company and one of

the cars of appellant Louisville Railway Company, caused by the negligence of the companies, brought this action to recover damages from each of them. A trial was had before a jury, and a verdict rendered against both appellants.

The principal error assigned by appellants is the failure of the trial court to sustain the motion made by them at the beginning of the trial to discharge the panel for misconduct of the jury commissioners in failing to select the jurors in the manner prescribed by the statute, "in that the commissioners did not write the name of each juror on a slip of paper and place them in the drum wheel but merely checked off names on the assessor's book and employed others not under oath to do the really important work of writing off the names and putting them in the wheel; the persons so employed not being under the direct supervision of the commissioners, who did not know whether they did the work assigned to them right or wrong." * * *

* * * * *

Ky. St. 1903, section 2241, provides in part that "the circuit judge of each county shall at the first regular term of circuit court therein after this act takes effect, and annually thereafter, appoint three intelligent and discreet housekeepers of the county, over twenty-one years of age, residing in different portions of the county, and having no action in court requiring the intervention of a jury, as jury commissioners for one year, who shall be sworn in open court to faithfully discharge their duty. They shall hold their meetings in some room to be designated by the judge, and while engaged in making the list of juries and selecting the names, writing and depositing or drawing them from the drum or wheel case, no person shall be permitted in said room with them. They shall take the last returned assessor's book of the county and from it carefully select from the intelligent, sober, discreet and impartial citizens, resident housekeepers in different portions of the county, over twenty-one years of age, the following number of names of such persons, to-wit: (then follows the number that shall be selected from each county, graded according to the population.) Each name so selected they shall write in plain handwriting on a small slip of paper, each slip of paper being as near the same size and appearance as practicable; and each slip with the name written thereon shall be by

them enclosed in a small case made of paper or other material and deposited unsealed in the revolving drum or wheel case hereinafter provided for."

In answer to the argument made for appellants, it is said for appellee that the record does not show that the substantial rights of appellants were prejudiced by the action of the court in overruling the challenge to the array; * * * The record does not disclose that the members of the panel from which the jurors were selected to try the case were in any respect objectionable, and in this particular the substantial rights of appellants were not prejudiced by the rulings of the trial court; but, in a matter that strikes at the very foundation of our system of selecting jurors, we do not deem it material or necessary that any prejudicial error shall be made to appear, other than a substantial one committed in failing to select the juries in the manner pointed out in the statute. It is probable that the jurors selected to and that did try this particular case were men who possessed all the statutory qualifications; and it may also be conceded that they were entirely acceptable to counsel and parties on both sides. But back of this is the more important question that litigants have the unqualified right to demand that juries shall be selected in the manner prescribed in the statute, and in passing on this right the individual qualification of the juror or the fact that he may be entirely acceptable to the parties is not to be considered. If the contention of appellee was sound, the careful and elaborate scheme devised for selecting juries would be nullified, the statute would be a dead letter, and no inquiry could be made into the manner in which jurors were originally chosen, if those selected to try the particular case possessed the statutory qualifications and were personally satisfactory. The Legislature, in obedience to a popular demand that a radical change be made in the manner of selecting juries, after long delay and much discussion, enacted the statute now in force; and this court in more than one case has given to this law the sanction of its approval and declared that its efficiency shall not be impaired or destroyed by the failure of public officers to observe its requirements.

Thus, in *Curtis v. Com.*, 23 Ky. Law Rep. 267, 62 S. W. 886, a motion was made to discharge the entire panel of petit jurors, because the names of the jurors were not drawn

from the jury wheel as they should have been, but were selected from a list regularly summoned in a previous month. This being a criminal case, this court had no power to review the action of the trial court in overruling the challenge to the array, but in the course of the opinion said: "These men so selected may have been, and doubtless were, of the very best citizenship in the county; but they were not drawn impartially from the body of legally qualified jurymen of the county. The mode provided by law for the selection of qualified and impartial jurymen was ignored, and the jury were selected by the judge of the circuit court himself. This was clearly erroneous. He may have done this with the very best of motives, but it was not the method provided by law, and should not have been done." In *Covington & Cincinnati Bridge Co. v. Smith*, 25 Ky. Law Rep. 2292, 88 S. W. 440, in discussing this jury law, the court said: "The statutes quoted provide an elaborate system for the selection monthly in courts of continuous session of impartial jurymen fresh from the body of the people. If these provisions are enforced, each litigant is guaranteed that the best effort possible has been made to secure for the trial of his case an impartial jury. It is not believed that the requirements in the statute in regard to the selection of juries would have been set forth with such minute particularity and detail, if it had been intended that the court might nullify the manifest intention of the Legislature by ignoring them." In *Risner v. Com.*, 95 Ky. 539, 26 S. W. 388, 16 Ky. Law Rep. 84, the jury commissioners did not put in the wheel the number of names required, and the court said: "While it is not made to directly or certainly appear that appellant was thereby substantially prejudiced, still he had the right to insist upon being tried by only a jury obtained according to the statute, which was passed for the purpose of securing fair and impartial jurors; and, to more effectually accomplish that end, the names of at least 200 persons should have been placed in the drum or wheel case. This provision cannot be disregarded in any substantial particular without defeating one of the principal purposes of the statute. *Central Kentucky Asylum for the Insane v. Hauns*, 21 Ky. Law Rep. 22, 50 S. W. 978, to which our attention is called by counsel for appellee, is not in point; nor is it in conflict with the authorities cited. There the objection to the man-

ner in which the jury was selected was not made until after the trial was completed, and hence came too late to be available.

If the methods avowed to have been adopted in this case by the commissioners are upheld, all the safeguards thrown around the selection of juries will be virtually abolished, and the effort of the legislative department to improve and elevate the jury system a failure. The juries are almost entirely composed of men selected by the commissioners, and this power confided to them cannot be delegated in whole or in part to others. No minor officers connected with the administration of justice have more important duties to perform than do the jury commissioners. Upon their judgment and discretion in the selection of intelligent, sober, discreet, and impartial citizens and housekeepers of the county depends in a large measure the pure and impartial administration of justice in the conduct of jury trials, and this valuable privilege ought not and will not be frittered away merely because delay or inconvenience to the court or litigants may result from sustaining a challenge to the array because of substantial irregularity in the selection of the juries. It is infinitely better that there should be some delay in the trial of cases or inconvenience suffered by individuals than that a statute intended to safeguard the rights of all litigants should be totally disregarded. If the mistake or irregularity was a minor one, we would not regard it as material; but, if the avowals made are true, the statute was violated in several substantial particulars. The provisions disregarded are not directory, but mandatory. They constitute the very substance and life of the law, and may not lightly be ignored or disobeyed. No fraud or improper purpose can be imputed to these commissioners, nor is it necessary that it should be. Doubtless they acted in good faith, but nevertheless in open disobedience of the law under which they were selected, and their conduct can neither be overlooked nor approved.

For the error mentioned, the judgment must be reversed;

* * *

(c) *Selecting the Petit Jury.*90
Court

COUGHLIN v. PEOPLE.

*Supreme Court of Illinois. 1898.**144 Illinois, 140, 164.*

BAILEY, C. J. * * *

Challenges of jurors, based upon an allegation of bias, favor or partiality, were, at the common law, divided into two classes, viz., principal challenges and challenges to the favor. A principal challenge was grounded on such manifest presumption of partiality, that if the fact alleged was proved to be true, the disqualification of the juror followed as a legal conclusion, incapable of being rebutted. In case of a challenge to the favor, on the other hand, the disqualification arose as a conclusion of fact to be determined by the triers, the evidence adduced in support of the challenge leading to no presumption which might not be overcome by other evidence.

Among the various matters which, at common law, were held to be principal cause of challenge, that is, cause from which bias or partiality would be inferred as a legal conclusion, were these: consanguinity or affinity of the juror with either of the parties within the ninth degree; that the juror was god-father to the child of either party, or *e converso*; that the juror was of the same society or corporation with either party; or was tenant or "within the distress" of either party; or had an action implying malice depending between him and either party; or was master, servant, counsellor, steward or attorney for either party; or after he was returned, he ate and drank at the expense of either party; or had been chosen as arbitrator by either party. By most of the authorities it was held to be ground of principal challenge, that the juror had formed and declared his opinion touching the matter in controversy. 5 Bac. Abridg. 353; 3 Black Com. 363; 2 Tidd's Prac. 853; Coke Litt. 155; 3 Burns' Justice of the Peace (28th Ed.) 519; 21 Viner's Abridg. 252; 1 Chit. Crim. Law, 541; 3 Chit. Gen. Prac. 794; *Pringle v. Hulse*, 1 Cow. 436, note 1; *People v. Bodine*, 1 Denio, 304. According to these authorities and others like

them, where the matter alleged was held to be ground for principal challenge, all the challenging party was called upon to do was, to prove the existence of the fact alleged by him as a ground of challenge, and that being shown, the incompetency of the juror followed as a necessary legal consequence, and in such case, no inquiry was permitted as to whether, notwithstanding the fact shown, he could sit as a juror and render a fair and impartial verdict. The law, from the fact proved, conclusively presumed bias, and permitted no further inquiry.

In this State, triers are not appointed, according to the mode of procedure at common law, all challenges, by our practice, being determined by the court. Nor has the common law distinction between principal challenges and challenges to the favor been kept up in this State, still many of the principles growing out of that distinction have been habitually recognized and enforced. Indeed, most of the objections to jurors which at common law were held to be ground of principal challenge, are held with us to be absolute disqualifications, that is, upon mere proof of the fact alleged, the disqualification follows as a legal conclusion, and evidence is not admitted to show that, notwithstanding the fact proved, the juror is really impartial.

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91 *Labish*
KUMLI v. SOUTHERN PACIFIC CO.

Supreme Court of Oregon. 1892.

21 Oregon, 505.

BEAN, J.—This is an action to recover damages for injuries alleged to have been received by plaintiff while a passenger on one of defendant's passenger trains which was wrecked by the falling of the bridge or trestlework across the marsh known as Lake Labish, in Marion county, in November, 1890. The trial resulted in a verdict and judgment in favor of plaintiff for the sum of fifteen hundred dollars, from which defendant appeals, assigning as error the action of the court in overruling its challenge for actual bias, to the

jurors Kennedy, Harriott, Cooley, and Iler, and in refusing to set aside the verdict of the jury, because it is so excessive, and so disproportionate to the amount of plaintiff's injury as to indicate passion or prejudice on the part of the jury. These assignments of error will be noticed in the order indicated.

1. As to the overruling of the challenge to the jurors: It is unnecessary to state the facts, as disclosed by the examination of any of the jurors, or their *voir dire*, except the juror Iler, whose examination presents as strong a case for the defendant as any in the record. The juror Iler, in his examination in chief by defendant's counsel, said that he did not know the plaintiff; had heard nothing about this case; had heard considerable talk about the wreck; read of it in the newspapers, and heard persons talk about it who claimed to have looked at and examined the wreck; from what he had heard the persons say who had examined the wreck, and what he saw in the newspapers, he had formed and expressed an opinion as to whether or not the railroad company was to blame for the wreck; he had that opinion then; did not know that it was a particularly fixed opinion; it is one that would require some evidence to remove. He could not say how many persons he had heard talk about the wreck, who had examined and looked at it, but supposed, perhaps, a half dozen; they said what they supposed caused the wreck; they were persons whom he had respect for. From what they said, and what he had read in the newspapers, he had formed an opinion as to the cause of the wreck; he had heard the various theories put forth through the newspapers, as to whether the wreck was caused by a defective structure, or by a rail being removed from the track by some evil-disposed person. At the conclusion of his examination by counsel, the juror, in response to questions by the court, said that what he had heard about the transaction was not from any of the witnesses in the case, but just from persons who had gone to view the wreck; that no opinion he had formed would influence his judgment in the trial of the case, but he should try the case impartially, according to the law and the evidence; that he could disregard what he had heard about the wreck, and would be governed by the evidence altogether; would not regard what he had heard, as it was only hearsay; would pay no

attention to what he had been told, but would simply be guided by the testimony given in court. The challenge was thereupon overruled by the court, defendant excepting.

There is much conflict in the adjudged cases as to when an opinion touching the merits of the particular case will disqualify a person called as a juror. The Standard of Lord Mansfield, in *Mylick v. Saladine*, 1 W. Bl. 480, that "a juror should be as white as paper, and know neither plaintiff or defendant, but judge of the issue merely, as an abstract proposition upon the evidence produced before him," has long since been discarded as impracticable. The courts are agreed, that with the present popular intelligence and wide dissemination of current events, through the medium of the press, a juror's mind cannot reasonably be expected to be "as white as paper," and it is no longer regarded as an objection, *per se*, to a person called as a juror, that he has heard of the particular case, or even formed or expressed an opinion touching the merits thereof.

"Were is possible," said Mr. Chief Justice Marshall, "to obtain a jury without any prepossessions whatever, respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps, impossible, and therefore not required. The opinion which has been avowed by the court is, that light impressions, which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him." (Trial of Aaron Burr, Vol. 1, 416; 1 Thomps. Trials, sec. 79.)

The rule laid down by this distinguished jurist in a trial which at the time attracted universal attention, has become substantially the settled law of this country, and it is now generally considered that if the juror's opinion will readily yield to the evidence presented in the case, he is not incompetent to sit upon the trial of the issue.

* * * * *

While the rule is generally recognized, that the disqualifying opinion of a juror must be of a fixed and determined

character, its application is frequently a matter of great nicety, and the courts have struggled, apparently in vain, to establish some judicial test, by which the question can be determined. In order to avoid the uncertainty in the decisions, as well as the supposed inflexible rules of law, by which the courts were driven, in many instances, to the illiterate and hopelessly ignorant portions of the community for jurors, the legislature of this, as well as many other states, has enacted a statute by which the competency of a person, called as a juror, shall be determined, on the trial of a challenge, for having an opinion touching the merits of the particular case.

By section 187, Hill's Code, it is provided, that on the trial of a challenge for actual bias, "although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied from all the circumstances that the juror cannot disregard such opinion, and try the issue impartially." This statute is but a recognition of the fact that, at the present day, when newspapers, railroads, and telegraphs have made intercommunication easy, and when the important transactions of today in all their details are published to the world tomorrow, the advance of popular intelligence and wide dissemination of knowledge of current events, have under the former rules of law, rendered it impossible to secure a jury of intelligent men for the trial of causes which have excited much public attention and have resulted in the necessity of trying such cases before juries composed of the illiterate and ignorant. Statutes of this character have been held not unconstitutional as invading the right of trial by jury. (*Stokes v. People*, 53 N. Y. 164; 13 Am. Rep. 492; *Jones v. People*, 2 Colo. 351; *Cooper v. State*, 16 Ohio St. 328.)

This statute does not deny the principle, which has its foundation in natural justice as well as law, that jurors should be impartial and free from any existing bias which may influence their judgment. But it assumes, and we think correctly, that a man may be a fair and impartial juror, although he have an opinion touching the merits of the cause on trial, and that he may, notwithstanding, be able to set

aside and disregard such opinion and decide the case from the evidence independently thereof and uninfluenced thereby. We think human experience teaches that it may not unfrequently happen that persons who have formed an opinion touching the merits of a cause from reports verbal or written, may, as jurors, lay aside their prepossessions, and not only honestly and conscientiously endeavor, but in fact be able to hear and decide the case upon the evidence, uninfluenced by such prepossessions. Whether a person called as a juror can do so or not depends largely upon his general intelligence, manner, tone, appearance, personal peculiarities, and sources of information from which his opinion is formed, its strength, the fact whether he exhibits any pride of opinion which may lead him to give too little or too much weight to the testimony for or against either party, and many other circumstances, difficult if not impossible to suggest. The determination of his competency, therefore, necessarily becomes primarily a question for the trial court, keeping ever in view, as it should, that the ultimate object to be attained is a trial before a fair and impartial jury. The question is wisely left largely to the sound discretion of that court, and its findings upon a challenge to a juror for actual bias, where there is any reasonable question as to his competency, ought not to be reviewed by an appellate court unless it clearly appear that such discretion has been arbitrarily exercised. (*State v. Tom*, 8 Or. 177; *State v. Saunders*, 14 Or. 300.)

In the case before us, we think the challenges to the jurors were each properly overruled. Such opinions as they had were formed from newspaper reports and casual conversations with persons who had visited the wreck. They evidently had no prejudice against the defendant, and had taken no particular interest in the case. It is apparent that they had nothing but loose, floating, hesitating opinions; and as far as we can see, there was no such prejudgment of the case as would prevent them from sitting as fair and impartial jurors. The language of their examination is qualified and considerate, and is not that of positive men, hasty to judge and prompt to condemn, but rather that of honest, careful conscientious men, fair, open, and candid, with an obvious purpose to conceal nothing and suppress nothing. They each was conscious that they could disregard all they

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had heard about the case, and try it on the evidence as produced, uninfluenced by any opinion or impression they then had. We cannot think this is such a manifestation of partiality or prejudice as left nothing to the conscience or discretion of the trial court.

* * * * *

The judgment is *affirmed*.⁵⁵

⁵⁵ See *People v. Garner*, (1921) 216 Mich. 178, for conflicting views expressed in majority and minority opinions, as to whether the previously formed opinion of a juror as to the guilt or innocence of the accused is good ground for challenge.

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Joh
SEARLE v. ROMAN CATHOLIC BISHOP OF
SPRINGFIELD.

ROMAN CATHOLIC BISHOP OF SPRINGFIELD
v. SEARLE.

Supreme Judicial Court of Massachusetts. 1909.

203 Massachusetts, 493.

TWO ACTIONS OF TORT; the first action by George Everett Searle against the Roman Catholic Bishop of Springfield, who as a corporation sole under St. 1898, c. 368, held the title to certain real estate in the town of Easthampton, which was bought as a site for a church edifice, alleging the conversion by the defendant of a one story and a half wooden building alleged to be personal property and to be the property of the plaintiff, having been built for the plaintiff by one Charles W. Smith, with the consent of Delia A. Strong, who then was the owner of the land; and the second action by the defendant in the first case against the plaintiff in the first case and certain other persons, for damages alleged to have been caused by an attempt to remove the building from the real estate, of which it was alleged to be a part, seeking also equitable relief by way of injunction. * * *

KNOWLTON, C. J. The question at the trial was whether a building erected on land of the defendant in the first action,

who will hereinafter be called the defendant, was personal property belonging to Searle, who will hereinafter be called the plaintiff, or was real estate owned by the defendant.

* * * * *

Exception was taken by the defendant to the ruling of the judge at the request of the plaintiff, that no person of the Roman Catholic faith should sit as a juror in these cases. Under this ruling two jurors were excluded from the panel, one a resident of Northampton and the other a resident of South Hadley. The ruling was made on the ground that the defendant is the Roman Catholic Bishop of Springfield, a corporation sole under the St. 1898, c. 368, who holds the title to the real estate in trust for the Roman Catholic church, and that these excluded jurors have an interest in the suit analogous to that which taxpayers have in a suit against the city or town in which they reside. It is not contended and it could not successfully be contended that holding the same religious belief as one of the parties, or affiliation with him in the same church, would disqualify a person from sitting as a juror in his case. The application of such a doctrine would be unjust and impracticable. *Commonwealth v. Buzzell*, 16 Pick. 153; *Purple v. Horton*, 13 Wend. 1; *Barton v. Erickson*, 14 Neb. 164; *Smith v. Sisters of Good Shepherd*, 27 Ky. Law Rep. 1170.

The real estate held by the defendant is in the town of Easthampton, and it was bought as a site for a church edifice. The excluded jurors were not taxpayers in that town, and it may be assumed that they were not members of the parish that was expected to use the church. The ruling applied to all jurors of the Roman Catholic faith, without reference to their residence or to any close affiliation with the local church. Has every person of the Roman Catholic faith in the diocese of the bishop of Springfield a pecuniary interest, of which the court can take notice, in every church owned by the defendant in every part of the diocese? We are of opinion that he has not. It does not appear, and we have no reason to suppose, that every Roman Catholic living in a remote part of the diocese can be affected pecuniarily by a small loss or gain of the bishop as owner, in connection with the erection of a Roman Catholic church in Easthampton.

Under the St. 1898, c. 368, the defendant's holding of property is "for the religious and charitable purposes of the Ro-

man Catholic Church." In the R. L. c. 36, sec. 44-46, it is strongly implied that there is a difference in the trusts, and in the beneficiaries, among churches in different places, and that the members of a particular parish and those directly connected with the church therein have different pecuniary relations to the church there from those of the same faith who live in a different part of the same diocese. Upon the record before us this ruling of the judge appears to be wrong. See *Burdine v. Grand Lodge of Alabama*, 37 Ala. 478; *Delaware Lodge v. Allmon*, 1 Penn. (Del.) 160.

The remaining question is whether the error was prejudicial to the legal rights of the defendant. The manner of impaneling jurors is prescribed by the R. L. c. 176, sec. 25. The names of those summoned as jurors are written on ballots and placed in a box, and, after the ballots are shaken up, the clerk draws them one by one in succession until twelve are drawn. Apart from challenges, "the twelve men so drawn * * * shall be the jury to try the issue," etc. The order of the judge was a violation of the statutory provision, and of the defendant's right to have the excluded men sit as jurors unless challenged by the plaintiff.

The case was tried by other qualified jurors, and it is argued that the defendant was not injured by the order. Under the R. L. c. 176, sec. 32, no irregularity in the drawing, summoning, returning or impaneling of jurors is sufficient to set aside the verdict, unless the objecting party was injured thereby. In general it may be assumed that all duly qualified jurors, against whom there cannot be a successful challenge for cause, will consider and try a case properly. But a man may have affiliations and friendships or prejudices and habits of thought which would be likely to lead him to look more favorably for the plaintiff, or less favorably for him, upon a case of a particular class, or upon one brought by a particular person or a member of a particular class of persons, than would the average juror, even though his peculiarities are not sufficiently pronounced to disqualify him for service. It is in reference to these peculiarities that the parties are given a limited number of peremptory challenges. While they have no direct right of selection, this right of peremptory challenge gives to each party a restricted opportunity for choice among qualified persons. Anything which renders this statutory right of peremptory challenge materially less valuable

~~is an injury to a party, within the meaning of the statute.~~

We do not intimate that any juror would consciously allow feelings of friendship or prejudice, or unusual and peculiar habits of thought, to affect his conduct in the jury room; much less that a party has a right to have the benefit of the peculiar views or special feelings of a particular juror in the trial of his case. But the right of peremptory challenge in the impaneling of jurors cannot be disregarded as of no value to the parties. In the case at bar, a class of persons qualified as jurors, whom the plaintiff thought in such relations of religious affiliation with the defendant that they would be likely to hear his defense in an attitude of special friendship, was withdrawn from the list of jurors. The order of the judge rejecting these men, at the request of the plaintiff, gave him at the outset an additional power of choice, and made his right of peremptory challenge relatively more valuable, while the defendant's similar right was made relatively less valuable. We are of opinion that this was an injury to the defendant which entitles him to a new trial. The number of persons summoned as jurors that belonged to this class does not appear. It only appears that the names of two of them happened to be drawn from the box.

Our decision seems to be in accordance with the weight of authority, although some of the cases depend upon local statutes. *Hildreth v. Troy*, 101 N. Y. 234; *Welch v. Tribune Publishing Co.*, 83 Mich. 661; *Scranton v. Gore*, 124 Penn. St. 595; *Montague v. Commonwealth*, 10 Gratt. 767; *Kunneen v. State*, 96 Ga. 406; *Bell v. State*, 115 Ala. 25; *Danzey v. State*, 126 Ala. 15.

* * * Whether an error of law like that in the present case, if it arose only in determining the qualifications of a single juror, should be held so far to injure an objecting party as to require the verdict to be set aside, we do not find it necessary to determine; but when, as in the present case, the ruling applies to a class of persons, we feel constrained to say that there was an injury of which the law should take notice.

Exceptions sustained.

GOFF v. KOKOMO BRASS WORKS.

*Appellate Court of Indiana. 1909.**43 Indiana Appellate, 642.*

MYERS, J.—Action by appellant to recover damages for personal injuries alleged to have been sustained by him while in the service of appellee. The issues were formed by the complaint and answer of general denial. The cause was tried by a jury and a verdict returned for appellee. From a judgment in favor of appellee appellant has appealed to this court, assigning as error the overruling of his motion for a new trial.

The reasons assigned in support of the motion relate solely to the action of the court in sustaining the objections of appellee to certain questions, propounded by appellant to the persons called to act as jurors, touching their competency and qualifications so to act. These questions called for information as to whether they were acquainted with any of the officers or agents of the Travelers Insurance Company, whether any of them ever had any business relations with that company, whether they were then or ever had been the agents or in the employ of that company, or whether they were then acquainted with any agent of that company? Preliminary to these questions appellant offered to introduce evidence to the court tending to show that the Travelers Insurance Company was interested in the result of the suit, and this offer was refused. * * *

From the objections made to the various questions propounded by appellant to each of the jurors, and from the rulings of the court as disclosed by the record, it appears that the court proceeded upon the theory that, as appellee was the only defendant of record, the latitude of appellant's inquiry did not extend to elicit the suggested information.

The matter of impaneling a jury must, to a great extent, be left to the sound discretion of the trial court, and only in cases where an abuse of that discretion is clearly shown will appellate tribunals disturb the judgment of that court. Courts of last resort having to do with questions, in principle, not unlike the one here presented, with almost one accord, have held that where parties are acting in good faith considerable latitude should be allowed along lines touching the com-

petency of persons called as jurors to act in the matter under investigation, as also for the purpose of furnishing a basis upon which the court and parties may proceed intelligently, to the end that a fair and impartial jury may be obtained.

* * *

In *M. O'Connor & Co. v. Gillaspie* (1908), 170 Ind. 428, it is said: "Parties litigant in cases of this class are entitled to a trial by a thoroughly impartial jury, and have a right to make such preliminary inquiries of the jurors as may seem reasonably necessary to show their impartiality and disinterestedness. In the exercise of this right counsel must be allowed some latitude, to be regulated in the sound discretion of the trial court, according to the nature and attendant circumstances of each particular case. The examination of jurors on their *voir dire* is not only for the purpose of exposing grounds of challenge for cause, if any exist, but also to elicit such facts as will enable counsel to exercise their right of peremptory challenge intelligently. Questions addressed to this end are not barred though directed to matters not in issue, provided they are pertinent, and made in good faith. It does not appear from the record that an accident or indemnity insurance company was in any manner interested in this action, but the laws of this state authorize the incorporation of companies for indemnifying employers against liability for accidental injuries to employes, and it is a matter of common knowledge that numerous companies are engaged in such insurance in this State."

In the case at bar the Travelers Insurance Company was not a party to the record, and for aught that appears from the complaint was not interested in the result of the suit, but the record shows that appellant offered to introduce evidence to the court tending to show that it was present in court by hired counsel actively engaged in defending the action; and that it had issued a policy of insurance to appellee. This evidence was admissible only in the discretion of the court, and for its sole use in determining counsel's good faith in pursuing the inquiry. Therefore, meeting the question, does the record before us show an abuse of that discretion lodged with the trial court as will authorize this court to set aside the judgment? Limiting our inquiry to the particular information desired by appellant, as indicated by the questions propounded to each juror, and to which objections were sus-

tained, it seems to us quite clear that the questions should have been answered. For, in case the insurance company was pecuniarily interested in the litigation, a person in its employ or otherwise interested in it, naturally would be more liable to be unduly influenced to grant an advantage on the side of his employer or in the protection of a private interest than one having a single purpose—returning a verdict according to the law and the evidence. * * *

The weight of authority affirms the right of parties to examine persons called as jurors on their *voir dire*, as counsel sought to do in this case. He was denied that right. The information indicated by the questions does not appear in the record as having been furnished in any other manner. Whether any or all of the jurors who tried the case had any interest in the insurance company, which counsel for appellant offered to show to the court was financially interested in the result of the litigation, nowhere appears. The action of the court in refusing to permit counsel for appellant to examine the persons called as jurors along the line suggested in this opinion was error, and, in the absence of a showing that it was harmless, entitled appellant to reversal of the judgment without first showing that some disqualified juror sat in the case. * * *

*Judgment reversed.*⁵⁶

⁵⁶ *Statutory restrictions.* In some states the character and scope of the questions to be asked a juror are prescribed by statute. See *Commonwealth v. Warner*, (1899) 173 Mass. 541, 54 N. E. 353; *Commonwealth v. Poisson*, (1893) 157 Mass. 510, 32 N. E. 906; *State v. Bethum*, (1910) 86 S. C. 143, 67 S. E. 466; *State v. Roberts*, (1910) (Del.) 78 Atl. 305; *Woolfolk v. State*, (1890) 85 Ga. 69, 11 S. E. 814.

In Massachusetts the court shall examine the jurors or permit the parties or attorneys to do so under its direction.—R. S. 1902, Ch. 176, Sec. 28.

In South Carolina the examination must be by the court on motion of either party,—1 Code 1902, Sec. 2944. And the same rule prevails in Alabama,—3 Code 1907, Sec. 7270.

In Georgia, in trials for felony, any juror may be put on his *voir dire* and four statutory questions put to him. 2 Code, 1911, Sec. 1001.

94. QUEEN v. STEWART.
Bunt
 Kent Assizes, England. 1845.

1 Cox's Criminal Cases, 174.

The prisoners were indicted for larceny, under the following circumstances: They passed for husband and wife, and having taken a house at Tunbridge Wells, Mrs. Stewart went to the shop of the prosecutor, selected the goods in question to the amount of 10 l., and ordered them to be sent to her home. The prosecutor accordingly despatched the goods by one Davies, and gave him strict injunctions not to leave them without receiving the price. Davies, on arriving at the house, told the two prisoners he was instructed not to leave the goods *without the money, or an equivalent*. After a vain attempt on the part of K. Stewart to induce Davies to let him have the property on the promise of payment on the morrow, he, Stewart, wrote out a cheque for the amount of the bill and gave it to Davies, requesting him not to present it until the next day. It was drawn on the London Joint Stock Bank, Prince's street, London, and Davies having left the goods, returned with the cheque to his employers. It was presented at the bank, in London, the next morning, when it was dishonoured for want of effects. It was also proved, that although the prisoner had opened an account at the said Bank, it had been some time before overdrawn, and several of his cheques had been subsequently dishonoured. At the commencement of the case, and as each jurymen came into the box,

C. JONES, Serjt., for the prisoners, asked him whether he was a member of a certain association for the prosecution of parties committing frauds upon tradesmen.

Clarkson and Bremridge, for the prosecution, objected to this proceeding.

ALDERSON, B.—It is quite a new course to catechise a jury in this way.

Jones, Serjt.—I have a right, my lord, to challenge, and I submit that I am entitled to ask for information that is necessary to enable me effectively to exercise that right. At all events, your lordship will perhaps intimate to the jury, that such of them as are members of this association had better retire from the box.

ALDERSON, B.—I cannot allow you to cross-examine the jury, nor will I intimate to them any thing on the subject you mention. If you like to challenge absolutely you may do so.

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⁵⁷ The same practice obtains in Canada, Justice William R. Riddell, of Ontario says:—"I have never, in thirty years' experience, seen it take more than half an hour to get a jury even in a murder case, and never but once heard a jurymen asked a question." The Courts of Ontario, 64 Univ. of Penn. L. Rev. 17, 32.

POINTER v. UNITED STATES.

Supreme Court of United States. 1894.

151 United States, 396.

HARLAN, J. At the February term, 1892, of the Circuit Court of the United States for the Western District of Arkansas, the grand jury returned an indictment against John Pointer for the crime of murder.

* * * * *

The entire panel of the petit jury was called and the jurors were examined as to their qualifications, and, the journal entry states, thirty-seven in number were found to be generally qualified under the law, that is, in the words of the bill of exceptions, "qualified to sit on this case." The defendant and the government were then furnished, each, with a list of the thirty-seven jurors thus selected, that they might make their respective challenges, twenty by the defendant and five by the government, the remaining first twelve names, not challenged, to constitute the trial jury. The defendant at the time objected to this mode of selecting a jury: "1st, because it was not according to the rule prescribed by the laws of the State of Arkansas; 2d, because it was not the rule practiced by common law courts; 3d, because the defendant could not know the particular jurors before whom he would be tried until after his challenges, as guaranteed by the statutes of the United States, had been exhausted; 4th, because the government did not tender to the defendant the jury before whom he was to be tried, but tendered seventeen men instead of

twelve, and made it impossible for defendant to know who the twelve men before whom he was to be tried were until after his right to challenge was ended."

At the time this objection was made the defendant's counsel saved an exception to the mode pursued in forming the jury, and said: "The point we make is, that the government must offer us the twelve men they want to try the case." The court observed: "They offered you thirty-seven." "We understand," counsel said, "but we want to save that point."

* * * * *

The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused. "The end of challenge," says Coke, "is to have an indifferent trial, and which is required by law; and to bar the party indicted of his lawful challenge is to bar him of a principal matter concerning his trial." 3 Inst. 27, c. 2. He may, if he chooses, peremptorily challenge "on his own dislike, without showing any cause;" he may exercise that right without reason or for no reason, arbitrarily and capriciously, Co. Lit. 156 b; 4 Bl. Com. 353; *Lewis v. United States*, 146 U. S. 376. Any system for the empanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned. And, therefore, he cannot be compelled to make a peremptory challenge until he has been brought face to face, in the presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due administration of justice.

Were his rights in these respects impaired or their exercise embarrassed by what took place at the trial? We think not. The jurors legally summoned for service on the petit jury were, as we have seen, examined in his presence as to their qualifications, and thirty-seven were ascertained, upon such examination, to be qualified to sit in the case. Both the accused and the government had ample opportunity, as this examination progressed, to have any juror who was disqualified, rejected altogether for cause. A list of all those found to be qualified under the law, and not subject to challenge for cause, was furnished to the accused and to the government, each side being required to make their challenges at the same time, and having notice from the court that the first twelve unchallenged would constitute the jury for the trial of the

case. It is apparent, from the record, that the persons named in the list so furnished were all brought face to face with the prisoner before he was directed to make, and while he was making his peremptory challenges.

Was the prisoner entitled, of right, to have the government make its peremptory challenges first, that he might be informed, before making his challenges, what names had been stricken from the list by the prosecutor? In some jurisdictions it is required by statute that the challenge to the juror shall be made by the State before he is passed to the defendant for rejection or acceptance. Such is the law of Arkansas, and the court below was at liberty to pursue that method. Mansfield's Digest, sec. 2242. And such is regarded by some courts as the better practice, even where no particular mode of challenge is prescribed by statute. *State v. Cummings*, 5 La. Ann. 330, 332. But as no such provision is embodied in any act of Congress, it was not bound by any settled rule of criminal law to pursue the particular method required by the local law. The uniform practice in England, as appears from the observations of Mr. Justice Abbott, afterwards Lord Tenterden, in *Brandeth's Case*, 32 Howell's St. Tr. 755, was to require the accused to exercise his right of challenge before calling upon the government. He said: "Having attended, I believe, more trials of this kind than any other of the judges, I would state that the uniform practice has been that the juryman was presented to the prisoner or his counsel, that they might have a view of his person; then the officer of the court looked first to the counsel for the prisoner to know whether they wished to challenge him; he then turned to the counsel for the crown to know whether they challenged him." p. 771. In the same case, Lord Chief Baron Richards said that he conceived it to be clear that "it is according to the practice of the courts that the prisoner should first declare his resolution as to challenging." p. 774. Mr. Justice Dallas expressed his concurrence in those views. pp. 774, 775. But the general rule is, that where the subject is not controlled by statute, the order in which peremptory challenges shall be exercised is in the discretion of the court. *Commonwealth v. Piper*, 120 Mass. 185; *Turpin v. State*, 55 Maryland, 464; *Jones v. State*, 2 Blackford, 475; *State v. Hays*, 23 Missouri, 287; *State v. Pike*, 49 N. H. 406; *State v. Shelledy*, 8 Iowa,

477, 480, 504; *State v. Boatwright*, 10 Rich. (Law), 407; *Shufin v. State*, 20 Ohio St. 233.

In some jurisdictions the mode pursued in the challenging of jurors is for the accused and the government to make their peremptory challenges as each juror, previously ascertained to be qualified and not subject to be challenged for cause, is presented for challenge or acceptance. But it is not essential that this mode should be adopted. In *Regina v. Frost*, 9 Car. & P. 129, 137, (1839), the names of jurors were taken from the ballot-box, and each was sworn on the *voir dire* as to his qualifications before being sworn to try. When the government peremptorily challenged one who had been sworn on the *voir dire* as to his qualifications, it was objected that the challenge came too late, because the juror had taken the book into his hand to be sworn to try. In disposing of this objection Chief Justice Tindal said: "The rule is that challenges must be made as the jurors come to the book and before they are sworn. The moment the oath be begun it is too late, and the oath is begun by the juror taking the book, having been directed by the officer of the court to do so. If the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby." These observations, it is apparent, had reference only to the question whether a peremptory challenge could be permitted after the juror had, in fact, taken the book into his hand for the purpose of being sworn to try. At most, in connection with the report of the case, they tend to show that the practice in England, as in some of the States, was to have the question of peremptory challenge as to each juror, sworn on his *voir dire* and found to be free from legal objection, determined as to him before another juror is examined as to his qualifications. But there is no suggestion by any of the judges in Frost's case that that mode was the only one that could be pursued without embarrassing the accused in the exercise of his right of challenge. The authority of the Circuit Courts of the United States to deal with the subject of empanelling juries in criminal cases, by rules of their own, was recognized in *Lewis v. United States*, subject to the condition that such rules must be adapted to secure all the rights of the accused. 146 U. S. 379.

We cannot say that the mode pursued in the court below, although different from that prescribed by the laws of Arkansas, was in derogation of the right of peremptory chal-

lenge belonging to the accused. He was given, by the statute, the right of peremptorily challenging twenty jurors. That right was accorded to him. Being required to make all of his peremptory challenges at one time, he was entitled to have a full list of jurors upon which appeared the names of such as had been examined under the direction of the court and in his presence, and found to be qualified to sit on the case. Such a list was furnished to him, and he was at liberty to strike from it the whole number allowed by the statute, with knowledge that the first twelve on the list, not challenged by either side, would constitute the jury. And after it was ascertained, in this mode, who would constitute the trial jury, it was within the discretion of the court to permit them to be again examined before being sworn to try. But no such course was suggested, and the record discloses no reason why a further examination was necessary in order to secure an impartial jury. The right of peremptory challenge, this court said, in *United States v. Marchant*, 12 Wheat. 480, 482, and in *Hayes v. Missouri*, 120 U. S. 68, 71, is not of itself a right to select, but a right to reject, jurors.

It is true that, under the method pursued in this case, it might occur that the defendant would strike from the list the same persons stricken off by the government. But that circumstances does not change the fact that the accused was at liberty to exclude from the jury all, to the number of twenty, who, for any reason, or without reason, were objectionable to him. No injury was done if the government united with him in excluding particular persons from the jury. He was not entitled, of right, to know, in advance, what jurors would be excluded by the government in the exercise of its right of peremptory challenge. He was only entitled, of right, to strike the names of twenty from the list of impartial jurymen furnished him by the court. If upon that list appeared the name of one who was subject to legal objection, the facts in respect to that juror should have been presented in such form that they could be passed upon by this court. But it does not appear that any objection of that character was made, or could have been made, to any of the thirty-seven jurors found, upon examination, to be qualified.

Thus, in our opinion, the essential right of challenge to which the defendant was entitled was fully recognized. And there is no reason to suppose that he was not tried by an im-

partial jury. The objection that the government should have tendered to him the twelve jurors whom it wished to try the case, or that he was entitled to know before making his challenges the names of the jurors by whom it was proposed to try him, must mean that the government should have been required to exhaust all of its peremptory challenges before he peremptorily challenged any juror. This objection is unsupported by the authorities, and cannot be sustained upon any sound principle.

* * * * *

We perceive no error in the record to the prejudice of the substantial rights of the plaintiff in error.

Judgment affirmed.

36 STATE v. MYERS.
J. A. B. C.
 Supreme Court of Missouri. 1906.

198 Missouri, 225.

GANTT, J. * * *

2. It is next insisted that the court erred in overruling the defendant's challenge to the Jurors Lancaster, Golden, Cossett, Borgnier, Wharton, Miller, Soper and Capps for the reason that the said jurors on their *voir dire* examination testified that they had formed opinions as to the guilt or innocence of the defendant from having read a copy of the confession of Frank Hottman published in the Kansas City newspapers. To this assignment of error the State makes two answers: First, no specific ground of challenge was stated by the defendant to either or all of said jurors; * * * The record discloses that upon the close of the examination of each of the said jurors, the defendant made the general challenge, "Defendant challenged this juror;" no specific ground of challenge was given in either case. Were the challenges sufficient to preserve the error now complained of for review by this court? In *Kansas City v. Smart*, 128 Mo. 1. c. 290, it was said: "The grounds of challenge to a juror must be stated when it is offered and tested on his *voir dire*. The trial court is entitled to know the reason for the challenge. (*State v.*

Brownfield, 83 Mo. 453, 454; Thompson & Merriam on Juries, sec. 253, and cases cited; 1 Thompson on Trials, sec. 98.)" In *State v. Taylor*, 134 Mo. 142, Judge Sherwood, speaking for this court, reviewed the authorities on this point and said:

"* * * Nothing is better settled than that challenges for cause must be specifically stated. The particular cause must be set forth. (*People v. Reynolds*, 16 Cal. 128; *Mann v. Glover*, 14 N. J. L. 195; *Powers v. Presgroves*, 38 Miss. 227; *Southern Pacific Co. v. Rauh*, 49 Fed. 696; *Drake v. State*, 20 Atl. 747; 2 Elliott's Gen. Prac., sec. 530, and other cases there cited.) The facts constituting the cause of complaint were not given in this instance; the challenge simply amounted to the statement of a legal conclusion. The rule should be the same here as it is where general objections are taken to the evidence, that it is incompetent, immaterial, etc., and where it is held that general objections amount to nothing more than saying, 'I object.' Indeed, there seem to be more cogent reasons why specific objections should be urged in a case of this sort, where the question is as to the admission of a jurymen, than where it is as to the admission of a piece of evidence. At any rate, in either case, fairness to the court and to adverse counsel alike demand the grounds of the challenge for cause to be particularly set forth." * * *

Counsel for the defendant, however, insists that in this case the ground of the challenge was so apparent to the court and the opposite counsel that they could not have been misled as to the ground of the challenge. We are unable to concur in this view. These jurors had been fully examined as to their competency, and among other things as to their opinions formed from reading newspaper reports. If the objection was intended to be based specifically upon the ground of opinions formed or expressed, it should have been so stated and the matter properly preserved for our review.

* * * * *

The judgment of the Circuit Court must be and is affirmed, and the sentence which the law pronounces is directed to be carried into execution.

97 Jaha McDONALD v. STATE.
Supreme Court of Indiana. 1909.

172 Indiana, 393.

MYERS, J. Appellant was convicted on an indictment charging him and another with conspiring for the purpose and with the intent unlawfully, feloniously and designedly to defraud the Adams Express Company. * * *

The questions sought to be presented arise upon alleged error in refusing the peremptory challenge of a juror on his *voir dire*, and in giving instructions. The evidence is not in the record. A bill of exceptions discloses that in impaneling the jury, when the jury had been passed back to the defendant's counsel for re-examination for the third time, and defendant had used but three peremptory challenges, being entitled to ten, the defendant peremptorily challenged a juror who had been in the jury box from the time the impaneling of the jury began, and the challenge was disallowed, "for the reason that, under a rule of said court, which had been in existence for many years, the defendant's peremptory challenge was made too late," said rule was stated by the court at the time as follows: "That each side, the defendant and the State, is entitled to examine each juror twice, and challenge, if desired, but cannot challenge a juror after the jury has been passed twice with each juror in the box. Said rule is an oral rule, and is not entered in the records of the court, but has been regularly enforced for many years." It is further recited that the defendant and his attorney, at the time of the challenge, did not know of the rule, but they did not inform the court on being advised of such rule that either or both of them were ignorant of it, and did not ask that it be suspended, nor that an exception be made to its enforcement, on account of such ignorance. We think it quite clear that there can properly be no such thing as an oral rule of a court. Rules of court, when legally adopted and promulgated, have the effect of positive laws. Sec. 1443, Burns 1908, sec. 1323 R. S. 1881; *Magnuson v. Billings* (1899), 152 Ind. 177; *State v. Van Cleave* (1902), 157 Ind. 608; *Smith v. State, ex rel.* (1894), 137 Ind. 198; 11 Cyc. 742.

They ought not only to be formally promulgated, but they

should be definitely stated, which could not be true of a practice reposing solely in the breast of a judge. They should be published and made known in some permanent form, so that they might be known to all. The so-called rule was clearly not a rule at all, and binding upon no one—clearly not upon one who has no notice of it. The statutory provision (sec. 2099 Burns 1908, Acts 1905, pp. 584, 634, sec. 228), is as follows: "In prosecutions for capital offenses, the defendant may challenge, peremptorily, twenty jurors; in prosecutions for offenses punishable by imprisonment in the state prison, ten jurors; in other prosecutions, three jurors. When several defendants are tried together, they must join in their challenges.

Irrespective of the so-called rule, was appellant denied a statutory right? No provision is made by statute nor by rule as to how or when the right shall be exercised, and it is claimed by appellant that it may be done at any time until the jury is sworn. In some jurisdictions the passing of a juror after he has been examined, tendered to and accepted by the other party, is a waiver of the right to challenge. In others, the right to challenge is in the sound discretion of the court. In others, a party who accepts a juror with knowledge of an objection waives the objection, but if a cause of objection is afterward discovered it is not waived, unless he is guilty of negligence in not discovering the objection. 24 Cyc. 322, 323. There is no showing made that appellant did not know from the beginning the grounds for the peremptory challenge, and he stands here upon the bare proposition that he was entitled to the challenge in any event, without offering any excuse to the court, or making any request for exemption or relief from the local practice. Had any request for exemption upon the ground that the so-called rule was void, or that the appellant or his counsel had no knowledge of it, been made, or if any reason were shown why the juror twice passed by appellant as satisfactory had been discovered to be unacceptable, a different question would be presented, for, independently of the so-called rule, appellant shows no ground for relief from his own act and acquiescence.

We think it cannot be said that the right of challenge is denied where it is restricted to a defined number of opportunities for challenge, nor that there must be a definite rule fixing the time when, or the manner in which, it must be exer-

cised, for we think it may be controlled either by a fixed rule, or by any reasonable limitation imposed in any specific case, so long as the right of peremptory challenge is not taken away; in other words, that, when reasonable opportunity is given to challenge, the spirit of the statute is complied with, and that it does not mean that the right is an open one at all times until the jury is sworn, irrespective of all else; that there is no good reason why there may be speculation as to what the opposite party may do, and the jury passed backward and forward to await the action of the adversary; that the statute means that when the jury is passed to a party he must challenge peremptorily if he would challenge, in the absence of an after-arising condition, and that, when the opportunity was twice given, as here, and not exercised, a party cannot complain, unless new conditions arise, calling for an exception to, or relaxation of, the practice or the order in the particular case, and that if a given practice, not rising to the dignity of a rule, is invoked, as here, one to be exempt from its operation, on account of his ignorance of it, must seasonably apply to be relieved from its operation. At common law no challenge to the array or panel could be made until the full jury was present. 1 Chitty, Crim. Law (4th Am. ed.), *544. Our statute (sec. 2101 Burns 1908, Acts 1905, pp. 584, 634, sec. 230), was evidently adopted with this practice in mind, and the right to challenge contemplated the right to challenge as the panel thus full stood, or as it might stand, and not that the right should be one arising out of indefinitely passing the jury as acceptable.

In *State v. Potter* (1846), 18 Conn. 166, a talesman was called and examined by the counsel for defendant as to his bias, or for cause of challenge, and no objection appearing the court informed defendant's counsel that they could challenge him peremptorily. They declined to exercise the right at that time, as the panel was not full, and after it was full they challenged the juror peremptorily, and the court inquired whether any cause then existed which did not exist when they first declined the right. They answered in the negative, and the court held that the challenge came too late, and this ruling was upheld. * * *

Where, upon impaneling a jury, the judge announced that he would require the defendant to make his challenges as he desired, to each juror as called, it was held not error to re-

fuse a peremptory challenge after the juror was sworn and accepted, and it was held that, when there was a fair opportunity to interpose a peremptory challenge, the defendant cannot complain of a refusal to be allowed the further exercise of the right. *People v. Carpenter* (1886), 102 N. Y. 238, 6 N. E. 584.

We are not unaware that in the earlier cases in this State and in other states it is held that the right of challenge continues up to the swearing of the jury, but we are unable to perceive that any substantial right of a defendant is invaded when an opportunity for challenge of the full numbers is afforded and it is not availed of up to the time the jury is sworn. The object to be attained is an impartial jury, and while the right of peremptory challenge is an absolute one, it is not, we think, so far so that it may be exercised under all conditions. If, by the introduction of new men upon the panel, a cause for challenge should arise—such as the coming on of a person at such enmity to one already passed that they could not work in harmony, or the introduction of anything which might prejudice the right of a defendant—he would have a clear right to exercise his preference, and challenge the man already acceptable, rather than the new man, and the right would thus be preserved until the full panel is complete and the jury sworn. He has a right to a full panel to begin with, the right of canvass and comparison among jurors, and if his full right of challenge is preserved, within the line here indicated, it is practically a right of peremptory challenge until the jury is sworn, but it does not follow that the opportunity must be open under all circumstances or conditions, for it is a right which may be waived. Neither do we understand that the rule here declared is in conflict with the earlier holdings of the court, which upon examination are found to be general declarations as to the right of peremptory challenge extending until the jury is sworn, and did not involve any question of practice as to the mode of conducting the impaneling of juries, and of exercising the right of challenge, or of the right and power of courts to direct the manner of its exercise. * * * No reversible error is shown, and the judgment is affirmed.⁵⁸

⁵⁸ *Order of challenges.* "The right to challenge jurors is one given and secured by law, and cannot be taken away by the court. Until the challenges to which a party is entitled under the statutes are exhausted,

the right extends to every juror called. The juror is first challenged for cause, either actual or implied bias; then peremptorily. In civil actions, each party is entitled to three peremptory challenges. G. S. 1894, § 5370. The usual practice in the selection of a jury in such actions is to require the peremptory challenges to be made by the parties alternately, one at a time, beginning with defendant." *Swanson v. Mendenhall*, (1900) 80 Minn. 56, 82 N. W. 1093.

18. STATE v. CADY.
Quint
Supreme Judicial Court of Maine. 1888.

80 Maine, 413.

PETERS, C. J. Two respondents were arraigned together under a joint liquor indictment, having the same counsel to answer for them. The judge allowed each respondent two peremptory challenges in impaneling the jury, and when one respondent in person challenged a juror, the other disputed the challenge, claiming that he had a right to have the challenged juror on the panel. One respondent accepted and the other rejected the juror.

The judge accorded to them two challenges each, while they were entitled to two jointly, and no more. In capital cases each prisoner, under a joint trial, is entitled to his personal challenges. The statute in that case prescribes that "each person" shall be so entitled. In all other criminal cases it is "the party" that is entitled to the two challenges. If they do not agree upon the persons to be objected to, they lose their challenges. The presumption is, where respondents in criminal cases, not lately capital, consent to be tried together, or where the judge in his discretion orders a joint trial, that their interests are alike, and differences between them are uncalled for. By R. S., c. 134, sec. 20, it is provided that issues in fact in criminal cases not capital, shall be tried by a jury drawn and returned in the same manner, and challenges shall be allowed, as in civil cases. By R. S., ch. 82, sec. 74, it is provided that in civil cases, and criminal cases not capital, "each party" is entitled to two peremptory challenges when a jury is impanelled by lot. ~~Party does not mean person.~~ Allowing challenges without cause is a merely statute right, not to be extended by construction. Where defendants are nu-

merous, if each had personal challenges, it would require the presence of an impracticable number of jurors. This question is settled by several authorities. *State v. Reed*, 47 N. H. 466; *Stone v. Segur*, 11 Allen, 568; *State v. Sutton*, 10 R. I. 159. These cases show that several respondents are but one party, and are entitled to no more challenges than one defendant. But if in his discretion, the judge extended a greater privilege than the statute concedes, neither respondent is in a position to complain of it. We have held in *Snow v. Weeks*, 75 Maine, 105, that to a ruling of a judge, in excusing or rejecting a jurymen, exceptions will not lie. It is there said: "He may put off a juror when there is no real and substantial cause for it. That cannot legally injure an objecting party as long as an unexceptionable jury is finally obtained. He may put a legal juror off. He cannot allow an illegal juror to go on." This question was exhaustively and learnedly examined in a case of piracy, *United States v. Marchant*, 12 Wheat. 480, in which Judge Story maintains the same doctrine, and he there says: "The right of peremptory challenge is not of itself a right to select but a right to reject jurors." He further remarks that the right "enables the prisoner to say who shall not try him, but not to say who shall be the particular persons who shall try him."

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Exceptions overruled.

49 THEOBALD v. ST. LOUIS TRANSIT CO.

Supreme Court of Missouri. 1905.

191 Missouri, 395.

MARSHALL, J.—This is an action for \$5,000 damages arising from the death of the plaintiff's nineteen year old son, about six o'clock in the afternoon on the 20th of January, 1903, caused by one of the defendant's cars colliding with the rear of a wagon driven by the deceased, at a point seventy to one hundred fifty feet west of Union avenue on De Giverville avenue, in the city of St. Louis. There was a verdict and

judgment for the plaintiff for \$5,000, and the defendant appealed.

* * * * *

I.

The first error assigned is the ruling of the trial court in overruling the challenge for cause of the jurors Hartman and Bensberg.

Briefly stated the facts developed upon the *voir dire* were, that eight or nine years before the trial the juror Hartman had been thrown off of a car. He stated that that fact would influence him in the trial of this cause. He also stated that he would be governed by the testimony and instructions of the court, and believed that he could render an impartial verdict; that he had nothing against this defendant, but that he had during all those years entertained a prejudice against street car companies, and that that prejudice existed when he was first examined as to his qualifications for a juror, but that during the examination, that prejudice had been removed, and that he had reached the conclusion within the last five minutes that he could try this case impartially.

The juror Bensberg testified that he had a sort of a prejudice against the company, and that he did not think it would influence his verdict as a juror, yet added, "But still a person having a prejudice, that would probably unconsciously bias his opinion." * * *

Under our system of jurisprudence there is no feature of a trial more important and more necessary to the pure and just administration of the law than that every litigant shall be accorded a fair trial before a jury of his countrymen, who enter upon the trial totally disinterested and wholly unprejudiced. Where a juror admits, as Hartman did, that he had a prejudice against street car companies of eight or ten years standing, and that that prejudice existed up to the time he gave his first answer upon his *voir dire*, yet after being examined and cross-examined by counsel and the court, and being put in the position of having to say he would allow that prejudice to overcome the obligation of his oath as a juror, or on the other hand to say that he could divest his mind of such a prejudice and fairly try a case, and that the prejudice had become dissipated within the last five minutes, it can scarcely be reasonably said that such a juror fills the requirements of our system of jurisprudence.

The juror Bensberg more candidly and accurately stated the conditions existing in such cases when he said: "Well, a person having a prejudice, that would probably unconsciously bias his opinion." The truth of this statement is self-evident. The question of the qualification of a juror is a question to be decided by the court, and not one to be decided by a juror himself. * * * It is proper to examine a juror as to the nature, character and cause of his prejudice or bias, but it is not proper to permit the juror, who admits the existence in his mind of such prejudice or bias, to determine whether or not he can or cannot, under his oath, render an impartial verdict. Such a course permits the juror to be the judge of his qualifications instead of requiring the court to pass upon them as questions of fact.

Counsel for plaintiff further refer to Thompson on Trials, section 115, where the doctrine is laid down as follows: "The sound and prevailing view is that a party cannot, on error or appeal, complain of a ruling of a trial court in overruling his challenge for cause, if it appear that, when the jury is completed, his peremptory challenges were not exhausted; since he might have excluded the obnoxious juror by a peremptory challenge, and therefore the error is to be deemed error without injury. For the same reason, if a court erroneously overrules a challenge for cause, and thereafter the challenging party excludes the obnoxious juror by a peremptory challenge, he cannot assign the ruling of the court for error, unless it appear that, before the jury was sworn, his quiver of peremptory challenges was exhausted; in which case there is room for the inference that the erroneous ruling of the court may have resulted in leaving upon the panel other obnoxious jurors whom the party might, but for the ruling, have excluded by peremptory challenge. Some courts, therefore, hold that it is enough, in such a juncture, to show that his peremptory challenges were exhausted before the jury was sworn. But others take what seems the better view, that it must also appear, not only that his peremptory challenges were exhausted, but that some objectionable person took his place on the jury, who otherwise would have been excluded by a peremptory challenge."

Counsel for plaintiff cite cases which hold that even where the trial court erred in overruling a challenge for cause it must affirmatively appear by the record that the party had

exhausted his peremptory challenges in order to successfully challenge the ruling of the court.

This doctrine is manifestly pregnant with difficulty, and would necessitate an extensive collateral inquiry precedent to the regular proceedings in a case, in order that it might appear that the aggrieved party had or had not exhausted his peremptory challenges, or had not been driven to the necessity of using some of his peremptory challenges to get rid of the alleged prejudiced juror, whom he had challenged for cause, and thereby been deprived of the opportunity of getting rid of other objectionable jurors, though less objectionable than the juror challenged for cause. Such a ruling imposes a burden upon the party aggrieved, which he ought not to be compelled to bear, and reverses the theory of our system of jurisprudence that error is prejudicial unless the party in whose favor the error is committed, shows that it was harmless error. The rule stated by Thompson on Trials reverses this practice and imposes upon the party who points out and assigns the error, the further burden of showing affirmatively that he was prejudiced by the error. Under our statute each party is absolutely entitled to three peremptory challenges. The statute also gives parties litigant the right to challenge a juror for cause. If error appears in the ruling of the court on a challenge for cause that question should be decided wholly independent of any consideration of whether the party litigant had or had not exhausted his peremptory challenges. In other words, the statute provides for two classes of challenges, one for cause and the other peremptorily without assigning any cause. And in the determination of the question of the propriety of the ruling upon a challenge for cause, it is improper to mix with it a consideration of the question as to whether or not the complaining party had exhausted his peremptory challenges.

* * * * *

The conclusion is irresistible that the trial court should have sustained the challenge for cause.

* * * * *

For the foregoing reasons the judgment of the circuit court is reversed.

STATE v. DAVIS.

Take / 00

Supreme Court of Appeals of West Virginia. 1888.

31 West Virginia, 390.

JOHNSON, President:

On the 20th day of February, 1888, William Davis was, in the Circuit Court of Ritchie county, indicted for maliciously, etc., stabbing one Creed Wilson, with intent to maim, disfigure, disable, and kill him. The prisoner moved to quash the indictment, which motion was overruled, and the prisoner pleaded not guilty. The jury was sworn on the 24th day of February to try the issue. It appears from an order entered on the next day that "it appearing to the court that Peter G. Six, a juror, is unable to perform his duty, George W. Hammer, a qualified juror, was selected, tried, and sworn in his place," etc. The prisoner objected to the swearing of a new juror, which objection was overruled. * * *

The prisoner moved the court to discharge him, because he had not been tried before a proper jury. He also moved in arrest of judgment, and also for a new trial; which several motions were respectively overruled, and the court pronounced judgment on the verdict, and sentenced the prisoner to confinement in the penitentiary for the term of two years.

* * * * *

Upshur, Judge, in delivering the opinion of the court in *Fell's Case*, 9 Leigh 617, said, after reviewing a number of English and American cases: "One general rule is deducible from all the cases, which is that the court may discharge the jury whenever a necessity for so doing shall arise, but what facts and circumstances shall be considered as constituting such a necessity can not be reduced to any general rule. The power to discharge is a discretionary power, which the court, as in all other cases of judicial discretion, must exercise soundly according to the circumstances of the case. The object of the law is to obtain a fair and just verdict, and, whenever it shall appear to the court that the jury impaneled can not render such a verdict, it ought to be discharged and another jury impaneled. This is emphatically the case of necessity contemplated in the authorities we have referred to; as where the prisoner became too sick to attend to his defense or

one of the jury was rendered physically unable to discharge his duty. There are other cases of necessity equally strong, one of which probably is where a juror, from the peculiar condition of his mind and feelings, is manifestly disqualified from bestowing upon the case that attention and impartial consideration which is necessary to a just verdict. * * * The actual sickness of a juror, and his consequent inability to discharge his duty, is admitted on all hands to present such a necessity. In the case before us, the juror was not actually sick, but there was every reason to believe he would become so through longer confinement. Was the court bound to wait till the case actually occurred? We think not. * * * A necessity not less strong was presented by the situation of the wife of another juror. If the object of the trial be, as it undoubtedly is, to obtain a fair, just and impartial verdict, there can be but little prospect of such a result from the constrained and reluctant action of minds wholly absorbed in the deep and peculiar interest of their domestic relations." It was held that it would be improper, under such circumstances, to discharge the prisoner.

* * * * *

Here it appears from the record that the juror, Six, was informed that his son had just died. It would, indeed, be a stout-hearted father who could, unmoved, receive news of the death of a child. Some men could receive such news and proceed with their work with steady nerve and mind clear and strong; but observation teaches us, if, indeed, we have not learned from sad experience, that the natural result of information, suddenly imparted to a father, of the death of a child, is to unfit him, for the time, to attend to business. It would have been cruel to have required the juror to remain on the jury under such circumstances. His grief would naturally unfit him for the discharge of such an important duty. And if, as the court said in *Fell's* case, the object of the trial is to obtain a fair, just and impartial verdict, there could be little prospect of it under such circumstances. * * *

* * * * *

The statute says—and it is in perfect accord with the principles of the common law—that if a juror, after he is sworn, be unable from any cause to perform his duty, the court may, in its discretion, cause another qualified juror to be sworn in his place. Code, ch. 159, sec. 7. * * *

* * * * *

Both on principle and authority, the court, in this case, did not err in discharging the juror Six, for the reason shown by the record, because a manifest necessity existed therefor. Neither did the court err in ordering the trial to proceed with the jury as constituted after the substitution of the juror Hammer for Six, as he had his legal challenge to the original jurors and to the substituted juror. Every right guaranteed to him by the constitution was granted him. * * *

* * * The prisoner was not prejudiced by the fact that the juror Hammer had not heard everything that the other jurors heard. When the substituted juror was sworn, the trial commenced *de novo*. Then the prosecuting attorney introduced the evidence just as if the jury was entirely different from what it was before, and the defense, of course, had the right to bring forward all the evidence it could. We can not perceive how the prisoner was prejudiced by this. Certainly, nothing appears in the record to his prejudice in this respect. The court did not, therefore, err in refusing to exclude the evidence of the State.

* * * * *

There is no error in the judgment of the Circuit Court and it is affirmed.

*Affirmed.*⁵⁸⁴

⁵⁸⁴ In some states alternate jurors may be sworn, who hear the case with the 12 and are ready to take the places of any of the 12 who for any reason drop out during the trial. Thus, in California, Penal Code, Sec. 1089, in cases of felony, the judge may impanel two additional jurors as substitutes, if he believes the trial is likely to be a protracted one.

SECTION 3. RIGHT TO OPEN AND CLOSE.

191
JOHNSON v. JOSEPHS.
Supreme Judicial Court of Maine. 1884.

75 Maine, 544.

Trespass in which the plaintiff claimed damages in the sum of two thousand dollars for an alleged assault and battery by the defendant upon the person of the plaintiff.

The pleadings and the question presented to the law court are stated in the opinion.

* * * * *

PETERS, C. J. Plaintiff sued for an assault and battery. Defendant pleaded "*son assault demesne*," and plaintiff replied "*de injuria*." Under these pleadings the defendant, against the plaintiff's protest, was allowed by the court "to open and close." This was contrary to what we regard as the well settled practice in this state. The rule of practice and of law in this state, is that, when a plaintiff has to prove *anything* to make out a full and perfect case, he is entitled to open and close. The test is, whether he need put in any proof of any part of his claim. In this case, the burden fell upon him to prove the extent of the damages sustained. It is a case of unliquidated damages, and not a case of nominal damages, or of damages to be assessed by computation merely.

The plaintiff certainly had something to prove. The counsel for the defendant contends that the defendant's plea confessed everything alleged against him. We think not. It did not admit more than a general demurrer or a default would admit, and that would be nominal damages only. *Hanley v. Sutherland*, 74 Maine, 212, and cases cited. The plea of "*son assault demesne*" is but a qualified admission of the injury alleged. The point may be tested in this way: Suppose that, after the pleadings were completed the defendant had rested without any proof whatever. Judgment would go for the plaintiff, no doubt. But for how much? Would the court order judgment for the sum of one thousand dollars, the amount of damages which the plaintiff alleges, or would the plaintiff be required to prove the damages? Can it be, that a plea of *son assault demesne* admits any amount of damages which a

plaintiff inserts in the *ad damnum* of his writ? If so, a plaintiff may prevent the plea in many cases by alleging exaggerated damages.

* * * To take the lead, a defendant "must admit all the facts necessary to be proved by the plaintiff," and not merely a *prima facie* case. *Spaulding v. Hood*, 8 Cush. 602. "When anything is left for the plaintiff to show, he has the right to begin and close." *Thurston v. Kennett*, 2 Foster, N. H. 151; *Belknap v. Wendell*, 1 Foster, N. H. 175. The latest authorities sustain the plaintiff's view upon this question. * * *

*Exceptions sustained.*⁵⁹

⁵⁹ *Rule the same as to Evidence and Argument.* "The general rule is that the order of argument follows the burden of proof; and whoever opens the case with the evidence, if he has a right to so open, has the same right in the argument:" *Abel v. Jarrett*, (1897) 100 Ga. 732, 28 S. E. 453. To the same effect:—*D. M. Osborne & Co. v. Kline*, (1885) 18 Nebr. 344, 25 N. W. 360; *O'Connor v. Henderson Bridge Co.*, (1894) 95 Ky. 633, 27 S. W. 251; *Lowe v. Lowe*, (1875) 40 Ia. 220; *Palmer v. Adams*, (1893) 137 Ind. 72, 36 N. E. 695.

Discretionary or of right. In some jurisdictions the opening and closing is held to be a matter resting in the discretion of the court. *Woodward v. Insurance Co.*, (1899) 104 Tenn. 49, 56 S. W. 1020; *Smith v. Frazier*, (1866) 53 Pa. St. 226; *Young v. Newark Fire Ins. Co.*, (1890) 59 Conn. 41, 22 Atl. 32. But in the great majority of jurisdictions it is deemed a matter of right.

In Michigan, where the defendant is obliged in all cases to file a general issue, he may obtain the opening and closing under Circuit Court Rule 24 (c) by expressly waiving the benefit of the general issue and admitting the facts alleged in the plaintiff's declaration, this being done by a special notice accompanying the general issue.

In *Sorensen v. Sorensen*, (1903) 68 Neb. 483, 493, it was held that in proceedings *in rem*, where each party must rely on the strength of his own case, and not on the weakness of the opposition, and where, therefore, both parties may fail for lack of evidence, the ordinary rule does not apply, and the court should, as in cases of interpleader, determine the opening and closing in its sound discretion.

102 LAKE ONTARIO NATIONAL BANK v. JUDSON.

Court of Appeals of New York. 1890.

122 New York, 278.

[This action may be considered as brought on two counts, (1) on a promissory note, (2) on an overdraft. The defend-

ant filed an answer in three divisions, (1) failure of consideration for the note, with admission of the facts alleged in the first count, (2) denial of all facts in the complaint except as admitted, (3) a counterclaim.]

BRADLEY, J. * * * Upon the trial the question as to which party was entitled to the closing argument was raised; the court held that the plaintiff had the right to it, and the defendant excepted. The rule that the party having the affirmative of the issue in an action shall have the opportunity to make the opening and closing presentation of his case is deemed founded upon a substantial right, the denial of which is error. (*Conselyea v. Swift*, 103 N. Y. 604.) In its application to trials by jury it has ordinarily more practical importance than in those before the court without a jury and before referees. If it appears that a party could not have been prejudiced by the failure of the court to observe this rule, the error would not be available, and in trials by the court without jury or before referees that question would be dependent upon the circumstances of each case. In the present case the view of the court evidently was that the affirmative of the entire issue was not with the defendant, and that is the question presented for consideration. The denial by the defendant in his answer, except as therein admitted, of each and every allegation of the complaint, put in issue every material allegation of the complaint not distinctly admitted by the answer. (*Allis v. Leonard*, 46 N. Y. 688; 22 Alb. L. J. 28; *Calhoun v. Hallen*, 25 Hun, 155.) The charge in the complaint, in due form, of the indebtedness of the defendant to the plaintiff for the amount advanced to him upon his check in excess of the balance of his account with the plaintiff, was not admitted by the answer, but was controverted by such denial. It appears that after the trial had been moved and the plaintiff, by its counsel had, by statement of it, made the opening of the case to the court, the defendant orally admitted the count of the complaint alleging the overdraft. * * * The question arises whether the oral admission at the trial of the plaintiff's claim for the amount of the defendant's overdraft, entitled him to the right of closing the argument on the final submission of the case to the court for determination. And that depends upon the question whether the affirmative of the issue, with a view to such a right, must be ascertained from the pleadings, or may arise from admissions

orally made at the trial. The issues to be tried can be ascertained only by reference to the pleadings, and they must govern so far as relates to the right of the parties to open the case at the beginning and conclude the argument at the close of the trial. When the parties go to trial they respectively assume the burden of establishing that which they have affirmatively alleged as a cause of action or counter-claim, if it is controverted by allegation sufficient to put it in issue. The admission of a fact upon the trial is evidence merely. It may obviate the necessity of further trial of the issue to which it relates, but does not change it as represented by the pleadings. That can be done by amendment only. It is true that the admission made at the trial may reduce the controversy to matter as to which the affirmative is with the defendant. Such would be the effect of evidence of any character, undisputed and indisputable of the facts constituting the alleged cause of action. The right under consideration does not depend simply upon the admission of those facts, unless they are admitted or uncontroverted by the answer; otherwise it is evidence only. There is no occasion to extend the rule so as to give effect for such purpose, to concessions at the trial. This might lead to the adoption of such a course when further dispute of the facts upon which a plaintiff relies may appear hopeless to a defendant, for the purpose of obtaining the right of closing the trial. There is no apparent reason for applying such rule to any one more than to any other stage of the trial. The defendant who may wish to take the right of opening and concluding the trial, must frame his pleading with that view, and so as to present no issue upon any allegation of the complaint essential to the plaintiff's alleged cause of action. If the defendant fail to do that, no matter how little proof the remaining issue may require, or how easily, or in what manner it may be established by evidence, the right of the plaintiff to open and close the case is not denied to him. (*Mercer v. Whall*, 5 Ad. & El. [N. S.] 447.) The test is, whether without any proof, the plaintiff, upon the pleadings, is entitled to recover upon all the causes of action alleged in his complaint. If he is, and the defendant alleges any counter-claim, controverted by the plaintiff's pleading or any affirmative matter of defense in avoidance of the plaintiff's alleged cause of action, and which is the subject of trial, the defendant has the right to open and close, other-

wise not. * * * If the defendant, by permission of the court, had stricken out the denial in his answer, or amended it by inserting the admission orally made, a different question would have been presented at the trial upon the claim of the defendant to the right to conclude it.

No other question requires the expression of consideration. The judgment should be affirmed.

All concur except FOLLETT, Ch. J., not sitting.

*Judgment affirmed.*⁶⁰

⁶⁰ It is the substance, not the form of the issue which determines the right,—Huntington v. Conkey, (1860) 33 Barb. (N. Y.) 218, 228. Thus one cannot obtain the right to open and close by anticipating defenses,—Bush v. Wathen, (1898) 104 Ky. 548; nor by undertaking to assume the burden of proving denials,—Sorensen v. Sorensen, (1903) 68 Neb. 483, 488.

There is some authority for the rule that admissions made at the trial will determine the right to open and close. See Abel v. Jarrett, (1897) 100 Ga. 732, 28 S. E. 453.

Statutory Modification of Rule. The practice is sometimes governed by statute. Thus, in Schoonover v. Osborne, (1902) 117 Iowa, 427, 90 N. W. 844, it was held that under code § 3701, the right to open and close the argument is to be determined by the evidence, and not by the pleadings.

SECTION 4. OPENING STATEMENT OF COUNSEL.

103
Jake SCRIPPS v. REILLY.
Supreme Court of Michigan. 1877.

35 Michigan, 371.

GRAVES, J. Defendant in error recovered judgment in the superior court of Detroit in an action for libel, and plaintiff in error complains of various proceedings at the trial.

Defendant in error was a lawyer in practice in Detroit. He was a single man. In the spring of 1875 he was elected circuit judge of Wayne county, and in the fall thereafter was appointed to fill a vacancy caused by the resignation of Judge Patchin.

In 1873 plaintiff in error began publishing the newspaper called the "Evening News," and has continued the publication since that time. In 1875 the paper had a large daily circula-

tion and the news items of each issue averaged some two hundred. The parties were not personally acquainted, but the paper opposed the election of defendant in error and supported another gentleman, and during the canvass some intemperate articles were published. Some time in the fall after the election one Robbins filed a bill in the superior court to obtain a divorce from his wife, and among other charges in the bill against her, alleged that she had been guilty of adultery with defendant in error.

Almost immediately after this bill was placed on file, a reporter and gatherer of local news for the paper got access to the bill, and with the help of the city editor prepared an article covering this charge in Robbins' bill, and caused it to be published in the paper. This occurred on the 7th of December. This article is the libel complained of. The action was commenced the next day. * * *

The first in the order of proceeding at the trial seems naturally to call for attention first.

It relates to the course the counsel for defendant in error was permitted to pursue, against repeated objections, in opening the case to the court and jury.

He declared it to be his purpose, as part of his opening, to read at length before the jury a series of articles published in the newspaper during the course of several months and commencing in the spring of 1875 and running until some time after the appearance of the publication in suit.

And the first group suggested consisted of articles from the 19th of March to the 6th of December, and none of which referred to defendant in error. The reading of them was objected to on the ground that neither of them would be relevant or competent if regularly offered as evidence under the issue. Counsel for defendant in error then stated that he proposed to read such articles as in good faith he should offer in evidence, and he would read them because he could not remember their contents. The court thereupon ruled that he might read in his opening such articles as he claimed to be libelous, and which had been afterwards retracted.

About twenty articles, not relating to defendant in error, and running through the period before indicated, were then read to the jury as part of the opening. An exception was taken to each. They were calculated from their character to influence the minds of the jurors against plaintiff in error.

The counsel for defendant in error then offered to read at length, as part of his opening, a series of articles published the spring before the publication charged as libelous, concerning the defendant in error when running for the office of circuit judge.

This was objected to on the ground that the articles did not tend to show actual malice, and would not be competent if offered as evidence. Counsel for defendant in error then explained that he did not propose to then read them as evidence to show malice, but to read such as he expected to offer and prove afterwards, and such as when put in evidence would tend to show malice towards defendant in error. The court overruled the objection and allowed counsel to read as he proposed. He then read, as part of his opening to the jury, five articles he claimed tended to show actual malice by plaintiff in error against defendant in error. They bore date March 12th, March 22nd, March 29th, March 31st, and April 3rd, 1875.

The counsel for defendant in error then proposed to read at length, as part of his opening and not as evidence, another series of articles published after the libel.

This was objected to on the ground that the articles would not be competent or admissible if offered as evidence. They all referred to the alleged libelous article and the legal proceedings growing out of it.

The objection was overruled. * * * The opening statement having been allowed to embrace the reading in full of all these publications, and having been brought to a close, the counsel for defendant in error proceeded to offer evidence. None had yet been received, and although the plaintiff in error had not been able to prevent the reading of the publications to the jury he was still not able to meet them as evidence, for any purpose or in any way.

They were lodged in the jurors' minds as matters in the cause they were entitled to receive, but not through the channel the law has made for the conveyance of evidence, or at the stage of proceeding proper for submitting evidence. They were matters which could not fail, when so presented, to prepossess the jury unfavorably against the plaintiff in error. Confining attention now to this branch of the case, it appears from the record, that of the series of publications not relating to defendant in error, and permitted to be read

at length in the opening statement, on the pledge that they would be afterwards offered in good faith as evidence, five were not even offered as evidence at all at any stage of the trial, and as to one other the record is contradictory; some ten or a dozen or more, the record being ambiguous as to a few, were not offered except upon the rebutting case, and were then rejected by the court; and the residue of this list, being five or six, were reserved until the plaintiff in error had rested his defense, and were then offered and admitted as rebutting evidence.

Of the series published in the spring of 1875, concerning the candidacy of defendant in error as circuit judge, and which were read at length in the opening, on the avowal of counsel's belief that they intended to show actual malice by plaintiff in error against defendant in error, and would be offered in evidence for that purpose, not one was offered during the making out the case in chief. They were held back until the plaintiff in error had rested, and were then tendered as rebutting evidence. All were excluded. There were five in this group.

Of the set published after the appearance of the alleged libel, five were given in evidence by the defendant in error to show actual malice, and they were so given, but against objection, as part of his case in chief. * * *

When the judge came to charge the jury, he referred to the course which he had permitted in respect to the opening statement, and observed, "Mr. Griffin in his opening read several articles which at the trial were finally excluded. These should also be withdrawn from your consideration and laid out of view in your deliberations upon the case."

No further reference was made to the subject of the opening statement, and no caution whatever was given concerning the articles which had been read at length by permission of the court against objection, but which had not even been offered in evidence at all.

The question is, whether the practice which was here allowed in the opening address was correct, and if not, whether the advice quoted from the charge cured the error, and in case it did not, then whether it is competent for this court to revise the proceedings.

The trial judge must always have a very large discretion in controlling and managing the routine proceedings at the

trial, and it is not necessary to specify the matter to which such discretion extends. .It applies beyond doubt to the addresses of counsel as well as to other incidents. But it must be a reasonable, a legal discretion, and whether it be so or not must depend upon the nature of the proceeding on which it is exercised, the way it is exercised and the special circumstances under which it is exercised. * * *

The text books in this country which deal with the subject are distinctly agreed concerning the end and scope of this opening address. They all represent it as a proceeding prefatory to putting in evidence, and as one practically necessary to make an advance exhibit of the legal nature of the controversy and its salient peculiarities, and enable the judge, jury and opposing counsel to apprehend the necessities of the plaintiff's case and correctly understand the drift and bearing of each step and each offer of proof as it shall occur subsequently. And considering that its office is to afford preliminary explanation, that it is to precede proofs and precede controversy before the jury, and is not to embody or convey proof or prepossess the jury, they unite in substantially denying the right to make use of it to get before the jury a detail of the testimony expected to be offered, and especially any not positively entitled to be introduced, and deny the right to use it as a cover for any topics not fairly pertinent. A brief summary or outline of the substance of the evidence intended to be offered, with requisite clear and concise explanations, are considered proper. But a relation of expected oral testimony at length, or a reading of expected documentary proofs at large, or any other course fitted to mislead the triers, should not be tolerated. Of course there may be cases and instances where a statement of the evidence itself, or a reading of a paper, may be convenient and harmless. Such, however, must be exceptional, and not within the spirit of the general requirement. * * *

The practice pursued was wrong, and the error was not cured or materially alleviated by the charge. * * * It is quite impossible to conclude that the jurors had not been influenced too far by the erroneous rulings and proceedings, to be brought into the same impartial attitude by the court's admonition, which they would have held if the counsel for defendant in error had been properly confined in his opening statement. The course of fair and settled practice was vio-

lated to the prejudice of plaintiff in error, and it is not a satisfactory answer to say that the court went as far as practicable afterwards to cure the mischief so long as an inference remains that the remedy applied by the court was not adequate. * * *

The judgment must be reversed with costs and a new trial ordered.

104 FOSDICK v. VAN ARSDALE.

Supreme Court of Michigan. 1889.

74 Michigan, 302.

MORSE, J. * * *

The record shows that, after the primary case of the plaintiff was closed,—

“V. H. Lockwood proceeded to state the defendants’ case to the jury, and during the opening proceeded to state the law governing the defendants’ case, and upon which the defense was based; whereupon the counsel for the plaintiff interposed an objection, and the said court sustained the objection, stating that the law would come from the court in due time.”

This is made the first assignment of error in defendants’ brief.

We are not able, from this meager statement in the record, to know whether error was committed or not by this action of the circuit judge. But counsel have the right in stating their case to the jury at the opening to briefly set forth what points of the law they rely upon, and the nature of the testimony they propose to introduce to support such points. It is true the law is to be given by the court; but, as it is not given in most cases until the testimony is ended, and the counsel have summed the same up in support of their case before the jury, the counsel have the right, both in opening the case to the jury, before the testimony to support their case is offered, and when closing the argument, after the testimony is in, to state to the jury that they claim the law to be thus and so, and that they shall request the court to so instruct them, and

that they will adduce such and such testimony to support their claim under the law in the first instance, or at the close to state that the evidence in the case, under the law as they shall claim it to be, establishes their right to a verdict at the hands of the jury. The counsel have no right to read law to the jury, or to usurp the province of the court in any way in this respect, but they have the undoubted right to state so much of the law, as they claim it to be, as may enable them to lay before the jury an intelligent idea of the force, effect, and bearing of the testimony upon their case, either before or after said testimony is in the case.

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⁶¹ *Contra*: San Miguel Con. Gold Min. Co. v. Bonner, (1905) 33 Colo. 207.

105-20
John
OSCANYAN v. ARMS COMPANY.
Supreme Court of the United States. 1880.

103 United States, 261.

FIELD, J. This is an action to recover the sum of \$136,000, alleged to be due to the plaintiff upon a contract with the defendant, as commissions on the sales of fire-arms to the Turkish government, effected through his influence. The defendant pleads the general issue. At the time the transactions occurred, out of which this action has arisen, the plaintiff was consul-general of the Ottoman government at the port of New York. The defendant is a corporation, created under the laws of Connecticut. The action was originally commenced in the Supreme Court of New York, and on motion of the defendant, was removed to the Circuit Court of the United States. When it was called for trial, and the jury was impanelled, one of the plaintiff's counsel, as preliminary to the introduction of testimony, stated to the court and jury the issues in the case, and the facts which they proposed to prove. From such statement it appeared that the sales for which commissions were claimed by the plaintiff were made whilst he was an officer of the Turkish government, and through the influence which he exerted upon its

agent sent to this country to examine and report in regard to the purchase of arms. * * * It is sufficient now to say that the defendant, considering that the facts which the plaintiff proposed to prove showed that the contract was void as being corrupt in itself and prohibited by morality and public policy, upon which no recovery could be had, moved the court to direct the jury to render a verdict in its favor. The court thereupon inquired of the plaintiff's counsel if they claimed or admitted that the statements which had been made were true, to which they replied in the affirmative. Argument was then had upon the motion, after which the court directed the jury to find a verdict for the defendant, which was accordingly done. Judgment being entered upon it, the case was brought to this court for review. The reversal of the judgment is sought for alleged errors of the court below in three particulars:

* * * * *

1. Several reasons are presented against the power of the court to direct a verdict upon the statement of the facts which the plaintiff proposed to prove, that might be more properly urged against its exercise in particular cases. The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced. The question in either case must be whether the facts upon which it is called to instruct the jury be clearly established. If a doubt exists as to the statement of counsel, the court will withhold its directions, as where the evidence is conflicting, and leave the matter to the determination of the jury.

In the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof. And if in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion, or that of counsel, act upon it and close the case. If, on a trial for a homicide, to take an illustration suggested by counsel, it should appear from the opening state-

ment that the accused had been pardoned for the offense charged, it would be a waste of time to listen to the evidence of his original criminality; for if established he would still be entitled to his discharge by force of the pardon. So, in a civil action, if it should appear from the opening statement that it is brought to obtain compensation for acts which the law denounces as corrupt and immoral, or declares to be criminal, such as attempts to bribe a public officer, or to evade the revenue laws, or to embezzle the public funds, the court would not hesitate to close the case without delay. Of course, in all such proceedings nothing should be taken, without full consideration, against the party making the statement or admission. He should be allowed to explain and qualify it, so far as the truth will permit; but if, with such explanation and qualification, it should clearly appear that there could be no recovery, the court should not hesitate to so declare and give such direction as will dispose of the action.

Here there were no unguarded expressions used, nor any ambiguous statements made. The opening counsel was fully apprised of all the facts out of which his client's claim originated, and seldom was a case opened with greater fullness of detail. He dwelt upon and reiterated the statement of the fact which constituted the ground of the court's action in directing a verdict for the defendant, namely, that it was Oscanyan's influence alone which controlled the agent of the Turkish government; and for the use of that influence the defendant had agreed to give the compensation demanded,—that is to say, that whilst an officer of the Turkish government the plaintiff had stipulated for a commission on contracts obtained from it through his personal influence over its agent. Had the case been pending in a court of some of the States, or in an English court, a nonsuit would have been ordered, if the facts stated had been deemed fatal to the action. Involuntary nonsuits not being allowed in the Federal courts, the course adopted was the proper proceeding. The difference in the two modes is rather a matter of form than of substance, except in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted either upon motion or upon appeal.

* * * * *

Our conclusion, therefore, is that the first position of the plaintiff is not well taken.

REDDING v. PUGET SOUND IRON & STEEL WORKS.

106
Joke*Supreme Court of Washington. 1905.**36 Washington, 642.*

RUDKIN, J.—This was an action brought by the widow and minor children to recover damages for the death of the husband and father, caused by the wrongful act of the defendant. After the jury was impaneled to try the cause in the court below, the attorney representing the plaintiff made the opening statement of his case to the jury. Upon this statement the defendant moved the court to withdraw the case from the consideration of the jury, and to direct a judgment for the defendant. At the suggestion of the court, the motion was so amended as to include the pleadings, and, as thus amended, the motion was granted, the jury discharged, and a final judgment entered in favor of the defendant. The plaintiff appealed.

No reason is assigned in support of a judgment on the pleadings except that the complaint is defective and does not state facts sufficient to constitute a cause of action. The judgment rendered was a final judgment on the merits, and if warranted at all, must find its support in the opening statement of counsel, and not in some defect in the complaint. The complaint alone, however deficient, would not justify or sustain a judgment on the merits such as was rendered by the court below. For this reason we will not consider or pass upon the sufficiency of the complaint, as the same may be amended after the case is remanded. It is unnecessary to set forth the opening statement of counsel in full. We deem it sufficient to say that the statement was most general in its character, and fell far short of stating facts sufficient to warrant a recovery against the respondent. Nothing was stated affirmatively, however, that would constitute a defense to the action or bar a recovery. When, then, is a court justified in taking a case from the jury and directing a judgment on the opening statement of counsel? That a party to an action is bound by admissions made by his attorney in the opening statement of his case, or at any stage of the trial, and that the court may act upon such admissions and direct a judgment in accord-

ance therewith in a proper case is not disputed or denied. This is all that was decided in *Lindley v. Atchison, etc. R. Co.*, 47 Kan. 432, 28 Pac. 201, and *Johnson v. Spokane*, 29 Wash. 730, 70 Pac. 122. In neither case was the opening statement upon which the trial court acted brought before the appellate court. *Oscanyan v. Arms Co.*, 103 U. S. 261, was an action on contract. It appeared from the opening statement of counsel that the contract in suit was against public policy and void, and the supreme court of the United States held that upon such a statement the circuit court properly directed a verdict for the defendant. So, in any case, if it affirmatively appears from the opening statement of counsel that the contract in suit is void, or if facts are admitted which constitute a full and complete defense to the action, it would be idle for the court to proceed further with the trial.

But such is not the case here. Counsel stated too little, not too much. The court directed a judgment, not because the appellant was admitted out of court, but because the opening statement did not state facts sufficient to constitute a cause of action. Counsel may state their case as briefly or as generally as they see fit, and it is only when such statement shows affirmatively that there is no cause of action, or that there is a full and complete defense thereto, or when it is expressly admitted that the facts stated are the only facts which the party expects or intends to prove, that the court is warranted in acting upon it. The opening statement now before the court contained no admissions which would constitute a defense or defeat the action, and the omission of counsel to state the case more fully is no justification for the action of the court below in withdrawing the case from the jury.

The judgment is therefore reversed, and the cause remanded for new trial.⁶²

⁶² In *Jordan v. Reed*, (1908) 77 N. J. L. 584, 71 Atl. 280, it was held that to authorize a non-suit "the statement of counsel, by its omissions or admissions, must render it clearly evident either that no case can be made out or that a recovery is precluded."

In *Kelly v. Bergen County Gas Co.*, (1906) 74 N. J. L. 604, 67 Atl. 21, the court stated that "if objection be made to a statement too meagre to sustain the plaintiff's case, counsel will, doubtless, be permitted to enlarge his statement."

In *Hoffman House v. Foote*, (1902) 172 N. Y. 348, 65 N. E. 169, the

court said: "The practice of disposing of cases upon the mere opening of counsel is generally a very unsafe method of deciding controversies, where there is or ever was anything to decide. It cannot be resorted to in many cases with justice to the parties, unless counsel stating the case to the jury deliberately and intentionally states or admits some fact that, in any view of the case, is fatal to the action."

In *Farnham v. Lenox Motor Car Co.*, (1918) 229 Mass. 478, 482, the court said:—

"Doubtless it would be within the province of the court under the rule to require the parties to state the substance of the evidence which each expected to offer at the trial, and to ascertain whether there was upon such statement any disputed question of fact or any fact to be found either directly or by inference; and also in appropriate instances to frame questions, answers to which would settle such disputed fact or facts. Of course great care must be exercised in the use of this power and the fullest opportunity given to parties to make a complete statement with the knowledge that it is to be made the basis of a ruling of law upon the rights of the parties. But there is no fundamental objection to a ruling of law made upon a fair statement of what the evidence is expected to be. In reason there is no distinction between a rule of this nature and the well-recognized practice of this court in appropriate cases of permitting a ruling to be made on the footing that on the opening statement of counsel to the jury no case is shown in law. *Hey v. Prime*, 197 Mass. 474, 84 N. E. 141, 17 L. R. A. (N. S.) 570; *Lee v. Blodget*, 214 Mass. 374, 377, 102 N. E. 67. This rule prevails generally. *Oscanyan v. Arms Co.*, 103 U. S. 261, 263, 264, 26 L. Ed. 539; *Butler v. National Home for Soldiers*, 144 U. S. 64, 12 Sup. Ct. 581, 36 L. Ed. 346; *Carr v. Delaware, Lackawanna & Western Railroad*, 78 N. J. Law, 692, 75 Atl. 928; *Jordan v. Reed*, 77 N. J. Law, 584, 71 Atl. 280; *Barto v. Detroit Iron & Steel Co.*, 155 Mich. 94, 118 N. W. 738; *Hoffman House v. Foote*, 172 N. Y. 348, 65 N. E. 169; *Hutton v. Stewart*, 90 Kan. 602, 135 Pac. 681; *Cornell v. Morrison*, 87 Ohio St. 215, 100 N. E. 817; *St. Paul Motor Vehicle Co. v. Johnston*, 127 Minn. 443, 149 N. W. 667. See also *Lane v. Portland Railway, Light & Power Co.*, 58 Or. 364, 114 Pac. 940; *James v. Pearson*, 64 Wash. 263, 116 Pac. 852. But it is not the rule in England and some of the states. *Fletcher v. London & North Western Railway Co.*, [1892] 1 Q. B. 122; *Pietsch v. Pietsch*, 245 Ill. 454, 458, 92 N. E. 325, 29 L. R. A. (N. S.) 218; *Haley v. Western Transit Co.*, 76 Wis. 344, 45 N. W. 16; *Sullivan v. Williamson*, 21 Okl. 844, 98 Pac. 1001."

107 SECTION 5. CONDUCT OF COUNSEL.

MCCARTHY v. SPRING VALLEY COAL CO.

omit Supreme Court of Illinois. 1908.

232 Illinois, 473.

This is an action on the case in the circuit court of Bureau county to recover damages for personal injury sustained in the appellant's coal mine. * * *

DUNN, J.—* * *

* * * * *

Complaint is made of the conduct of counsel for the appellee in the course of the trial. The counsel who made the opening statement to the jury began: "In this case Patrick McCarthy, thirty-three years of age, with a wife and five children," when he was interrupted with an objection, which the court sustained. * * *

The statement to the jury that the appellee had a wife and five children was manifestly improper. Its only object could have been to enhance the damages by getting before the jury, in this improper and unprofessional manner, facts calculated to arouse their sympathy, which counsel knew could not in any legitimate way be brought to their attention. To admit evidence of such facts is error. (*Jones & Adams Co. v. George*, 227 Ill. 64.) The fact once lodged in the minds of the jury could not be erased by an instruction, and appellee by his statement secured the benefit of the fact to the same extent as if he had introduced evidence to prove it.

* * * * *

The Appellate Court required a *remittitur* of \$2000 from the judgment as the alternative of a reversal on account of the effect on the minds of the jury of the improper statement in regard to appellee's wife and children. Such *remittitur* does not, however, cure the error. (*Jones & Adams Co. v. George*, *supra*.) It is impossible to tell the effect, on the verdict, of the impressions wrongfully conveyed to the jury's mind by the improper conduct of counsel.

See State v. Miller, Ad. Sheet 7-635

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admission)

The judgment will be reversed and the cause remanded for a new trial.

Reversed and remanded.

108 WAGONER v. HAZLE TOWNSHIP.

Supreme Court of Pennsylvania. 1906.

215 Pennsylvania State, 219.

MESTREZAT, J.—The proximate cause of Mrs. Wagoner's injuries was the hole or opening in the bridge, and if the jury found, as they did, that the hole was caused by the negligence of the defendant township, its liability necessarily followed.

* * * * *

The question of Mrs. Wagoner's contributory negligence was for the jury. The facts were not undisputed. The plaintiffs claim that after the wheel of the wagon had gone into the opening in the bridge she attempted to alight from the wagon, and was in the act of doing so at the time it was struck by the car of the Lehigh Traction Company, and that her conduct in no way contributed to her injuries. What she did on that occasion, and whether she acted with the prudence required of her, were for the jury.

Prior to the present action the plaintiffs brought suit against the Lehigh Traction Company to recover damages for the same injuries, and obtained a verdict of \$6,000. The case, on appeal, was heard by this court last year, and the judgment was reversed and a new trial was awarded. On the trial of the present action the counsel for the plaintiff in the presence of the jury and where they could distinctly hear it, made the following offer: "We now offer in evidence the record in that case, for the purpose of showing that the jury gave the plaintiff a verdict of six thousand dollars, and that the case was appealed to the Supreme Court and that the Supreme Court reversed the judgment of the court below, practically saying that it was not responsible, but that the township was bound to keep its own road in repair." Thereupon the defendant's counsel said:

"We object and move that a juror be withdrawn, because of the statement made by the attorney for the plaintiff, in full voice before the jury, as to the amount of the other verdict." The court declined to withdraw a juror and the defendant excepted to the ruling. We think the court committed error for which the judgment must be reversed.

The offer was clearly incompetent, and the only purpose it could serve, or effect it could have, would be to place before the jury the amount of the large verdict in the Lehigh Traction Company case. The counsel should not have made the offer, and after he had made it, it was the duty of the court to protect the defendant against its effect. The purposes of the offer was obvious, and its effect would be equally apparent. Such conduct on the part of counsel is different from an unintentional or inadvertent remark to a jury which does the opposite party no injury. When such remarks are made they may or may not have an influence upon the jury, but there can be no question about the effect upon the tribunal of an offer to show what a former jury, dealing with the same facts, had determined as to the amount of damages due the plaintiffs for the injuries which they sustained. It was a criterion for the jury in considering the case which they evidently would accept, and which no language of the trial judge could drive from their minds. The offer got before the jury what was clearly incompetent and what manifestly would, to some extent at least, control their verdict. The only way to remedy the wrong was to withdraw a juror and compel the plaintiffs to submit the cause to another jury, uninfluenced by such wholly irrelevant and incompetent matter.

* * * * *

When an attorney in the trial of a cause willfully and intentionally makes an offer of wholly irrelevant and incompetent evidence, or makes improper statements as to the facts in his address to the jury, clearly unsupported by any evidence, which are prejudicial and harmful to the opposite party, it is the plain duty of the trial judge, of his own motion, to act promptly and effectively by reprimanding counsel and withdrawing a juror and continuing the cause at the cost of the client. In no other way can justice be administered and the rights of the injured party be protected. The imposition of the costs will remind the

client that he has an attorney unfaithful to him as well as to the court. The obligation of fidelity to the court which an attorney assumes on his admission to the bar is ever thereafter with him, and when he attempts to defeat the justice of a cause by interjecting into the trial wholly foreign and irrelevant matter for the manifest purpose of misleading the jury, he fails to observe the duty required of him as an attorney and his conduct should receive the condemnation of the court. This condemnation can and should be made effective.

The ninth assignment of error is sustained and the judgment of the court below is reversed with a *venire facias de novo*.

109 TOLEDO, ST. LOUIS & WESTERN RAILROAD CO. v.
Amst BURR.

Supreme Court of Ohio. 1910.

82 Ohio State, 129.

This action was originally commenced in the court of common pleas of Henry County, Ohio, by Burr & Jeakle and The Ohio German Fire Insurance Company as plaintiffs, against The Toledo, St. Louis & Western Railroad Company as defendant, to recover damages from said railroad company for the destruction by fire—alleged to have been communicated by sparks emitted from one of defendant's locomotive engines—of a sawmill owned by said Burr & Jeakle and insured by them in The Ohio German Fire Insurance Company. * * *

CREW, J.—The only error assigned in this case which need be specially considered in this opinion, is that of the alleged misconduct of counsel in the argument of the case to the jury. Upon the argument of this cause in the court of common pleas one of the counsel for plaintiffs stated to the jury among other things, "that within thirty days after the occurrence of this fire, Mr. Schmettau, as counsel for the defendant, made an offer of settlement, and that offer was repeated as late as the day of the commencement of

this trial." To this statement the defendant by its counsel then and there excepted. And thereupon, to quote from the record, "counsel who had made the statement, stated to the jury that he withdrew the statement objected to," and the court then instructed the jury as follows: "Gentlemen of the jury, it becomes my duty to say to you on this question that here is absolutely no evidence in this case that either party ever wanted to settle or that any attempt was ever made to settle; and I will say to you further, as a matter of law, that if the parties had gotten together in an effort to settle this case, the law wouldn't permit such effort to settle to be given to the jury in evidence; it is your duty to disregard absolutely the whole of any statement by any counsel to the effect that any effort was made to settle this case or any other case." And thereupon the argument proceeded. That the statements thus made by counsel transcended the bounds of legitimate argument and were grossly improper, is both obvious and conceded, but it is claimed that any prejudicial effect which such statements may have had was removed or cured by the subsequent action of court and counsel. This conclusion, we think, by no means follows, nor does it affirmatively appear in this case that such conclusion is justified by the facts. While it is true that courts of last resort have frequently, though not uniformly, held the rule to be, that the prejudice, if any, resulting from the misconduct of counsel in argument to the jury may be eliminated or cured by the prompt withdrawal of the objectionable statements made by counsel, accompanied by an instruction from the court to the jury to disregard such statements, yet this rule, so far as our examination of the authorities has disclosed, is recognized and applied by the courts in those cases only, where it is made to appear by the record from a consideration of the character of the statements made, that their prejudicial effect has probably been averted by such withdrawal and instruction. * * *

When we consider, in the present case, that there was no direct evidence establishing the origin of this fire, and that upon the whole of the evidence adduced on the trial the question of defendant's negligence and consequent liability was at best a very close question of fact involved in much uncertainty and doubt, the harmful and extremely prejudicial effect of a statement by counsel to the jury, that soon

after the fire the railroad company had offered to settle the loss, and that such offer had been renewed on the very day the trial commenced, becomes at once perfectly apparent. And the attempted withdrawal of these statements from the jury was, we think, wholly impotent to rid them of the mischievous inference that they were nevertheless true; and was utterly ineffectual to dislodge or remove from the minds of the jurors the harmful impression, which such statements were calculated, and obviously intended, to produce. * * *

* * * * *

Judgments of the circuit court and of the court of common pleas reversed, and cause remanded to the latter court for a re-trial according to law.

MURPHY'S EXECUTOR v. HOAGLAND.

Court of Appeals of Kentucky. 1908.

32 Kentucky Law Reporter, 839.

LASSING, J. This is a contest over the will of John, commonly known as "Pat" Murphy. * * *

* * * * *

Appellant also complains of the misconduct of counsel for the contestants during the progress of the trial. During the course of the cross-examination of the witnesses, Margaret Devereaux, counsel for contestants asked this question: "Do you know how many of the jurors wanted to break it," (referring to the will of John Murphy at the last trial thereof), and continued, "Don't you know, as a matter of fact, that eight stood for breaking the will?"

This question was at once objected to by counsel for the propounder and the objection was sustained. The learned counsel must have known that any question which referred to the result or the partial result of a former trial of the case was very improper, in fact inexcusable. Propounder's counsel could not permit the question to go unnoticed, and the very fact that he objected, but served to emphasize its importance in the minds of the jurors. They may have, and doubtless did, attach much importance to the question which

was asked and objected to by counsel for the propounder, and even though it was excluded by the court, the jurors, being sensible and intelligent men, could not rid their minds of the information which this question gave them, to-wit: That eight jurors had, on a previous trial, stood for breaking the will. They no doubt reasoned among themselves that had this not been true, the propounder would not have objected to its being asked, and, being taken as true, it was in fact stating to the jury that, while you are to try this case according to the evidence, we want you to know that, at least, eight jurors on a former trial believed that the will should not be permitted to stand.

* * * * *

For the reasons given the judgment is reversed and cause remanded, for further proceedings consistent with this opinion.⁶³

⁶³ See *Cosselman v. Dunfee*, (1902) 172 N. Y. 507 and *Simpson v. Foundation Co.*, (1911) 201 N. Y. 479, in condemnation of the too prevalent practice in negligence cases of bringing out the fact through improper questions or answers, that the defendant is insured against liability for accidental injuries.

LOUISVILLE & NASHVILLE RAILROAD CO. v.
REAUME.

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Court of Appeals of Kentucky. 1908.

32 Kentucky Law Reporter, 946.

CARROLL, J. Appellee, who was a passenger on one of appellant's trains, was injured by the derailment of the train at a point near Zion station, on the line of its railroad between Cincinnati and Louisville. In an action brought by her to recover damages for injuries received, the jury returned a verdict in her favor for ten thousand dollars.

* * * Much is also said about the misconduct of appellee's counsel in continuing to ask questions that the trial court had ruled incompetent. It is improper for counsel to persist in asking questions that the court has ruled to be incompetent, the purpose being to impress the jury with

the importance of the facts that have been excluded from their consideration. When the court has sustained an objection to a question, it is the privilege of counsel to make an avowal as to what the witness would say if permitted to answer, and this avowal he has the right to have put in record for the purpose of an appeal. But the question excluded should not be again asked the same witness in like or a different form, unless it be that the objection was made to the question because of the form in which it was put. If this is the ground upon which the objection is based, counsel should, of course, be permitted to ask the question in proper form, so that the objection may go to the competency or relevancy of it. As an illustration of the manner in which counsel for appellee sought to get before the jury incompetent evidence, he repeatedly asked in different forms and ways—if the railroad company had not settled or attempted to settle with other persons injured in the same wreck; and also concerning the condition of the health of appellee's father and other members of her family. A party will not be permitted, by indirect means, to acquaint the jury with facts which he is not allowed to bring to their notice by direct evidence. If this practice was permitted to go without criticism, or could be indulged in, without suffering the penalty of reversal, the trial judge, after exhausting all other means, could not, unless he felt inclined to resort to contempt proceedings, prevent the mind of the jury from being prejudiced by the efforts of counsel to put before them, in an indirect way, evidence that was incompetent. Skilled counsel in resorting to practices of this character, have in view the effect that it will produce on the jury and their expectations are too frequently well founded, as it is difficult for a jury to escape from being impressed in some manner by the insistence with which damaging, but incompetent, evidence is offered and the objections of adverse counsel to it sustained. If a practice of this kind is persistently indulged in by counsel, although the trial judge repeatedly tried to prevent it, it would as surely be grounds for reversal as any other substantial error that a party might commit in the trial of a case. * * *

113
20he MATTER OF SCHAPIRO.

Appellate Division of the Supreme Court of New York.
1911.

144 Appellate Division, 1.

INGRAHAM, P. J. The New York County Lawyers' Association presented a petition to this court asking for the disbarment of the respondent.

The charges in the petition are as follows: The respondent brought an action for one Rosenblatt in the United States Circuit Court for the Southern District of New York to recover damages for personal injuries alleged to have been caused by a firm consisting of Gould & Eberhardt. A Dr. Dawbarn had attended the respondent's client professionally for the injuries alleged to have been received. * * * The hospital records disclosed facts which would seriously affect the plaintiff's right to recover, and the respondent alleges that the testimony of the doctor as to the facts disclosed upon the operation that the doctor had performed upon the plaintiff, in that action, was essential to a recovery. That being the situation, he first drew up, executed, and delivered to the doctor an agreement to pay him one-third of the recovery and subsequently drew up and delivered to the doctor another agreement to pay him the same fee that he should pay to the counsel who had tried the case. Thus a person who was to be examined as a witness received from the attorney who expected to call him an agreement by which the attorney agreed to pay him if he would testify a substantial portion of the recovery which would result from the testimony this witness was to give upon the trial, and the bald question that we have presented is whether the making of such an agreement between an attorney who represented a party to an action and a person who was to be called as a witness to prove the cause of action is professional misconduct.

The law recognizes a contract between an attorney and his client by which the attorney is to receive for the services that he renders in an action a sum of money contingent upon success, and the law also allows a party to an action who is vitally interested in the result of the trial the right to give

testimony to be considered by the court or jury in determining the questions at issue. The interest of a party to an action giving such testimony is, however, apparent from the nature of the case, and the weight to be given to such testimony is to be considered in view of the interest of the party testifying. But, when other witnesses are called to substantiate a claim or defense, they occupy an entirely different position. They appear as witnesses, and, in the absence of proof of facts showing interest in the case, their testimony stands on a very different plane from that of interested witnesses, whose testimony is allowed, but whose interest in the result of the controversy leaves their credibility a question to be determined by the court or jury. Article 76 of the penal law prescribes penalties for using forged or fraudulently altered evidence or inducing another to give false testimony on the trial. * * *

It is the object of these provisions to surround the giving of testimony with all the safeguards possible to prevent the giving of false testimony upon a trial or other judicial proceeding, and yet every one who is familiar with the administration of justice has constantly called to his attention the prevalence of perjury by parties and witnesses in judicial proceedings.

If agreements between attorneys and witnesses upon whose testimony the clients' cases depend to share in the attorneys' fees for conducting the prosecution are to be approved, it will be almost impossible to prevent perjury and the violation of these provisions of the penal law to which attention has been called. The only safeguard lies in the fact that the attorney is an officer of the court upon whom rests the responsibility of preventing false or perjured testimony and calling only those witnesses whom he believes to be truthful witnesses testifying to facts as they understand them to be, and there can be no greater professional misconduct than for an attorney and counselor at law to make agreement by which a witness is to share in the result of the action, and then calling the witness and offering his evidence to the court and jury as testimony to influence them in the determination of the questions submitted. A witness who demands and receives compensation or a promise of compensation for giving his testimony is necessarily a discredited witness, and an attorney and counselor at law who

knowingly makes an agreement with a witness, by which he agrees to pay a witness a sum of money or an interest in the recovery as compensation for the giving of particular testimony rather than other testimony, or in consequence of an express or implied threat to testify against a party proposing to call him as a witness, unless he receives compensation from the party proposing to call him, is making an agreement which is plainly contrary to public policy, and one which is subversive of the orderly and efficient administration of justice. We are aware that witnesses who are to be called to give expert testimony which involves the special knowledge and skill of the witness and often require examination and study upon a particular branch of science are from the necessity of the case justified in demanding and receiving compensation for the time and labor devoted to the investigation of the particular science about which they are to testify, but this practice has been allowed from the necessity of the case and the inability of courts and juries to determine questions without the benefit of such expert knowledge. And there has grown up a habit in cases where witnesses who are in impoverished circumstances can be paid by the party calling them for the time actually lost in attending at court or before the tribunal where they are to give testimony. But in all these cases the witness receives compensation, not for swearing to a particular state of facts, but for the time and labor expended in the investigation of an abstruse subject about which testimony is to be given or the time lost in attending at the tribunal where the testimony is to be given. Such an agreement, however, can never be valid where the amount to be paid is to depend upon the testimony that he is to give, and where his right to compensation depends upon the result of the litigation in which he testifies. It is apparent, therefore, that the mere making of such an agreement as the respondent admits he made in this case by which a witness that he intended to call and did call to prove his case should have a substantial portion of the recovery, if one was obtained, is a most serious professional misconduct demanding the strongest condemnation.

* * * * *

The question, then, is what the punishment should be. The serious aspect of this case is the way that the respondent has

treated this charge. Both in the Municipal Court action and in this proceeding, he seems to have considered as a defense to this charge that this proposed witness exacted this agreement as a condition to his testifying to the facts required by the respondent and his client, and the fact that a witness made a demand for compensation for giving testimony in a particular way which would be favorable to the respondent and his client with a threat that he would testify to a different state of facts if the agreement for compensation was not given seem to be looked upon as a complete defense to a charge of professional misconduct for making such an agreement. It is the attitude of the respondent in making the agreements and in his answer to these charges that forces us to the conclusion that he is not fit to remain a member of a profession the proper performance of whose duties requires honesty and integrity.

The testimony given by Dr. Dawbarn was in an action tried in the United States Circuit Court, and, in view of that testimony, the facts as they now appear by his own affidavit should be considered by the United States attorney; and the petitioner should, we think, call his attention to the facts appearing upon this application.

It follows, therefore, that upon the respondent's own statement of his connection with this transaction he must be disbarred, and the application is therefore granted. All concur.⁶⁴

⁶⁴ "As officers of the court, the duties of counsel are not in conflict with those which devolve upon him as the representative of a party. * * * It is not the duty of counsel to suggest points of law which are against his client; but it is his duty to insist upon no point which he knows to be contrary to law."—Moody v. Davis, (1851) 10 Ga. 403, 410.

113 IN RE CAHILL.

Supreme Court of New Jersey. 1901.

66 New Jersey Law, 527.

FORT, J. Upon a proceeding in the court of chancery in the case of *Riker v. Riker*, on a petition for divorce, it ap-

peared, during the taking of the depositions therein, that the suit was instituted and carried on by collusion between the parties to the record, and that the defendant in the petition was paying the costs of the suit: * * * Mr. Cahill denied each allegation, and claims that he was without knowledge of the collusive character of the divorce suit. * * * But it does appear from the evidence, and it is proven, that Mr. Cahill knew that this divorce was being sought by collusive action of the parties. That conclusion is irresistible. * * *

It seems hard to believe that the least inquiry or examination would not have shown to Mr. Cahill that the adultery which he was informed was the ground for the divorce was "done with an intent to procure a divorce," and we have already found, under the evidence herein, that the complaint was made by collusion between the parties, "for the purpose of dissolving their marriage," and that too, with Cahill's knowledge. A solicitor cannot shut his eyes to facts and say, "I did not see them," when he would have seen them if he had kept his eyes open.

The court must feel that it can rely implicitly upon the representations and recitals of fact by its attorneys and solicitors. If a solicitor allows a petition for divorce to be presented to the court, with an affidavit of noncollusion which he knows to be false, he participates in an attempt to deceive the court. Such conduct in an officer of the court is highly reprehensible. The court has the right to rely upon the integrity of its officers. The legal profession is a confidential one, with a double duty upon its members, viz. utmost good faith towards both client and court. A lawyer who seeks by trick or by deception to impose upon either his client or the court is unfitted to advise the one or to appear before the other. He desecrates the temple of Justice.

It is quite gratifying to be unable to recall any previous case of this nature having been presented to this court. The bar of this state has maintained a high standard of ethics in its relation with the court. It is greatly to be regretted that this single instance of apparent lapse in this regard should have occurred. * * *

An order will be entered that John Francis Cahill be suspended as an attorney of this court until the first day of the November term of the supreme court for the year nineteen

hundred and three, and that he be prohibited from practicing as an attorney or a solicitor in any of the courts of this state until said date, upon pain of being stricken from the roll absolutely, if he shall violate the order of suspension.

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FERTIG v. STATE.

Supreme Court of Wisconsin. 1898.

100 Wisconsin, 301.

MARSHALL, J. The errors assigned on behalf of plaintiff in error will be considered in their order and are as follows: * * * (2) permitting the prosecuting attorney to use improper language, detrimental to the accused, in closing his argument to the jury; * * *

* * * * *

2. The prosecuting attorney was permitted to say, in closing the case to the jury, replying to remarks of the attorney for the accused regarding the testimony of William Spaulding: "What would counsel have him do? Come here and shower bouquets on the assassin of his brother? Crown him with a wreath of laurels?" And also permitting the district attorney to say, in substance, that there was murder in the heart of the accused as he proceeded to and effected the homicide,—that he had murder in his heart, in his eye, and in his brain; that he stood where the tracks indicated to get a good aim; the object of his vengeance was coming, sitting on the wood in full view; he (the accused) was a crack shot and knew it; he cocked his gun, drew the bead on the deceased, and the deed was done, and a son and brother was sent to his Maker without a moment's warning, by the act of an assassin,—as vile an act as ever happened on earth; so foul that it would be worthy of the vicegerent of the monarch of hell. That such language, with the earnestness with which we may well assume the words were uttered in the closing moments of an important trial, was highly calculated to carry the jury along the line of thought which it indicated, that is, that the accused was guilty, cannot be doubted; but whether it was outside the case, or

tended unfairly to influence the jury, and to swerve them from the duty of deciding the case on the evidence, and that alone, in the light of the law governing the subject, is quite another question. So long as counsel did not depart from the evidence produced, but confined his argument to reasoning from that up to the conclusion that it established guilt, however eloquently and persuasively he may have handled his subject, it was not only legitimate but commendable. Within the record in this regard, the field is broad, and the license of the advocate, and duty as well, permits him to say with the utmost freedom what the evidence tends to prove, and that it convinces him, and should convince the jurors as well, of the fact in issue. * * * So long as the advocate keeps within the record, the accused has no legitimate ground of complaint. That appears to be what was done in this case. There is nothing to indicate that the district attorney asserted that the accused was a murderer or assassin, except with reference to the offense for which he was being tried, and as he drew that conclusion from the evidence. It was the inevitable conclusion of the line of argument pursued by the prosecutor, from the evidence, and could not have been otherwise understood by the jury. It is quite unlike *Scott v. State*, 91 Wis. 552, where the district attorney spoke of the accused as a thief, not with reference to the offense for which he was on trial, but as a fact tending to establish guilt of that offense.

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By the court. * * * The judgment is *affirmed*.

115

WILLIAMS v. BROOKLYN ELEVATED RAILROAD CO.

Andrews

Court of Appeals of New York. 1891.

126 New York, 96.

This action was brought to recover damages to plaintiff's premises in Brooklyn, caused by the erection and operation of defendant's elevated railroad upon the street in front of them.

ANDREWS, J.

* * * * *

The counsel for the plaintiff, in his address to the jury, after referring to "the utter disregard of the rights of the private citizens by corporations," proceeded to read from a newspaper, "The New York Tribune," an article headed "Only a Boy Peddler," purporting to be an account of the death of a boy, "a little fellow fifteen years old, a Roumanian, a stranger in its great city (New York), selling collar buttons and pocket combs from a modest tray, to help support his mother and eight brothers and sisters," caused by his touching an electric wire which, the article stated, had been left swinging for months from a pole near which the boy had taken his stand. * * *

When the counsel for the plaintiff commenced reading the article the defendant's counsel interposed and objected to the reading, and asked the court to prevent it. The court overruled the objection, and the defendant's counsel excepted. * * *

The reading by counsel in summing up to the jury of the newspaper article "Only a Boy Peddler," was wholly irrelevant to the case. It could have been read for no purpose except to influence the jury against corporations and to lead them, under the influence of a just anger excited by the incident narrated, to give liberal damages to the plaintiff in the case on trial. The refusal of the court to interfere, under the circumstances of this case, was legal error. The privilege of counsel and the largest liberality in construing it did not authorize such a totally irrelevant and prejudicial proceeding. * * *

We think the judgment in this case should be reversed upon the exception taken to the reading of the newspaper article.

Judgment reversed and new trial ordered.⁶⁵

⁶⁵ In *Bjoraker v. Chicago, M. & St. P. Ry. Co.*, (1908) 103 Minn. 400, where plaintiff's attorney, in a personal injury case, had referred in somewhat dramatic language to the poverty and helplessness of plaintiff and his aged mother, contrasting it with the opulence of the officials of the defendant railroad, stating (without evidence to support it) that the earnings for two hours of the great Milwaukee system would pay any verdict the jury might give, the court, in ordering a new trial, said: "If attorneys will persist in indulging in such intemperate and unwarranted speeches to juries, they must expect that the verdicts which are obtained will be set aside. * * * It is simply an appeal to passion and prejudice, calculated to carry the jury beyond the case and induce a verdict for a large amount against the railway company, on

the ground that the plaintiff is poor and unfortunate and the defendant is able to pay."

116 CAMPBELL v. MAHER.

Supreme Court of Indiana. 1885.

105 Indiana, 383.

ELLIOTT, J. In the course of his argument to the jury the counsel for the appellee said: "The record in this case shows that the plaintiff was not willing to try this case at his home in Daviess county, among his neighbors, but has brought the case to Pike county on a change of venue, among strangers." The appellant objected, and the court, as the record recites, "remarked that it was not improper for counsel to refer to matters which were disclosed by the record, since the whole record was before the jury, but that the argument of counsel had gone too far, and should be limited to the record." What followed is thus exhibited in the record: "And thereupon counsel for the plaintiff resumed his seat, and the counsel for the defendant again turned to the jury, and, resuming his argument, said: 'The court says I may refer to the record. Gentlemen, the record of this case shows that the cause was brought from Daviess county to this county on the motion of the plaintiff.' To which statement the plaintiff's counsel again objected, and again assigned in support of his objection the reasons assigned by him in support of the objection to argument of defendant's counsel herein above set out, but the court overruled said objection, to which the plaintiff's counsel excepted, whereupon the defendant's counsel again turned to the jury and said: 'Gentlemen of the jury, I have only stated to you what the record in this cause shows to be true, and the court has decided that I have a right to do this.'"

The trial court was unquestionably wrong in ruling that everything that appears in the record is the subject of argument to the jury, for there are many things which the record discloses that the jury have no right to consider. Juries, as every one knows, are sworn to try the case "according to the

law and the evidence," and an argument must be confined to the evidence and the law. Where a party secures a legal right according to law, the fact that he has secured it can not be used to his prejudice. A change of venue is a legal right, and where it is awarded by the court in conformity to law, it can not be used to the prejudice of the party by whom it was obtained, nor can it be commented on in argument. It would be a perversion of law to permit the exercise of a legal right, under the order of the court, to be made the subject of consideration by a jury. We need not, however, discuss this question further for it is settled against the appellee by authority. *Farman v. Lauman*, 73 Ind. 568.

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Judgment reversed.

117
John
WILKINSON v. PEOPLE.

Supreme Court of Illinois. 1907.

226 Illinois, 135.

WILKIN, J. * * *

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It is insisted that the judgment below should be reversed because one of the attorneys who appears as counsel for the People and argued the case orally in this court was a leading and material witness on behalf of the prosecution in the court below. In justification of his conduct it is insisted that there is no law in this State, statutory or otherwise, forbidding an attorney to be a witness and at the same time an attorney in a case. Doubtless that is true; but courts have generally condemned the practice as one which should be discountenanced and of doubtful professional propriety. We said, speaking by Justice Breese, in *Morgan v. Roberts*, 38 Ill. 65, on page 85: "We are not advised that it is contrary to any statute or to any maxim of the common law to make the attorney in a cause a witness in the cause he is managing. This is a matter which appeals to the professional pride of an attorney and his sense of his true position and duty. In the English courts, in several cases, it was held that an attorney cannot appear

in the same cause in the double capacity of witness and advocate, and it has been so ruled in Pennsylvania and in Iowa, on the circuit. In Indiana it was held by Judge McDonald, now United States district judge, that an attorney in a cause could not be permitted to testify to the general merits of the case. In *Frear v. Drinker*, 8 Pa. St. Rep. 521, the court said that it was a highly indecent practice for an attorney to cross-examine witnesses, address the jury and give evidence himself to contradict the witness; that it was a practice to be discountenanced by court and counsel; that it was sometimes indispensable that an attorney, to prevent injustice, should give evidence for his client. It, however, leads to abuse. But at the same time there was no law to prevent it. All the court can do is to discountenance the practice, and, when the evidence is indispensable, to recommend to the counsel to withdraw from the cause. This subject has engaged the attention of other courts and of this court, and however indecent it may be in practice for an attorney retained in a case and managing it, to be a witness also, we cannot say he is incompetent, and must leave him to his own convictions of what is right and proper under such circumstances."

The fact that he does appear in this record in the unenviable attitude of a willing witness and a zealous attorney should not, perhaps, work a reversal of the judgment below if the record were in all other respects free from error, but we cannot overlook such professional impropriety when our attention is called to it.

Other grounds of reversal urged have received consideration, but we think they are without substantial merit.

For the errors indicated the judgment below will be reversed.

*Judgment reversed.*⁶⁶

CARTER, J., dissenting.

⁶⁶ Neither the civil law nor the French law allowed an attorney to testify for his client.—*Granon v. Hartshorne*, (1834) Fed Cas. No. 5689; and new trials have been granted on the ground of such testimony in England.—*Stones v. Byron*, (1846) 16 L. J. Q. B. 32, *Dunn v. Packwood*, (1846) 11 Jur. 242.

In *Jacobs v. Weissinger*, (1920) 211 Mich. 47, the court said that the consideration of such testimony by the court was "always a matter of embarrassment, because it is difficult to distinguish between the zeal of the advocate and the fairness and impartiality of a disinterested witness."

"It is unseemly for a member of the bar voluntarily to place himself

in a position where his duty to his client requires him to address court or jury on the question what degree of credibility should be given to his own sworn testimony,"—New York Cent. & H. R. RR. Co. v. Henney, (1913) 207 Fed. 78, 124 C. C. A. 635.

118
Joke
ESHELMAN v. RAWALT.
Supreme Court of Illinois. 1921.

298 Illinois, 192.

CARTWRIGHT, J. * * *
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It is the province of the jury to determine the facts, but it is the province and the duty of the courts to see that every litigant has a fair trial in accordance with the law, and it is complained that the verdict, which was very large, was increased and brought about by the conduct of the attorney for the plaintiff on the trial. The record of the trial from the time the jury were sworn until the argument began contains 330 pages, and it is impracticable to give such a detailed statement as would furnish a complete understanding of the grounds for complaint. There were continual side remarks by plaintiff's attorney, interruptions in the examination of witnesses conducted by the attorneys for the defendant, comments on the evidence, assertions of fact that would be proved, epithets and remarks, and an attitude of disrespect toward the court, such as statements that the attorney was going to yield to the opinion of the court, but believed that he was right. His conduct was correctly characterized by the Appellate Court as consisting of a running fusilade of interruptions, contradictions, cross-talk, and side remarks, indulged in over repeated objections by counsel for the defendant, and persisted in over repeated warnings and admonitions of the court, and showing disrespect for all rules and ethics in the practice of the law. The Appellate Court said that the trial judge must certainly have been the personification of "patience on a monument" to be able to refrain from enforcing proper decorum, but said that it would be unwarranted to reverse the judgment, and thereby penalize plaintiff for the conduct of his counsel, for which it did not appear he was in any wise responsible.

We do not concur with the Appellate Court that the judgment for the complainant could not be reversed for the conduct of his counsel, or that he was not responsible for it. That would be to reverse every rule of law approved by the judgment of mankind as to the responsibility of a principal for acts of his agent, or an employer for acts of his servant. The law holds the principal responsible for the acts and derelictions of his agent within the authority conferred, and the master for the conduct of his servant and injuries occasioned by him within the scope of his employment. A client is bound, according to the ordinary rules of agency, by the acts of his attorney within the scope of the attorney's authority, and to say that he is not responsible for misconduct of his attorney is to visit the evil consequences upon an unoffending party. Not only is that true, but if such a rule is adopted the services of an attorney able to get unjust verdicts by unfair means, or prevent just verdicts by like means, would be in very great demand, and his professional prospects greatly enhanced, to the public injury. The Appellate Court did not find anything in the record to indicate that the defendant was injured by the course pursued by the attorney for the plaintiff, but we do not agree that such is a fact. Not only was it impossible to have a fair trial in the state of disorder, confusion, and disturbance unusual in a court of record, but it was impossible for the defendant to make any fair presentation of the situation. The conduct of the attorney was such as would naturally enhance the damages which the jury were advised they could allow in the exercise of their discretion.

The learned judge exhibited rare patience and ability in his rulings, and there was no error on his part in the trial or in instructing the jury. He protested constantly against the conduct of the attorney, and warned him how the record would appear; but when he said that the record would show matters that he was very much afraid of, and would not look very good, the attorney said, "I don't care how it looks." The verdict obtained by the means employed in this case cannot be permitted to stand.

The judgments of the Appellate Court and circuit court are reversed, and the cause remanded to the circuit court.

Reversed and remanded.

119 CANONS OF LEGAL ETHICS.⁶⁷3. *Attempts to Exert Personal Influence on the Court.*

Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

5. *The Defense or Prosecution of Those Accused of Crime.* It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

15. *How Far a Lawyer May Go in Supporting a Client's Cause.* Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud of chicane. He must obey his own conscience and not that of his client.

16. *Restraining Clients from Improprieties.* A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation.

17. *Ill-feeling and Personalities Between Advocates.* Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

18. *Treatment of Witnesses and Litigants.* A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not

excusable on the ground that it is what the client would say if speaking in his own behalf.

19. *Appearance of Lawyer as Witness for His Client.* When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client.

20. *Newspaper Discussion of Pending Litigation.* Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *ex parte* statement.

22. *Candor and Fairness.* The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a text-book; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence, which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an

argument, addressed to the Court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

23. *Attitude Toward Jury.* All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the Court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

29. *Upholding the Honor of the Profession.* Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

30. *Justifiable and Unjustifiable Litigations.* The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

32. *The Lawyer's Duty in its Last Analysis.* No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice involving

disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.⁶⁸

⁶⁷ These are the canons of ethics of the American Bar Association adopted in 1908. Only those are here given which apply to the subject of court practice. See complete text in 33 Am. Bar Ass'n Rep. (1908) 575, and in each volume of Am. Bar Ass'n Reports from 1917 to 1922 inclusive (Vols. 42-47). Also in Costigan's Cases on Legal Ethics, 570-583. On the general subject of legal ethics see An Essay on Professional Ethics, by George Sharswood, of the Supreme Court of Pennsylvania, pp. 1-214; and Ethical Obligations of the Lawyer, by G. L. Archer, pp. 1-367.

⁶⁸ "The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for the purpose. The right to practice law is in the nature of a franchise from the state conferred only for merit. It cannot be assigned or inherited but must be earned by hard study and good conduct. It is attested by a certificate of the Supreme Court and is protected by registration. No one can practice law unless he has taken an oath of office and has become an officer of the court, subject to its discipline, liable to punishment for contempt in violating his duties as such, and to suspension or removal. It is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot indirectly by employing competent lawyers to practice for it, as that would be an evasion which the law would not tolerate."—Matter of Co-operative Law Co., (1910) 198 N. Y. 479.

SECTION 6. DISMISSAL, NON-SUIT AND DIRECTED VERDICT.

(a) *Dismissal.*

1922
Am BERTSCHY v. McLEOD.

Supreme Court of Wisconsin. 1873.

32 Wisconsin, 205.

Appeal from the County Court of Milwaukee County.

This action was brought to recover an alleged unpaid balance due from the defendant to the plaintiff for a steam engine and fixtures furnished by the plaintiff to defendant, pursuant to a written agreement between the parties, a copy of which is inserted in the complaint. The answer contains, in addition to certain matters pleaded as defenses, two counter-claims, one of which alleges that the written agreement does not contain the contract made by the parties and which they intended to include therein, in that an important portion of such contract is omitted therefrom, and prays that the written agreement be reformed so as to include the omitted portion; and the other counter-claim is for damages for the alleged failure of the plaintiff to perform such contract on his part, on account of which the defendant demands judgment against the plaintiff for a sum exceeding the demand of the plaintiff.

The plaintiff replied to such counter-claims, in effect denying the material allegations thereof. After issue was thus joined in the action, the attorney for the plaintiff entered a sidebar rule, or order of course, with the clerk of the court, discontinuing the action on payment of the defendant's taxable costs therein. He also, on the same day, served upon the attorneys for the defendant notice of such proceeding, and an offer to pay the defendant's costs upon presentation of a taxed bill thereof, and a further offer to appear without formal notice before any taxing officer for the purpose of having the costs adjusted. The attorneys for the defendant immediately notified the plaintiff's attorney that they should disregard the attempted discontinuance of the action, for the reason that after a counter-claim had been interposed the action could only be discontinued by leave of court; and they accordingly

noticed the cause for trial, and caused it to be placed on the calendar for trial at the next term of the court.

Thereupon a motion was made on behalf of the plaintiff, to strike the cause from the calendar, on the ground that the same had been discontinued. The court denied the motion, holding that the cause had not been legally discontinued, but was still pending. This appeal is from the order denying such motion.

* * * * *

LYON, J. The following propositions must, we think, be conceded: 1st. At the common law, a plaintiff had the absolute right to discontinue his action before or after issue joined, and without leave of court. 2nd. In suits in equity, under the former practice, the plaintiff might, in like manner, dismiss his bill, but such dismissal did not carry with it a cross bill interposed by the defendant. 2 Barb. Ch. Pr., 128 and cases cited. 3d. The right of discontinuance is not effected by the code, but remains the same, both in legal and equitable actions, as under the former practice.

By the common law, neither of the counterclaims here interposed could be pleaded in the action. The one which demands a reformation of the written agreement could only be made available by a suit in equity; and the other, which demands judgment for damages for the alleged violation of his contract by the plaintiff, in excess of the plaintiff's demand, could only be enforced by a separate action. Of course, the subject matter of the latter counter-claim might be pleaded as a defense to the action, either in whole or in part; but the defendant could not in that case recover judgment for any excess of damages sustained by him, over and above the damages sustained by the plaintiff. In brief, at the common law the defendant could only plead such matter in defense, and could not obtain in the action equitable relief, or recover a judgment for damages against the plaintiff, as he now may under proper pleadings and proofs. Waterman on Set-Off, Recoupment, etc., 471; 1 Chitty's Pl., 569; 2 Black. Com. (Cooley's ed.), 305, note 19. Hence, all there was of the action at the common law was the cause of action as stated in the declaration, and the defense pleaded thereto by the defendant; and that was all which the plaintiff had an absolute right to discontinue. Such right of discontinuance still remains under the present practice, and, to the extent above

indicated, has been rightfully exercised in this case by the plaintiff. The plaintiff's cause of action, and all defenses pleaded thereto which could have been pleaded as such under the former practice, have disappeared from the cause by force of the order of discontinuance.

But we are unable to perceive how it can be held, upon any logical principle, that such discontinuance necessarily carried with it those proceedings of the defendant which the code permits him to institute in the action, or rather to engraft upon it, but which are, in substance and effect, actions brought by the defendant against the plaintiff. Had these proceedings been under the common law practice, as already observed, the counter-claims interposed in this action would have been asserted in two separate and distinct actions, one at law and the other in equity, in both of which the position of the parties would be the reverse of their position in the present action. In such case, surely the discontinuance by the plaintiff of the action brought by him would not work a discontinuance of such other actions brought against him. Why should the plaintiff's discontinuance of his action lead to that result under the present practice? The learned counsel for the plaintiff have failed to answer this question satisfactorily, and we freely confess our inability to do so.

The cases decided by the various courts of New York upon the subject of the right of discontinuance under the code are conflicting, and quite unsatisfactory; and we can get but little aid from them in determining the question under consideration.

It may be stated, in support of the views above expressed, that this right or practice of counter-claim is borrowed from the civil law, where it is designated "demand in reconvention;" and the Louisiana cases referred to by the learned counsel for the defendant clearly show that, by the rules of the civil law, a discontinuance of the action by the plaintiff is ineffectual to put a defendant out of the court who has interposed a "demand in reconvention."

If the foregoing views are correct, it necessarily follows that the discontinuance of his action by the plaintiff left the issues made by the counter-claims and the reply thereto, pending in court and for trial, and that the court ruled correctly in refusing to strike the cause from the calendar. If application be made for that purpose, the county court should, under

the special circumstances of the case, permit the plaintiff to vacate the order of discontinuance so entered by him, to the end that the whole controversy between the parties may be adjudicated in this action.

* * * * *

By the Court.—The order appealed from is affirmed.⁶⁹

⁶⁹ Many cases hold that the plaintiff has no absolute right to dismiss, but that the matter is always, in the absence of statute, within the discretion of the court.—*Beaver v. Slane*, (1921) 271 Pa. St. 317, 114 Atl. 509; *Carleton v. Darcy*, (1878) 75 N. Y. 375.

In any case an order of dismissal should be made.—*Barnes v. Barnes*, (1892) 95 Cal. 174; *Carleton v. Darcy*, *supra*.

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CARPENTER AND SONS CO. v. NEW YORK, NEW
HAVEN, AND HARTFORD RAILROAD CO.

GORHAM MANUFACTURING COMPANY v. SAME.

Supreme Judicial Court of Massachusetts. 1903.

184 Massachusetts, 98.

LORING, J. It has always been a recognized principle of the English law, on the equity as well as on the common law side of the court, that a plaintiff is not bound to prosecute a suit or action to a finish because he has begun it. But on the contrary he is at liberty to abandon it without losing the right of action on which it is founded, and he can enforce that right subsequently on paying the costs of the former proceeding. In this respect a plaintiff is more fortunate than a defendant who has a day in court to interpose his defense if he would not have final judgment given against him.

What is not so clear is how far the plaintiff's proceeding (whether it be a suit in equity or an action on the common law side of the court) must have gone for it to have reached the stage where this right of abandonment is lost.

In England the plaintiff originally had a right to abandon an action at law and become nonsuit at any time before verdict, if not before judgment. *Derick v. Taylor*, 171 Mass. 444, 445. That it was before verdict and not before judgment is laid down in *Outhwaite v. Hudson*, 7 Exch. 380, 381; 2

Tidd's Practice, (3d Am. ed.) 867. This rule was adopted here by an ordinance of the Colony in 1641; Anc. Chart. 46; and in *Locke v. Wood*, 16 Mass. 317, it was contended by Webster and Shaw in 1820 that that was the rule of practice of the Commonwealth and that the plaintiff had a right to become nonsuit at any time before judgment. But the court "were of opinion that there was no such right; and that, after a cause is opened to the jury, and begun to be proceeded in before them, the parties are entitled to a verdict, unless the court should, in its discretion, allow a nonsuit or discontinuance." Since then it has been held or said to be the rule that a plaintiff can become nonsuit as of right at any time before the trial has begun but not afterwards. *Means v. Welles*, 12 Met. 356, 361; *Lowell v. Merrimack Manuf. Co.*, 11 Gray, 382; *Shaw v. Boland*, 15 Gray, 571; *Truro v. Atkins*, 122 Mass. 418; *Burbank v. Woodward*, 124 Mass. 357; *Kempton v. Burgess*, 136 Mass. 192; *Derick v. Taylor*, 171 Mass. 444; *Worcester v. Lakeside Manuf. Co.*, 174 Mass. 299. See also the previous case of *Haskell v. Whitney*, 12 Mass. 47.

The reason for denying in this Commonwealth the rule of the English common law was the injustice done to the defendant, who was subjected to being harassed a second time on one and the same cause of action on receiving costs, which in this Commonwealth are nominal. In that respect the burden of being subject to a second action is much greater here than in England, where costs are substantial. But the common law rule has now been abolished in England. By Order XXVI of the Rules of the Supreme Court, 1883, adopted under the judicature act, it is provided that "the plaintiff may, at any time before receipt of the defendant's defense, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing" discontinue the action. *Wilson's Practice of the Supreme Court of Judicature*, (7th ed.) 234.

The Massachusetts rule as to when a plaintiff could become nonsuit in a common law action was established when substantially, if not absolutely, all such cases were tried to a jury. No question could arise as to what the rule was when applied to cases tried by the court, as so many cases are now tried since Sts. 1874, c. 248, sec. 1; 1875, c. 212, sec. 1; 1894, c. 357, now R. L. c. 173, sec. 56, directing all cases to be tried by the court unless a trial by jury is claimed by one of the

parties. Until the case is opened the right to become nonsuit exists.

A question did arise as to the application of the rule in case of a preliminary trial before commissioners in case of a petition to recover compensation for property taken under the right of eminent domain. It was held that when the hearing before the commissioners was begun the right to become nonsuit was lost. *Worcester v. Lakeside Manuf. Co.*, 174 Mass. 299.

The case at bar presents the question whether the right is lost when a hearing before an auditor has been finished but before the auditor's report is filed.

* * * * *

Were the question now before us a question of first impression depending entirely on the advantages and disadvantages to the plaintiff and the defendant respectively, it is by no means clear that it ought not to be held to be too late for a plaintiff to become nonsuit when an order had been made sending the case to an auditor. A hearing before an auditor is not now, as it was, a preliminary investigation of complicated accounts and nothing more. * * *

But in spite of the character which auditor's hearings have now assumed, it is still true that such hearings result in evidence merely and cannot result in an adjudication; and we are of opinion that a hearing which results in evidence and cannot *per se* result in an adjudication is not a trial within the rule which has now been laid down for over eighty years, namely, that a plaintiff can become nonsuit at any time before the trial begins and not afterward. Moreover this seems to have been assumed by the Legislature in this very statute, St. 1900, c. 418 (R. L. c. 165, sec. 59, and c. 173, sec. 81.) It is there provided that if the plaintiff does not comply with the provisions of the act and attend before the auditor, or if he refuses in good faith to put in the testimony relied on by him, the court is authorized to direct him to become nonsuit. In making that provision it is assumed that the court has no power to enter judgment for the defendant at that stage of the proceeding.

Under these circumstances, we do not feel at liberty to dispose of the question on its merits. If, under the practice which now obtains, the rule, which we feel we are bound by,

does injustice to defendants, the remedy is with the Legislature.

*Entry of nonsuit to stand.*⁷⁰

⁷⁰ In some states voluntary dismissal can be had until the case is finally submitted to the court or jury.—*Oppenheimer v. Elmore*, (1899) 109 Ia. 196; *Lay v. Collins*, (1905) 74 Ark. 536; *Casey v. Jordan*, (1885) 68 Cal. 246; *New Hampshire Banking Co. v. Ball*, (1897) 57 Kan. 812; *Northwestern Mutual Life Ins. Co. v. Barbour*, (1893) 95 Ky. 7; *Adams v. Osgood*, (1898) 55 Neb. 766; *Woodward v. Woodward*, (1900) 84 Mo. App. 328.

It is too late to dismiss under the rule in these states after the case has been submitted to the court on a motion to direct a verdict.—*Fronk v. Evans City Steam Laundry Co.*, (1903) 70 Neb. 75. *Contra* in Missouri, Chicago, etc., *R. R. Co. v. Metalstaff*, (1900) 101 Fed. 769, 41 C. C. A. 669.

122 ASHMEAD v. ASHMEAD.
Submitted
 Supreme Court of Kansas. 1880.

23 Kansas, 262.

BREWER, J. This was an action for divorce. After the testimony had been received, and the case taken under advisement, the plaintiff moved the court for leave to dismiss her action without prejudice. Defendant objected, and insisted that judgment be rendered upon the merits, but the court sustained the motion, and permitted the plaintiff to dismiss without prejudice. Was this error? We have not before us the testimony upon which the court acted in sustaining this motion. We must therefore presume it sufficient, if the court had the power to grant such a motion. It will be conceded that after the final submission of the case, the plaintiff had no right to a dismissal without prejudice. Up to that time she had such right, and could exercise it of her own option, without the consent of the defendant or the permission of the court. At that time her rights in that respect ceased. But has not the court the power in its discretion to permit a plaintiff, even after the final submission, to recall that submission and dismiss without prejudice? It would be both strange and harsh, if such power did not exist. Oftentimes, by some oversight or forgetfulness, the plaintiff omits some

essential portion of his testimony. Is the court powerless to afford him relief? It is constant practice to open a case for additional testimony. Even after a jury has retired to consider of its verdict, the court may recall it, and open the case for future evidence. All this, it is true, rests within the discretion of the court, and is not a right of the party. Here the court exercised its discretion, and we cannot say that there was any abuse of such discretion. The case of *Schafer v. Weaver*, 20 Kas. 295, is in point. The question there arose, it is true, after a demurrer to the evidence had been sustained, but the principle is the same. The judgment will be affirmed.

123
Labe
FERGUSON v. INGLE.

Supreme Court of Oregon. 1900.

38 Oregon, 43.

MOORE, J. 1. It is contended by plaintiffs' counsel that the court erred in refusing to grant a voluntary nonsuit requested by their clients; while defendant's counsel insist that, the motion therefor not having specified the ground upon which it was predicated, no error was committed in this respect. Considering these questions in inverse order, the rule is well settled that the motion of an adverse party for a nonsuit must specify the grounds therefor, and, unless it does so, an appellate court will not review the action of the trial court in denying the motion: 14 Enc. Pl. & Prac. 117, 136; *Silva v. Holland*, 74 Cal. 530 (16 Pac. 385); *Flynn v. Dougherty*, 91 Cal. 669 (27 Pac. 1080, 14 L. R. A. 230); *Wright v. Fire Ins. Co.*, 12 Mont. 474 (31 Pac. 87, 19 L. R. A. 211.) The reason for this rule is found in the fact that an appellate court will consider only such questions as have been presented to the trial court at the proper time, and in an appropriate manner; and when it appears that the question sought to be reviewed was not thus submitted to such court the presumption that its decision thereon is correct ought to prevail. But, whatever reason may be adduced for the existence of this rule, the point insisted upon is without merit, for the motion in this case was not made by the adverse party. The statute

provides, in effect, that the plaintiff, upon his own motion, may secure a judgment of nonsuit at any time before trial, unless a counter-claim has been pleaded as a defense. Hill's Ann. Laws, sec. 246. A voluntary nonsuit is, therefore, peremptory, and, whatever motive may have prompted a plaintiff to dismiss his suit or action, he is not required to state it; for if the motion be made before trial, and in the absence of a counter-claim pleaded as a defense, the trial court is without discretion in the matter, and must give the judgment requested.

* * * * *

The judgment is therefore reversed, and the cause remanded, with instructions to grant the nonsuit. *Reversed.*

/ 24 (b) Involuntary Non-suit.
Suit
 CENTRAL TRANSPORTATION CO. v. PULLMAN'S
 PALACE CAR CO.

Supreme Court of the United States. 1890.

139 United States, 24.

GRAY, J. * * *
 * * * * *

There is a preliminary question of practice, arising out of the manner in which the case was disposed of below, which is deserving of notice, although not mentioned by counsel in argument. The circuit court, in ordering a nonsuit because in its opinion the evidence offered by the plaintiff was insufficient in law to maintain the action, acted in accordance with the statute of Pennsylvania, which provides that "it shall be lawful for the judge presiding at the trial to order a judgment of nonsuit to be entered, if in his opinion the plaintiff shall have given no such evidence as in law is sufficient to maintain the action, with leave, nevertheless, to move the court *in banc* to set aside such judgment of nonsuit; and, in case the said court *in banc* shall refuse to set aside the nonsuit, the plaintiff may remove the record by writ of error into the supreme court for revision and review, in like manner

and with like effect as he might remove a judgment rendered against him upon a demurrer to evidence." St. Pa. March 11, 1836, § 7; Id. March 11, 1875, § 1; 2 Purd. Dig. (11th Ed.) pp. 1362, 1363. Under that statute, as expounded by Chief Justice Gibson, the judge can order a nonsuit, only when all the evidence introduced, with every inference of fact that a jury might draw from it in favor of the plaintiff, appears to be insufficient in matter of law to sustain a verdict; and the defendant's motion for a nonsuit is equivalent to a demurrer to evidence, differing only in the judgment thereon not being a final determination of the rights of the parties, for if it is in favor of the plaintiff the case must be submitted to the jury, and if in favor of the defendant it is no bar to a new action. *Smyth v. Craig*, 3 Watts & S. 14; *Fleming v. Insurance Co.*, Brightly, N. P. 102; *Bournonville v. Goodall*, 10 Pa. St. 133. It is true that a plaintiff, who appears by the record to have voluntarily become nonsuit, cannot sue out a writ of error. *U. S. v. Evans*, 5 Cranch, 280; *Evans v. Phillips*, 4 Wheat. 73; *Cossar v. Reed*, 17 Q. B. 540. But in the case of a compulsory nonsuit it is otherwise; and a plaintiff, against whom a judgment of nonsuit has been rendered without his consent and against his objection, is entitled to relief by writ of error. *Elmore v. Grymes*, 1 Pet. 469; *Strother v. Hutchinson*, 4 Bing. N. C. 83, 5 Scott, 346, 6 Dow. 238; *Voorhees v. Coombs*, 33 N. J. Law, 482.

There are many cases in the books in which this court has held that a court of the United States had no power to order a nonsuit without the plaintiff's acquiescence. *Elmore v. Grymes*, above cited; *Crane v. Morris*, 6 Pet. 598, 609; *Silsby v. Foote*, 14 How. 218; *Castle v. Bullard*, 23 How. 172, 183. Yet, instead of overruling, upon that ground alone, exceptions to a refusal to order a nonsuit, this court, more than once, has considered and determined questions of law upon the decision of which the nonsuit was refused in the court below. *Crane v. Morris* and *Castle v. Bullard*, above cited. The difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant is, as observed by Mr. Justice Field, delivering a recent opinion of this court, "rather a matter of form than of substance, except [that] in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted, either upon motion or upon

appeal." *Oscanyan v. Arms Co.*, 103 U. S. 261, 264. Whether a defendant in an action at law may present in the one form or in the other, or by demurrer to the evidence, the defense that the plaintiff, upon his own case, shows no cause of action, is a question of "practice, pleadings, and forms and modes of proceeding," as to which the courts of the United States are now required by the act of congress of June 1, 1872, c. 255, § 5, (17 St. 197,) re-enacted in section 914 of the Revised Statutes, to conform, as near as may be, to those existing in the courts of the state within which the trial is had. *Sawin v. Kenny*, 93 U. S. 289; *Ex parte Boyd*, 105 U. S. 647; *Chateau-gay Ore, etc., Co., Petitioner*, 128 U. S. 544, 9 Sup. Ct. Rep. 150; *Glenn v. Sumner*, 132 U. S. 152, 156, 10 Sup. Ct. Rep. 41.

It is doubtless within the authority of the presiding judge, and is often more convenient, in order to prevent the case from being brought up in such a form that the judgment of the court of last resort will not finally determine the rights of the parties, to adopt the course of directing a verdict for the defendant and entering judgment thereon. But the judgment of nonsuit, being a final judgment disposing of the particular case, and rendered upon a ruling in matter of law duly excepted to by the plaintiff, is subject to be reviewed in this court by writ of error.

* * * * *

71 Non-suits may be based upon either the evidence or the record. See *French v. Central Const. Co.*, (1907) 76 Oh. St. 509; *Sanders v. Pierce*, (1896) 68 Vt. 468, and *Conway v. Sexton*, (1909) 243 Ill. 59, *supra*, for cases of the latter kind. In *Conway v. Equitable Accident Co.*, (1906) 27 R. I. 467, the plaintiff was non-suited where he sued in assumpsit upon a contract that the evidence showed to be under seal.

In *Lehigh Valley RR. Co. v. Quereau*, (C. C. A. 1923), 289 Fed. 767, 770, the court said:—"A dismissal at the end of the plaintiff's case has always been regarded as caused by a failure of proof, and therefore it is not on the merits, and is not a bar to a future action for the same cause or subject-matter. *Ploxin v. B. H. R. Co.* (C. C. A.) 261 Fed. 854. But where judgment is directed after the defendant has rested his case, and there is a mere varying of reasons assigned for recovery in the future action, the cause of action remains the same, and the prior disposition of the case is a bar to the future action. *United States v. Cal. & Ore. Lands Co.*, 192 U. S. 355. * * * In an action at law in the state court, a dismissal of the complaint is but a non-suit, and does not determine the merits of the action. *Niagara Fire Ins. Co. v. Campbell Stores*, 101 App. Div. 400. * * * To constitute a disposition on the merits, it is necessary that the defendant either offer proof and rest, or rest without offering proof, and then move for the direction of a verdict, otherwise it is error to dismiss upon the merits. *Peterson v. Ocean*

Elec. Ry. Co., 214 N. Y. 43." But the rule in New York has been changed by the Civil Practice Act, Sec. 482, providing that a final judgment dismissing a complaint before the close of plaintiff's evidence is not on the merits unless therein expressly declared to be so, but a dismissal after the close of the plaintiff's evidence is on the merits and bars another action unless the court dismisses without prejudice."

Retraxit. "The second question is, whether the judgment rendered in the first action was final. It is claimed to be equivalent only to a non-suit, and therefore not *res adjudicata*. A judgment of *non-suit*, whether rendered because of the failure of the plaintiff to appear and prosecute his action, or because upon the trial he fails to prove the particulars necessary to make good his action, or when rendered by consent upon an agreed statement of facts, is not conclusive as an estoppel, because it does not determine the rights of the parties. *Homer v. Brown*, 16 How. 354; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121; *Haldeman v. United States*, 91 U. S. 584. But a non-suit is to be distinguished from a *retraxit*. *Minor v. Mechanics' Bank*, 1 Pet. 46. Blackstone defines the difference as follows: "A *retraxit* differs from a non-suit in this: one is negative and the other positive. The non-suit is a mere default or neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open, voluntary renunciation of his claim in court, and by this he forever loses his action." 3 Blackstone Com. 296. And it has been held that a judgment of dismissal, when based upon and entered in pursuance of the agreement of the parties, must be understood, in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself, to amount to such an adjustment of the merits of the controversy, by the parties themselves through the judgment of the court, as will constitute a defense to another action afterwards brought upon the same cause of action. *Bank of Commonwealth v. Hopkins*, 2 Dana, 395; *Merritt v. Campbell*, 47 Cal. 542. It is clearly so, when, as here, the judgment recites that the subject-matter of the suit had been adjusted and settled by the parties."—*United States v. Parker*, (1887) 120 U. S. 89, 95.

125 BOPP v. NEW YORK ELECTRIC VEHICLE
TRANSPORTATION CO.

Court of Appeals of New York. 1903.

177 New York, 33.

VANN, J. At the close of the plaintiff's evidence in chief, each defendant made a separate motion for a nonsuit and each excepted to the action of the court in denying the motion. Each defendant had the right to then withdraw from the case and rest upon its exception. Neither did so. The Vehicle Company picked up the burden first, put in its evidence and again moved for a nonsuit. Assuming that an ex-

ception was taken to the denial of its motion, for the second time it was in a situation to rely on its exception and refuse to take any further part in the trial. It did not do so. On the contrary, it continued to take an active and aggressive part in the trial by cross-examining the witnesses of its co-defendant, thoroughly and at length. It aided in developing the facts and attempted to defend itself against the allegations of the plaintiff and the effort of the other defendant to fasten the responsibility upon it alone. It did not succeed, and it now claims that all its action, after its motions to nonsuit were denied, should go for naught and be ignored upon the ground that the question is the same as if it had withdrawn from the case at that time. We do not think so. It did not remain in the case for amusement, but for self-defense, and it could not make further efforts to defend itself without running the usual risks. The plaintiff had the right to rely upon any evidence in her favor, whether it was put in by herself or by either defendant, and the Vehicle Company by failing to withdraw when it had the right to and continuing to take part in the trial, ran the risk that evidence tending to make it liable would be received. The situation does not differ in principle from the ordinary case where a sole defendant, instead of withdrawing when he fails to secure a nonsuit, continues to take part in the investigation to the end. In so doing, even if his motion should have been granted when made, the exception is undermined and becomes of no avail, provided at the close of the whole case the evidence presents a question for the jury.

Thus in *Jones v. Union Railway Company* (18 App. Div. 267, 268) Judge Cullen said: "When the defendant enters into its proof, the question never is, whether the plaintiff's evidence is sufficient to justify the submission of the case to the jury, but whether, on the whole case, there is a question of fact as to the defendant's liability. If, at the close of a plaintiff's case, the defendant is confident that no cause of action has been made out, the only method of securing a review of an erroneous ruling on the point is to let the case stand without further evidence. If the defendant enters upon its evidence, it takes the chances of supplying the deficiencies of the plaintiff's case."

So in *Hopkins v. Clark* (158 N. Y. 299, 304) we said through Judge Bartlett: "The rule laid down by the Su-

preme Court of the United States seems the proper one, to the effect that when a defendant, after the close of the plaintiff's evidence, moves to dismiss, and, the motion being denied, excepts thereto, and then proceeds with his case, and puts in evidence on his part, he thereby waives the exception, and the overruling of the motion to dismiss cannot be assigned as error."

* * * * *

So, in this case, the Vehicle Company, by continuing to try its case, for that is what it did, ran the risk that the evidence of its codefendant would supply the defects in the plaintiff's case against itself. It could not keep on trying its case without abiding by the condition of the evidence when all the testimony was in. At that time there was a question for the jury as to its liability, and hence its previous exceptions, taken when the evidence did not present that question, became of no avail.

* * * * *

The judgment should be affirmed, with costs.

GRAY, J. (dissenting).

* * * * *

HAIGHT, MARTIN and WERNER, JJ., concur with VANN, J.; PARKER, Ch. J., and O'BRIEN, J., concur with GRAY, J.

Judgment affirmed.

KIRBY v. PEASE.

126
Go to

Supreme Court of Washington. 1903.

33 Washington, 511.

MOUNT, J. This was an action to set aside a sale of real estate. It is alleged in the complaint that in 1896 an action was commenced in the superior court of Pierce county, wherein Henry Holgate was plaintiff and Samuel Parker and J. P. Kirby were defendants; that in February, 1898, before the issues were made up, the plaintiff therein, Henry Holgate, died, and no administration was had upon his estate; that in the month of December, 1898, after the attention of the trial court had been called to the fact of the death of the plaintiff therein, a judgment was entered against the said defendant

Kirby and in favor of said Holgate; that on November 26, 1902, an execution was issued upon the said judgment, and the property described in the complaint was sold thereunder, and respondent Pease became the purchaser; that the judgment and all proceedings had thereunder were void because the plaintiff in the action was dead at the time the judgment was obtained.

When the respondents were served with the summons they appeared, and moved the court to dismiss the action upon the ground that the action was "impertinent, vexatious, and contemptuous." This motion was supported by an affidavit showing that the question involved was *res adjudicata* in *Holgate v. Parker et al.*, wherein the question of the death of Holgate had been litigated, and that the lower court had been prohibited by this court in *State ex rel. Holgate v. Superior Court*, 21 Wash. 33, 56 Pac. 932, from again trying the question whether Holgate was dead at the time the judgment was rendered. This motion was sustained, and the action dismissed. Plaintiff appeals.

The only question discussed upon this appeal is that the grounds stated in the motion for dismissal are not grounds recognized by statute. It is true that the grounds stated in the motion, viz., that the action is "impertinent, vexatious, and contemptuous," are not designated by the Code as grounds for the dismissal of an action. In fact, we find no provision of the Code designating the grounds upon which an action may be dismissed. Any sufficient ground may therefore be stated. The affidavit accompanying the motion called the attention of the trial court to the facts that the parties to this action are the same and the question of the death of Holgate the same as in the case of *State ex rel. Holgate v. Superior Court*, wherein the trial court was prohibited from again trying that question. When these facts appeared, the trial court was certainly justified in dismissing the action. It could not be required by a party to an action to violate an order of this court.

The judgment is therefore affirmed.⁷²

⁷² In *O'Connell v. Mason*, (1904) 132 Fed. 245, the court said:—"We have no doubt of the inherent and necessary power of courts of general jurisdiction to protect members of the public from vexatious suits through an exercise of the right to dismiss frivolous proceedings which upon the face of the pleadings present no cause of action recognized by law. Unquestionably, the power to dismiss exists quite independent of express

statutory authority, and may be exercised in a proper case by the court upon its own motion."

Collusive suits, wherein parties seek to obtain the judgment of the court on fictitious controversies or on abstract questions of law having no relation to any actual adversary proceeding, are also subject to dismissal at the instance of the defendant or of an *amicus curiae* or of the court itself.—Haley v. Eureka County Bank, (1891) 21 Nev. 127.

Unauthorized suits, brought by attorneys without authority from the clients they purport to represent, may also be dismissed on motion.—Bell v. Farwell, (1901) 189 Ill. 414.

The same is true when it appears that the attorneys for the plaintiff are prosecuting the action under an unlawful champertous agreement with their client.—Allard v. Lamirande, (1872) 29 Wis. 502.

(c) *Directed Verdict.*

MEYER v. HOUCK.

127
Circuit

Supreme Court of Iowa. 1892.

85 Iowa, 319.

The defendants are husband and wife. On the twenty-seventh day of November, 1889, the defendant C. F. Houck executed and delivered to Calla Houck his promissory note for about twelve hundred dollars, and a chattel mortgage upon a stock of goods and merchandise, to secure the payment of the note. The mortgage was filed for record on the fourth day of December, 1889, and duly recorded. On the seventh day of December, 1889, the plaintiffs commenced an action against C. F. Houck upon an account for goods sold and delivered to him, and sued out an attachment, and caused the same to be levied upon the mortgaged goods. Calla Houck intervened in the action, and claimed the goods as mortgagee. The plaintiffs answered her petition of intervention by claiming that the mortgage was invalid and void as to creditors of C. F. Houck, because it was made with intent to defraud said creditors. There was a trial by jury, and when the plaintiffs completed the introduction of their evidence the intervenor moved the court to direct the jury to return a verdict against the plaintiffs. The motion was sustained, and the jury returned the verdict as directed, upon

which judgment was entered. The plaintiffs appeal.—
Affirmed.

ROTHROCK, J.

* * * * *

But it is further claimed that there was some evidence tending to show that the transaction in question was fraudulent, and that it was the duty of the court to submit the case to the jury if there was any evidence, however slight. It may be conceded that there was some evidence. There are one or two facts which might be regarded as badges of fraud; but, when weighed in the balance with the other evidence, they do not constitute such a conflict as would authorize a verdict for the plaintiffs. The rule of practice in relation to directing verdicts which has prevailed in this state is well understood. A motion to direct a verdict for the defendant has been regarded as a demurrer to the evidence, and it has always been held that such a motion not only admits the truth of the fact found, but every fact and conclusion which the evidence conduces to prove, or which the jury might have inferred therefrom in his favor. The rule was stated in very nearly the foregoing language in *Jones v. Ireland*, 4 Iowa, 63. And that practice has obtained in this state up to the present time. There are a multitude of cases adhering to the rule. It is unnecessary to cite them. They will be found collected in McClain's Digest (volume 2, pp. 335-338). The practice has been that where there is what is called a "scintilla of evidence" to be considered by the jury, it is error to direct a verdict. The rule has been stated in various forms of expression, as will be seen by an examination of the cases. In *Way v. Illinois Central R'y Co.*, 35 Iowa, 585, the following language is employed: "Hence, under the statute, and our previous rulings, it follows that it is the duty of a *nisi prius* court in this state to submit the case to the jury upon the evidence where it only tends even to prove it, although the court should feel in duty bound to set aside a verdict for the plaintiff if the jury should so find." It is further said in that case that "in other states a different, and perhaps better and more consistent rule obtains whereby the court may direct the jury how to find, where it would set aside a verdict otherwise." Citing *Brown v. R'y Co.*, 58 Me. 389; *Wilds v. Hudson River R'y Co.*, 24 N. Y. 430. In other cases the statement of the rule has been modified, as in *Starry v. Dubuque*

& *S. W. R'y Co.*, 51 Iowa, 419, in which the district court directed a verdict for the defendant, this court said: "Such being the case, it would have been the duty of the court to set aside a verdict in favor of the plaintiff. Why, then, occupy the valuable time of the court at the public expense for the purpose of going through a useless form and ceremony?" Language to the same effect will be found in the case of *Bothwell v. C. M. & St. P. R'y Co.*, 59 Iowa, 192. After a thorough examination of adjudged cases, we have reached the conclusion that the practice should be changed so as to harmonize with that "better and more consistent rule" referred to in *Way v. R'y Co.*, *supra*, which now obtains in England and in the United States courts, and in nearly all the states of the Union.

The doctrine in England on this question is well stated in the following language: "But there is in every case a preliminary question, which is one of law, namely, whether there is any evidence on which the jury could properly find the verdict for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit if the *onus* is on the plaintiff, or direct a verdict for the plaintiff if the *onus* is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a *scintilla*, in support of the case, but it is now settled that the question for the judge (subject, of course, to review) is, as is stated by Maule, J., in *Jewell v. Parr*, 13 C. B. 916, 'not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.'" *Ryder v. Wombwell*, L. R. 4 Exch. 32; *The Directors, etc., of the Metropolitan R'y Co. v. Jackson*, L. R. 3 App. Cas. 193; *The Directors, etc., of the Dublin, W. & W. R'y. Co. v. Slatterly*, Id. 1155.

* * * In *Pleasants v. Fant*, 22 Wall. 120, the following language is used: "It is the duty of the court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try; by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that

evidence is to be examined and applied; and finally, when necessary, by setting aside a verdict which is unsupported by evidence, or contrary to law. In the discharge of his duty it is the province of the court, either before or after verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor; not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury. But conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court, after a verdict, to set it aside, and grant a new trial. Must the court go through the idle ceremony, in such a case, of submitting to the jury the testimony on which the plaintiff relies when it is clear to the judicial mind that, if the jury should find a verdict in favor of plaintiff, that verdict would be set aside, and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be that, if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury." The same doctrine may be found in the following cases: *Raby v. Cell*, 85 Pa. St. 80, in which it is said that "at one time, indeed, it was the admitted doctrine that, if there was any, the least evidence,—a mere *scintilla*,—the question must be submitted to the jury. But that doctrine has been very justly exploded both in England and in this state;" *Wittkowsky v. Wasson*, 71 N. C. 451; *Zettler v. City of Atlanta*, 66 Ga. 195; *Weis v. City of Madison*, 75 Ind. 241; *Dryden v. Britton*, 19 Wis. 31; *Baldwin v. Shannon*, 43 N. J. Law, 596; *Brown v. R'y Co.*, 58 Me. 384, in which it is said: "It would be absurd to send a cause to a jury when the verdict, if rendered in favor of the plaintiff, would not be permitted to stand; *Wilds v. Hudson River R'y Co.*, 24 N. Y. 430, in which it is said: "No legal principle compels him (the judge) to allow a jury to render a merely idle verdict;" *Brown v. Massachusetts M. & L. Insurance Co.*, 59 N. H. 298; *Brooks v. Somerville*, 106 Mass. 271; *Enslinger v. McIntire*, 23 Cal. 593; *Morgan v. Durfee*, 69 Mo. 469; *Simmons v. Chicago & T. R'y Co.*, 110 Ill. 340. We might cite other adjudged cases to the same effect, but it is unnecessary. It will be seen from what we have cited that

the whole turn of legal thought in this country and in England is contrary to the rule of practice which requires a court to go on for several days with the trial of a case to a jury when the verdict must in the end be either for the defendant, or be set aside if for the plaintiff. It is true there are decisions to be found in a few states in which a *scintilla* of evidence is allowed to go to the jury. But an examination of the later cases in some of these states will show that the rule has not been adhered to. We have cited enough cases to show that the great weight of modern authority is contrary to the rule which this court has adhered to, though it has more than once intimated that the other rule adopted by the large majority of courts of last resort is better and more consistent.

Our conclusion is that when a motion is made to direct a verdict, the trial judge should sustain the motion when, considering all of the evidence, it clearly appears to him that it would be his duty to set aside a verdict if found in favor of the party upon whom the burden of proof rests. The adoption of this rule is no abridgment of the right of trial by jury. A party against whom a verdict has been directed by the court can have the ruling of the court reviewed by exception and appeal just as well as he can if the rule were otherwise, and he takes an appeal to this court from an order granting a new trial after verdict. He has no right to insist that the trial of his cause be continued as a mere idle form, or a mere experiment, that he may have the gratification of securing a verdict which must be set aside. As we have seen, courts very generally now designate such a proceeding as absurd. Probably this court has too long followed the rule to be in a position to denounce it in that way; but we think that, as the question involves no more than the change of a mere rule of practice, which will be of material advantage in the trial of cases in the saving of the time of the trial courts,—time which ought to be devoted to the transaction of legitimate business,—and the saving of court expenses to the counties, with no detriment to the rights of any one, it is high time that this state should adopt the more consistent and logical practice which now generally prevails elsewhere.

The judgment of the district court is affirmed.

MCDONALD v. METROPOLITAN STREET RAILWAY CO.

128 Court of Appeals of New York. 1901.
Grant
 167 New York, 66.

MARTIN, J. This action was for personal injuries resulting in death of the plaintiff's intestate, and was based upon the alleged negligence of the defendant. An appeal was allowed to this court upon the ground of an existing conflict in the decisions of different departments of the Appellate Division as to when a verdict may be directed where there is an issue of fact, and because in this case an erroneous principle was asserted which, if allowed to pass uncorrected, would be likely "to introduce confusion into the body of the law." (*Sciolina v. Erie Preserving Co.*, 151 N. Y. 50.) The court having directed a verdict, the appellant is entitled to the most favorable inferences deducible from the evidence, and all disputed facts are to be treated as established in her favor. (*Ladd v. Aetna Ins. Co.*, 147 N. Y. 478, 482; *Higgins v. Eagleton*, 155 N. Y. 466; *Ten Eyck v. Whitbeck*, 156 N. Y. 341, 349; *Bank of Monongahela Valley v. Weston*, 159 N. Y. 201, 208.)

If believed, the testimony of the plaintiff's witnesses was sufficient to justify the jury in finding the defendant negligent and the plaintiff's intestate free from contributory negligence. The evidence of the defendant was in many respects in direct conflict, and if credited would have sustained a verdict in its favor. Whether the defendant was negligent, the plaintiff's intestate free from contributory negligence, and the amount of damages, were submitted to the jury. It, however, having agreed upon a general verdict and failed to answer the questions submitted, the trial judge withdrew them and directed a verdict for the defendant. Upon the verdict so directed a judgment was entered. Subsequently an appeal was taken to the Appellate Division, where it was affirmed, and the plaintiff has now appealed to this court.

Although there was a direct and somewhat severe conflict in the evidence, the questions of negligence and contributory negligence were clearly of fact, and were for the jury and not for the court unless the right of trial by jury

is to be partially if not wholly abolished. It was assumed below that the plaintiff's evidence established a case which, undisputed, was sufficient to warrant a verdict in her favor. But the court said at the close of the defendant's evidence the plaintiff's case had been so far overcome that a verdict in her favor would have been set aside as against the weight of evidence. Upon that alleged condition of the proof, it held that the trial court might have properly submitted the case to the jury if it saw fit, but that it was not required to as the verdict might have been thus set aside. The practical result of that decision, if sustained, is in every case to vest in the trial court authority to determine questions of fact, although the parties have a right to a jury trial, if it thinks that the weight of evidence is in favor of one and it directs a verdict in his favor.

There have been statements by courts which seem to lend some justification to that theory, but we think no such broad principle has been intended and that no such rule can be maintained either upon principle or authority. The rule that a verdict may be directed whenever the proof is such that a decision to the contrary might be set aside as against the weight of evidence would be both uncertain and delusive. There is no standard by which to determine when a verdict may be thus set aside. It depends upon the discretion of the court. The result of setting aside a verdict and the result of directing one are widely different and should not be controlled by the same conditions or circumstances. In one case there is a retrial. In the other the judgment is final. One rests in discretion; the other upon legal right. One involves a mere matter of remedy or procedure. The other determines substantive and substantial rights. Such a rule would have no just principle upon which to rest.

While in many cases, even where the evidence is sufficient to sustain it, a verdict may be properly set aside and a new trial ordered, yet, that in every such case the trial court may, whenever it sees fit, direct a verdict and thus forever conclude the parties, has no basis in the law, which confides to juries and not to courts the determination of the facts in this class of cases.

We think it cannot be correctly said in any case where the right of trial by jury exists and the evidence presents an actual issue of fact, that the court may properly direct a

verdict. So long as a question of fact exists, it is for the jury and not for the court. If the evidence is insufficient, or if that which has been introduced is conclusively answered, so that, as a matter of law, no question of credibility or issue of fact remains, then the question being one of law, it is the duty of the court to determine it. But whenever a plaintiff has established facts or circumstances which would justify a finding in his favor, the right to have the issue of fact determined by a jury continues, and the case must ultimately be submitted to it.

The credibility of witnesses, the effect and weight of conflicting and contradictory testimony, are all questions of fact and not questions of law. If a court of review having power to examine the facts is dissatisfied with a verdict because against the weight or preponderance of evidence, it may be set aside, but a new trial must be granted before another jury so that the issue of fact may be ultimately determined by the tribunal to which those questions are confided. If there is no evidence to sustain an opposite verdict, a trial court is justified in directing one, not because it would have authority to set aside an opposite one, but because there was an actual defect of proof, and, hence, as a matter of law, the party was not entitled to recover. (*Colt v. Sixth Ave. R. R. Co.*, 49 N. Y. 671; *Bagley v. Bowe*, 105 N. Y. 171, 179.)

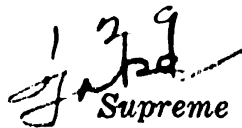
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We are of the opinion that a plain issue of fact was presented for the jury; that the court erred in directing a verdict; that the judgment and order should be reversed and a new trial granted, with costs to abide the event.

PARKER, Ch. J., BARTLETT, VANN, CULLEN and WERNER, JJ., concur; GRAY, J., dissents. *Judgment reversed, etc.*⁷³

⁷³ Commenting on this case the court said in *Weigand v. United Traction Co.*, (1917) 221 N. Y. 34, 39: "If, in the discretion of the court, a verdict *may* be set aside, the parties are not thereby deprived of a jury trial. It is only when a verdict for the plaintiff *must* be set aside as unsupported by sufficient evidence that a verdict for the defendant should be directed or the complaint dismissed."

See *Begert v. Payne*, (1921) 274 Fed. 784, holding that a verdict cannot be directed when a contrary verdict would be set aside as a matter of discretion but only when it would have to be set aside as a matter of law.



GILES v. GILES.

*Supreme Judicial Court of Massachusetts. 1910.**204 Massachusetts, 383.*

KNOWLTON, C. J.—This was a trial in the Superior Court upon three issues, framed upon an appeal from a decree of the Probate Court allowing the will of Charles E. Giles. The first issue presented the question whether the will was duly executed. The second raised the question whether it was procured by the undue influence of the petitioner. The third issue was as follows: "Was said instrument revoked by the said Charles E. Giles subsequently to the date, execution and publication thereof by the making, execution and publication of another will which has been lost or destroyed, and its contents cannot be proved so that it can be propounded for probate?"

Upon the first issue, after testimony by the subscribing witnesses tending to show that the will was properly executed, it was admitted in evidence, subject to the appellant's exception, and at the close of the testimony the jury were directed to return a verdict in favor of the petitioner. To this direction the appellants excepted.

The will was rightly admitted in evidence, and the testimony well warranted a finding that it was duly executed. If, indeed, full credence was given to the testimony of these witnesses, this conclusion followed almost necessarily. It is true that two of the witnesses had little definite recollection of the transaction, apart from their knowledge that their signatures to the clause of attestation were genuine, and that they knew from their signing that they saw the execution of the will by the testator in the presence of the three witnesses. While the jury, upon the facts, could not have been expected to reach any other conclusion than that which was recorded under the direction of the court, the issue was one to be passed upon by a jury, which is the ordinary tribunal for the determination of questions of fact. Where a proposition is only to be established by testimony of witnesses, the judge cannot properly direct a jury to decide that the fact is proved affirmatively by testimony. It is for the jury to say whether the witnesses are entitled to

credit. *Merchants' National Bank v. Haverhill Iron Works*, 159 Mass. 158; *Commonwealth v. McNeese*, 156 Mass. 231; *Way v. Butterworth*, 106 Mass. 75; *Whitten v. Haverhill*, ante, 95. We know of no case in this Commonwealth in which it has been determined that a jury can be directed to return a verdict, upon the oral testimony of witnesses, in favor of a party who has the burden of proving the facts to which they have testified. This direction was erroneous and the exception must be sustained.

* * * * *

Verdict on the first issue set aside; verdict on the third issue to stand.⁷⁴

⁷⁴ *Accord*: *Haughton v. Aetna Life Ins. Co.*, (1905) 165 Ind. 32, 73 N. E. 592; *Wolff v. Campbell*, (1892) 110 Mo. 114, 19 S. W. 622; *Anniston National Bank v. School Committee*, (1897) 121 N. C. 107, 28 S. E. 134; *Perklomen R. R. Co. v. Kremer*, (1907) 218 Pa. St. 641, 67 Atl. 913.

In *Goldstein v. D'Arcy*, (1909) 201 Mass. 312, the court sustained a verdict directed for a party who maintained the burden of proof with written evidence.

Many cases announce that the jury has the absolute right to disbelieve the uncontradicted evidence of unimpeached witnesses.—*Woodin v. Durfee* (1881) 46 Mich. 424; *Charleston Ins. & Trust Co. v. Corner*, (1844) 2 Gill (Md.) 410; *Anniston Nat. Bank v. School Committee*, (1897) 121 N. C. 107.

But other courts refuse to give the jury such autocratic power. In *Seibert v. Erie Ry. Co.*, (1867) 49 Barb. (N. Y.) 586, the court said: "The positive testimony of an unimpeached, uncontradicted witness cannot be discredited, or disregarded arbitrarily and capriciously by court or jury. *Lorner v. Meeker*, 25 N. Y. 361. If juries are permitted to discredit or disregard such testimony, there is no safety in the administration of justice, and parties might just as well let the result of a litigation abide the cast of a die, or a game of chance." See also *Crawford v. The State*, (1870) 44 Ala. 382.

See *Directing a Verdict for the Party Having the Burden of Proof*, by E. R. Sunderland, 11 Mich. L. Rev. 198, where a large number of cases are cited holding that a verdict may be directed in favor of the party having the burden of proof, irrespective of the character of the evidence. See *Woodstock v. Canton*, (1897) 91 Me. 62; *Chanute v. Higgins*, (1902) 65 Kan. 680; *May v. Crawford*, (1899) 150 Mo. 504, 527; *Webber v. Axtell*, (1910) 110 Minn. 52; *Seibert v. Erie Ry. Co.*, (1859) 49 Barb. 586; *Crawford v. The State*, (1870) 44 Ala. 382; *Green v. Stewart*, (1904) 23 App. Cas. D. C. 570; *Clancy v. Reis*, (1892) 5 Wash. 371; *Israel v. Day*, (1907) 41 Colo. 52; *Shumate v. Ryan*, (1906) 127 Ga. 118.

EMPIRE STATE CATTLE CO. v. ATCHISON, TOPEKA
& SANTA FE RAILWAY CO.9/13/0
Lake

MINNESOTA AND DAKOTA CATTLE CO. v. SAME.

*Supreme Court of the United States. 1907.**210 United States, 1.*

WHITE, J.—With the object of saving them from destruction by the flood which engulfed portions of Kansas City on May 31 and the first week of June, 1903, more than three thousand head of cattle belonging to the petitioners, which were in the Kansas City stock yards, were driven and crowded upon certain overhead viaducts in those yards. For about seven days, until the subsidence of the flood, they were there detained and could not be properly fed and watered. Many of them died and the remainder were greatly lessened in value. These actions were brought by the petitioners to recover for the loss so sustained upon the ground that the cattle were in the control of the defendant railway company as a common carrier, and that the loss sustained was occasioned by its negligence.

The railway company defended in each case upon the ground that before the loss happened it had delivered the cattle to a connecting carrier, but that if the cattle were in its custody it was without fault, and the damage was solely the result of an act of God, that is, the flood above referred to.

As the cases depended upon substantially similar facts and involved identical questions of law, they were tried together, and at the close of the evidence the trial court denied a peremptory instruction asked on behalf of the plaintiffs, and gave one asked on behalf of the railway company. 135 Fed. Rep. 135.

While there was some contention in the argument as to what took place concerning the requests for peremptory instructions, we think the bill of exceptions establishes that at the close of the evidence the plaintiffs requested a peremptory instruction in their favor, and on its being refused duly excepted and asked a number of special instructions, which were each in turn refused, and exceptions were sepa-

rately reserved, and the court then granted a request for a peremptory instruction in favor of the railway company, to which the plaintiffs excepted.

On the writs of error which were prosecuted from the Circuit Court of Appeals for the Eighth Circuit that court affirmed the judgment on the ground that as both parties had asked a peremptory instruction the facts were thereby submitted to the trial judge, and hence the only inquiry open was whether any evidence had been introduced which tended to support the inferences of fact drawn by the trial judge from the evidence. One of the members of the Circuit Court of Appeals (Circuit Judge Sanborn) did not concur in the opinion of the court, because he deemed that as the request for peremptory instruction made on behalf of plaintiffs was followed by special requests seeking to have the jury determine the facts, the asking for a peremptory instruction did not amount to a submission of the facts to the court so as to exclude the right to have the case go to the jury in accordance with the subsequent special requests. He, nevertheless, concurred in the judgment of affirmance, because, after examining the entire case, he was of opinion that prejudicial error had not been committed, as the evidence was insufficient to have justified the submission of the issues to the jury. 147 Fed. Rep. 457.

The cases are here because of the allowance of writs of *certiorari*. They present similar questions of fact and law, were argued together and are, therefore, embraced in one opinion. The scope of the inquiry before us needs, at the outset, to be accurately fixed. To do so requires us to consider the question which gave rise to a division of opinion in the Circuit Court of Appeals. If it be that the request by both parties for a peremptory instruction is to be treated as a submission of the cause to the court, despite the fact that the plaintiffs asked special instructions upon the effect of the evidence then, as said in *Beuttell v. Magone*, 157 U. S. 154, "the facts having been thus submitted to the court, we are limited in reviewing its action, to a consideration of the correctness of the finding on the law and must affirm if there be any evidence in support thereof." If, on the other hand, it be that, although the plaintiffs had requested a peremptory instruction, the right to go to the jury was not waived in view of the other requested instructions, then

our inquiry has a wider scope, that is, extends to determining whether the special instructions asked were rightly refused, either because of their inherent unsoundness or because, in any event, the evidence was not such as would have justified the court in submitting the case to the jury. It was settled in *Beuttell v. Magone, supra*, that where both parties request a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed and in effect submit to the trial judge the determination of the inferences proper to be drawn from them. But nothing in that ruling sustains the view that a party may not request a peremptory instruction, and yet, upon the refusal of the court to give it, insist, by appropriate requests, upon the submission of the case to the jury, where the evidence is conflicting or the inferences to be drawn from the testimony are divergent. To hold the contrary would unduly extend the doctrine of *Beuttell v. Magone*, by causing it to embrace a case not within the ruling in that case made. The distinction between a case like the one before us and that which was under consideration in *Beuttell v. Magone* has been pointed out in several recent decisions of Circuit Courts of Appeals. It was accurately noted in an opinion delivered by Circuit Judge Severens, speaking for the Circuit Court of Appeals for the Sixth Circuit in *Minahan v. Grand Trunk Ry. Co.*, 138 Fed. Rep. 37, 41, and was also lucidly stated in the concurring opinion of Shelby, Circuit Judge, in *McCormack v. National City Bank of Waco*, 142 Fed. Rep. 132, where, referring to *Beuttell v. Magone*, he said (p. 133):

"A party may believe that a certain fact which is proved without conflict or dispute entitles him to a verdict. But there may be evidence of other, but controverted facts, which, if proved to the satisfaction of the jury, entitles him to a verdict, regardless of the evidence on which he relies in the first place. It cannot be that the practice would not permit him to ask for peremptory instructions, and, if the court refuses to then ask for instruction submitting the other questions to the jury. And if he has the right to do this, no request for instructions that his opponent may ask can deprive him of the right. There is nothing in *Beuttell v. Magone, supra*, that conflicts with this view when the announcement of the court is applied to the facts of the case as stated in the opinion.

"In New York there are many cases showing conformity to the practice announced in *Beuttell v. Magone*, but they clearly recognize the right of a party who has asked for peremptory instructions to go to the jury on controverted questions of fact if he asks the court to submit such questions to the jury. *Kirtz v. Peck*, 113 N. Y. 226; S. C., 21 N. E. 130; *Sutter v. Vanderveer*, 122 N. Y. 652; S. C., 25 N. E. 907.

"The fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court so as to deprive the party of the right to ask other instructions, and to except to the refusal to give them, nor does it deprive him of the right to have questions of fact submitted to the jury if issues are joined on which conflicting evidence has been offered. *Minahan v. G. T. W. Ry. Co.*, (C. C. A.), 138 Fed. Rep. 37."

From this it follows that the action of the trial court in giving the peremptory instruction to return a verdict for the railway company cannot be sustained merely because of the request made by both parties for a peremptory instruction in view of the special requests asked on behalf of the plaintiffs. The correctness, therefore, of the action of the court in giving the peremptory instruction depends, not upon the mere requests which were made on that subject, but upon whether the state of the proof was such as to have authorized the court, in the exercise of a sound discretion, to decline to submit the cause to the jury. That is to say, the validity of the peremptory instruction must depend upon whether the evidence was so undisputed or was of such a conclusive character as would have made it the duty of the court to set aside the verdicts if the cases had been given to the jury and verdicts returned in favor of the plaintiff. *McGuire v. Blount*, 199 U. S. 142, 148, and cases cited; *Marande v. Texas & P. R. Co.*, 184 U. S. 191, and cases cited; *Southern Pacific Co. v. Pool*, 160 U. S. 440, and cases cited.

To dispose of this question requires us to consider somewhat in detail the origin of the controversy, the contracts of shipment from which the controversy arose and the proof which is embodied in the bill of exceptions relied on to justify the inference of liability on the part of the railway company.

* * * As we think the undisputed proof to which we have referred not only established the existence of the neces-

sity for the change of route, but also, beyond dispute, demonstrated that there was an entire absence of all negligence in selecting that route, we are clearly of opinion that no liability was entailed simply by reason of the change, even if that change could in law be treated as a concurring and proximate cause of the damages which subsequently resulted.

*Affirmed.*⁷⁵

⁷⁵ *Accord*, Joseph Milling Co. v. Bank of Joseph, (1923) ¹²⁹ Ore. 1, 216 Pac. 560. — *Wheat* *Milling*.

And see 3 Mich. Law Rev. 557; 12 Mich. Law Rev. 619; 19 Mich. Law Rev. 453.

131 FITZSIMONS v. RICHARDSON, TWIGG & CO.

Supreme Court of Vermont. 1913.

86 Vermont, 229.

HASELTON, J. This is general *assumpsit*. Trial was by jury. Verdict and judgment were for the defendants. The plaintiff excepted.

* * * * *

At the close of the evidence, each party claimed that a verdict should be directed in his favor, and filed a motion to that end. The court made a *pro forma* order directing a verdict for the defendants, and, such verdict being returned, rendered a *pro forma* judgment thereon. To the direction of the verdict and to the judgment thereon the plaintiff excepted. The exception raises the question of whether there was evidence fairly and reasonably tending to sustain the plaintiff's claim. *Comeau v. Manuel & Sons Co.*, 84 Vt. 501, 509, 80 Atl. 51; *Bass v. Rublee*, 76 Vt. 395, 57 Atl. 965.

The defendants claim that, because of the two motions, it was the duty of the court to direct a verdict one way or the other. But this claim is unsound. Where it affirmatively appears that neither party wishes to go to the jury, it is for the court to direct such a verdict as in its judgment the evidence requires. *Davis v. St. Albans*, 42 Vt. 585; *Robinson v. Larabee*, 58 Vt. 652, 5 Atl. 512; *Taylor v. Coolidge*, 64 Vt. 506, 24 Atl. 656; *Mascott v. First National Fire Ins. Co.*, 69

Vt. 116, 37 Atl. 255. There is nothing novel about this practice, for the parties in civil cases can always by agreement substitute the court for the jury. But the mere fact that each party to a cause moves for a verdict in his favor does not amount to a consent that the case shall be taken from the jury. One who claims that the evidence is all his way does not waive the right to claim that, at least, some of it is his way, and that right is not affected by the fact that the other party moves that a verdict be directed in his favor. *Woodsville, etc., Bank v. Rogers*, 82 Vt. 468, 74 Atl. 85.

* * * * *

⁷⁶ Accord: *Wolf v. Chicago Sign Printing Co.*, (1908) 233 Ill. 501; *Hayes v. Kluge*, (1914) 86 N. J. L. 657.

132011
RAINGER v. BOSTON MUTUAL LIFE ASSOCIATION.

Supreme Judicial Court of Massachusetts. 1897.

167 Massachusetts, 109.

Contract, upon a policy of insurance for \$1,000, issued by the defendant on the life of Fred S. Rainger, and payable to the plaintiff, who was his wife. The answer set up, among other defenses, false and fraudulent representations by Rainger in his application for insurance. Trial in the Superior Court, before Dewey, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts material to the points decided appear in the opinion. * * *

MORTON, J. * * *

The plaintiff further contends that it was not within the power of the judge to order the jury to return a verdict for the defendant at the time when and under the circumstances which he did. All that the exceptions state on this point is: "At the close of the evidence arguments were made by counsel, and the presiding justice charged the jury. After the jury had deliberated upon the case for nearly six hours, they were called back into court. The foreman stated that they were unable to agree, and the presiding justice directed

the jury to return a verdict for the defendant, to which the plaintiff duly excepted." So far as appears from the exceptions this took place in open court, and, if so, it is clear that the presiding justice had a right to call back the jury and direct them to return a verdict as he did. He did not lose his control over the jury because they had retired to a side room, under his direction, to deliberate on their verdict, and in the further conduct of the trial he could recall them and give them such additional directions or instructions as the case seemed to him to require. *Kullberg v. O'Donnell*, 158 Mass. 405; *Merritt v. New York, New Haven & Hartford Railroad*, 164 Mass. 440.

Exceptions overruled.

CAHILL v. CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY CO.

United States Circuit Court of Appeals, Seventh Circuit.
1896.

74 Federal Reporter, 285; 20 Circuit Court of Appeals, 184.

Before WOODS and JENKINS, Circuit Judges, and GROSSCUP, District Judge.

WOODS, Circuit Judge. This is an action on the case for personal injury suffered by Maria Cahill, the plaintiff in error, who, when attempting, afoot, to cross a switching track of the defendant in error at the Union Stock Yards, in Chicago, was struck and run over by a backing engine, whereby she lost both feet, and suffered other serious bodily injuries. * * *

The Court below directed a verdict for the defendant.
* * *

* * * * *

While we have treated the judgment in this case as if it had been rendered upon a verdict of the jury delivered in accordance with the court's peremptory direction, the fact is not literally so. The record shows that the jurors, at the conclusion of the charge, refused to render a verdict for the defendant, severally stating that they could not

conscientiously do so, whereupon the court said: "Very well. You may retire to your room, and return with such a verdict as you may find." The jury accordingly retired, but were recalled into court at a later hour, and directed again to return a verdict for the defendant; but, one juror still holding out, counsel for the plaintiff was permitted to stipulate of record that a judgment of dismissal might be entered, to have the same force and effect, and none, other, than a verdict for the defendant under the direction of the court, but that plaintiff should be considered as excepting to such direction, and also to such order of dismissal, and thereupon the court ordered such dismissal, and the plaintiff thereupon excepted to such ruling. The stipulation should not have been accepted. The authority and duty of a judge to direct a verdict for one party or the other, when, in his opinion, the state of the evidence requires it, is beyond dispute; and it is not for jurors to disobey, nor for attorneys to object, except in the orderly way necessary to save the right to prosecute a writ of error. The conduct of the juror in this instance was in the highest degree reprehensible, and might well have subjected him, and any who encouraged him to persist in his course, to punishment for contempt. His conduct was in violation of law, subversive of authority, and obstructive of the orderly administration of justice. In fact, by his course he put in jeopardy the interests which he assumed to protect, because it is only by treating the case as if the verdict directed had been returned that we have been able to review the judgment and to order a new trial. We deem it proper to observe here that it is not essential that there be a written verdict signed by jurors or by a foreman, and we have no doubt that, in cases where the court thinks it right to do so, it may announce its conclusion in the presence of the jury and of the parties or their representatives, and direct the entry of a verdict without asking the formal assent of the jury. Until a case has been submitted to the jury for its decision upon disputed facts, the authority of the court, for all the purposes of the trial, is, at every step, necessarily absolute; and its ruling upon every proposition, including the question whether, upon the evidence, the case is one for the jury, must be conclusive, until, upon writ of error, it shall be set aside. That remedy is provided by law, and presumably

will be effective and adequate, if there be just ground for invoking it. Certainly the obstinacy of a conceited juror is not likely to prove a wholesome substitute. The judgment is reversed and the case remanded, with instructions to grant a new trial.

[JENKINS, J., dissented on other grounds.]

34
Take
Cruikshank
v. St. Paul
Fire & Marine
Insurance Co.
Supreme Court of Minnesota. 1899.
75 Minnesota, 266.

CRUIKSHANK v. ST. PAUL FIRE & MARINE INSURANCE CO.

Supreme Court of Minnesota. 1899.

75 Minnesota, 266.

MITCHELL, J. This was an action to recover upon a "hail insurance policy," one provision of which was that,

"In case of loss by hail to the crops insured, the assured shall mail a written notice to the company at its office in the city of St. Paul, Minn., within forty-eight hours after the time of such loss, stating the day and hour of the storm, also the probable damage to each part of the crops insured."

So far as material for the purposes of this appeal, the defense was that the insured had not given notice of loss in accordance with this provision of the policy.

The policy contained a warranty that the insured was the owner of all the land upon which the crops covered by the policy were growing, but a breach of this warranty, if any, was a matter of defense, and no such defense was pleaded.

When the evidence closed the defendant moved the court to direct a verdict in its favor, but the court denied the motion and submitted the case to the jury, which found a verdict in favor of the plaintiff. Thereupon the defendant made a motion, not in the alternative for judgment notwithstanding the verdict, or, in case that should be denied, for a new trial, but merely for judgment notwithstanding the verdict. The court denied the motion, and from the judgment entered upon the verdict the defendant appealed.

Originally at common law, judgment notwithstanding the

verdict could only be granted in favor of the plaintiff, the remedy in favor of the defendant being to have the judgment arrested; but either by statute or by judicial relaxation of this rule, judgment notwithstanding the verdict became quite generally allowable in favor of either party. But in either case the motion was based on the record alone, and the granting or denying it depended upon the pleadings. The rendition of judgment notwithstanding the verdict was discretionary with the court. It would only be granted when it was clear that the cause of action, or the defense, put upon the record did not, in point of substance, constitute a legal cause of action or defense. It was never granted on account of any technical defect in the pleadings, but in such case the court would order a repleader.

By enacting laws 1895, c. 320,⁷⁷ the legislature was not creating a new remedy, but merely extended, as has been done in many other states, the common law remedy to cases where, upon the evidence, either party was clearly entitled to judgment. In thus extending the remedy it must be presumed that the legislature intended it to be governed by the same rules which applied when it was granted upon the record alone; that is, that it should not be granted unless it clearly appeared from the whole evidence that the cause of action, or defense, sought to be established could not, in point of substance, constitute a legal cause of action or a legal defense.

The court has acted on this construction of the statute and refused to order judgment even where there was a total absence of evidence on some material point, but where it appeared probable that the party had a good cause of action or defense, and that the defect in the evidence could be supplied on another trial. This is just such a case.

From the record it appears probable that the plaintiff has a good cause of action and that the defects, if any, in the evidence, are largely technical and could be supplied on another trial. The alleged defects in the evidence suggested are of the following character: that the letter from plaintiff's father to Kenaston was not formally introduced in evidence, that there was no evidence that the letter from Kenaston to the defendant was never mailed, and that there was no evidence that the person who came to adjust the loss was McClure, or that McClure was at that time defendant's ad-

juster. The statute permits a party to make his motion in the alternative. Defendant has elected not to do so, but to stand exclusively on its right to judgment in its favor notwithstanding the verdict against it. Not being entitled to this relief, it is not entitled, at least as a matter of right, to a new trial, on the ground of the insufficiency of the evidence. Indeed, counsel for the defendant conceded this upon the argument.

*Judgment affirmed.*⁷⁸

⁷⁷ The statute is as follows: "In all cases where at the close of the testimony in the case tried a motion is made by either party to the suit requesting the trial court to direct a verdict in favor of the party making such motion, which motion was denied, the trial court on motion made that judgment be entered notwithstanding the verdict, or on motion for a new trial, shall order judgment to be entered in favor of the party who was entitled to have a verdict directed in his or its favor; and the supreme court of the state on appeal from an order granting or denying a motion for a new trial in the action in which such motion was made may order and direct judgment to be entered in favor of the party who was entitled to have such verdict directed in his or its favor whenever it shall appear from the testimony that the party was entitled to have such motion granted."

The history of this statute in Minnesota is interesting. In 1913 it was amended so as to *require* the court to overrule the motion for a directed verdict whenever the adverse party objected to it, and to take the verdict of the jury; and thereafter the error, if any, could be corrected on motion by the entry of a proper judgment. G. L. 1913, ch. 245. In 1915 another amendment removed the requirement that the motion to direct should be overruled. G. L. 1915, ch. 31. In 1917 it was again amended so as to allow a judgment to be entered after an erroneous refusal to direct a verdict in cases where the jury disagreed and were discharged. G. L. 1917, ch. 24.

⁷⁸ Such a statute was held unconstitutional in *Slocum v. New York Life Ins. Co.*, (1912) 228 U. S. 364, by a five to four division, on the ground that the entry of a judgment contrary to the verdict of a jury was the denial of the right of trial by jury. See the following discussions of this case. Thorndyke: Trial by Jury in the United States, 26 Harv. L. Rev. 732; Ezra Ripley Thayer; Judicial Administration, 63 Univ. of Penn. L. Rev. & Am. L. Reg. 585-608 (containing a very illuminating discussion of the entire problem involved).

Other courts have held such statutes valid. See *Bothwell v. Boston Elevated Ry. Co.*, (1913) 215 Mass. 467, citing many cases.

SECTION 7. INSTRUCTING THE JURY.

135 (a) Province of Court and Jury.
Jube

SPARF AND HANSEN v. UNITED STATES.

Supreme Court of the United States. 1895.

156 United States, 51.

HARLAN, J.—The plaintiffs in error and Thomas St. Clair were indicted jointly for the murder of Maurice Fitzgerald upon the high seas, on board of an American vessel, the bark Hesper, as set forth in the indictment mentioned in *St. Clair v. U. S.*, 154 U. S. 134, 14 Sup. Ct. 1002. On motion of the accused, it was ordered that they be tried separately. St. Clair was tried, found guilty of murder, and sentenced to suffer the punishment of death. Subsequently the order for separate trials was set aside, and the present defendants were tried together, and both were convicted of murder. A motion for a new trial having been overruled, a like sentence was imposed upon them.

* * * * *

2. One of the specifications of error relates to the refusal of the court to give certain instructions asked by the defendants, and to parts of the charge to the jury.

* * * * *

The refusal to grant the defendants' requests for instructions, taken in connection with so much of the charges as referred to the crime of manslaughter, and the observations of the court when the jury, through their foreman, applied for further instructions, present the question whether the court transcended its authority when saying, as in effect it did, that, in view of the evidence, the only verdict the jury could under the law properly render would be either one of guilty of the offense charged, or one of not guilty of the offense charged; that if a felonious homicide had been committed by either of the defendants, of which the jury were the judges from the proof, there was nothing in this case to reduce it below the grade of murder; and that, "as one of the tribunals of the country, a jury is expected to be gov-

erned by law, and the law it should receive from the court."

* * * * *

The general question as to the duty of the jury to receive the law from the court is not concluded by any direct decision of this court.

* * * * *

The question before us received full consideration by Mr. Justice Story in *U. S. v. Battiste*, 2 Sumn. 240, 243, 244, Fed. Cas. No. 14,545. That was an indictment for a capital offense, and the question was directly presented whether in criminal cases, especially in capital cases, the jury were the judges of the law as well as of the facts. He said: "My opinion is that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and of fact, and includes both. In each they must necessarily determine the law as well as the fact. In each they have the physical power to disregard the law, as laid down to them by the court. But I deny that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law, and it is the duty of the jury to follow the law as it is laid down by the court. This is the right of every citizen, and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it, but in case of error there would be no remedy or redress by the injured party; for the court would not have any right to review the law as it had been settled by the jury." "Every person accused as a criminal has a right to be tried according to the law of the land,—the fixed law of the land, and not by the law as a jury may understand it, or choose, from wantonness or ignorance or accidental mistake, to interpret it. If I thought that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But

believing, as I do, that every citizen has a right to be tried by the law, and according to the law; that it is his privilege and truest shield against oppression and wrong,—I feel it my duty to state my views fully and openly on the present occasion."

In *U. S. v. Morris*, 1 Curt. 23, 51, 52, 58, Fed. Cas. No. 15,815, the question, in all of its aspects, was examined by Mr. Justice Curtis with his accustomed care. In that case the contention was that every jury, impaneled in a court of the United States, was the rightful judge of the existence, construction, and effect of every law that was material in a criminal case, and could, of right, and if it did its duty, must, decide finally on the constitutional validity of any act of congress which the trial brought in question. Touching the rightful powers and duties of the court and the jury under the constitution in criminal cases, Mr. Justice Curtis, among other things, said: "The sixth article, after declaring that the constitution, laws and treaties of the United States shall be the supreme law of the land, proceeds, 'And the judges, in every state, shall be bound thereby.' But was it not intended that the constitution, laws, and treaties of the United States should be the supreme law in *criminal* as well as in *civil cases*? If a state law should make it penal for an officer of the United States to do what an act of congress commands him to do, was not the latter to be supreme over the former? And if so, and in such cases juries finally and rightfully determine the law, and the constitution so means when it speaks of a trial by jury, why was this command laid on the judges alone, who are thus mere advisers of the jury, and may be bound to give sound advice, but have no real power in the matter? It was evidently the intention of the constitution that all persons engaged in making, expounding, and executing the laws, not only under the authority of the United States, but of the several states, should be bound by oath or affirmation to support the constitution of the United States. But no such oath or affirmation is required of jurors, to whom it is alleged the constitution confides the power of expounding that instrument, and not only construing, but holding invalid, any law which may come in question on a criminal trial." "In my opinion," the learned justice proceeded, "it is the duty of the court to decide every question of law which arises in a criminal trial.

If the question touches any matter affecting the course of the trial, such as the competency of a witness, the admissibility of evidence, and the like, the jury receive no direction concerning it. It affects the materials out of which they are to form their verdict, but they have no more concern with it than they would have had if the question had arisen in some other trial. If the question of law enters into the issue, and forms part of it, the jury are to be told what the law is, and they are bound to consider that they are told truly; that law they apply to the facts, as they find them, and thus, passing both on the law and the fact, they from both, frame their general verdict of guilty or not guilty. Such is my view of the respective duties of the different parts of this tribunal in the trial of criminal cases, and I have not found a single decision of any court in England, prior to the formation of the constitution, which conflicts with it."

* * * * *

But Mr. Justice Curtis considered the question from another point of view, and gave reasons which appear to us entirely conclusive against the proposition that it is for the jury, in every criminal case, to say authoritatively what is the law by which they are to be governed in finding their verdict. He said: "There is, however, another act of congress which bears directly on this question. The act of the 29th of April, 1802, in section 6, after enacting that, in case of a division of opinion between the judges of the circuit court on any question, such question may be certified to the supreme court, proceeds: 'And shall by the said court be *finally decided*; and the decision of the supreme court and their order in the premises shall be remitted to the circuit court, and be there entered of record and have effect according to the nature of such judgment and order.' The residue of this section proves that criminal as well as civil cases are embraced in it, and under it many questions arising in criminal cases have been certified to and decided by the supreme court, and persons have been executed by reason of such decisions. Now, can it be, after a question arising in a criminal trial has been certified to the supreme court, and there, in the language of this act, finally decided, and their order remitted here and entered of record, that when the trial comes on the jury may rightfully revise and reverse this final decision? Suppose, in the course of this trial, the

judges had divided in opinion upon the question of the constitutionality of the act of 1850, and that, after a final decision thereon by the supreme court and the receipt of its mandate here, the trial should come on before a jury, does the constitution of the United States, which established that supreme court, intend that a jury may, as matter of right, revise and reverse that decision? And, if not, what becomes of this supposed right? Are the decisions of the supreme court binding on juries, and not the decisions of inferior courts? This will hardly be pretended; and if it were, how is it to be determined whether the supreme court has or has not, in some former case, in effect settled a particular question of law? In my judgment, this act of congress is in accordance with the constitution, and designed to effect one of its important and even necessary objects,—a uniform exposition and interpretation of the law of the United States,—by providing means for a final decision of any question of law,—final as respects every tribunal and every part of any tribunal in the country; and, if so, it is not only wholly inconsistent with the alleged power of juries, to the extent of all questions so decided, but it tends strongly to prove that no such right as is claimed does or can exist.”

* * * * *

Perhaps the fullest examination of the question upon principle, as well as upon authority, to be found in the decisions of any state court, was made in *Com. v. Anthes*, 5 Gray, 185, 193, 206, 208, 218, where Chief Justice Shaw, speaking for a majority of the court, said that the true theory and fundamental principle of the common law, both in its civil and criminal department, was that the judges should adjudicate finally upon the whole question of law, and the jury upon the whole question of fact.

Considering, in the light of the authorities, the grounds upon which a verdict of guilty or not guilty, in a criminal case, was held, at common law, to be conclusive, he observed that though the jury had the power they had not the right to decide, that is, to adjudicate, on both law and evidence. He said. “The result of these several rules and principles is that, in practice, the verdict of a jury, both upon the law and the fact, is conclusive; because, from the nature of the proceeding, there is no judicial power by which the conclusions of law thus brought upon the record by that verdict

can be reversed, set aside, or inquired into. A general verdict, either of conviction or acquittal, does embody and declare the result of both the law and the fact, and there is no mode of separating them on the record so as to ascertain whether the jury passed their judgment on the law, or only on the evidence. The law authorized them to adjudicate definitively on the evidence; the law presumes that they acted upon correct rules of law given them by the judge. The verdict, therefore, stands conclusive and unquestionable, in point both of law and fact. In a certain limited sense, therefore, it may be said that the jury have a power and a legal right to pass upon both the law and the fact. And this is sufficient to account for many and most of the dicta in which the proposition is stated. But it would be more accurate to state that it is the right of the jury to return a general verdict; this draws after it, as a necessary consequence, that they *incidentally* pass upon the law. But here, again, is the question, what is intended by 'passing upon the law'? I think it is by embracing it in their verdict, and thus bringing it upon the record, with their finding of the facts. But does it follow that they may rightfully and by authority of the common law, by which all are conscientiously bound to govern their conduct, proceed upon the same grounds and principles in the one case as the other? What the jury have a right to do, and what are the grounds and principles upon which they are in duty and conscience bound to act and govern themselves in the exercise of that right, are two very distinct questions. The latter is the one we have to deal with. Suppose they have a right to find a general verdict, and by that verdict to conclude the prosecutor in the matter of law, still it is an open and very different question whether, *in making up that verdict* and thereby embracing the law, they have the same right to exercise their own reason and judgment, against the statement of the law by the judge, to adjudicate on the law, as unquestionably they have on the fact. The affirmative of this proposition is maintained by the defendant in this case, and by others in many of the cases before us. If I am right in the assumption that the judge is to adjudge the law, and the jury the fact, only, it furnishes the answer to this question to what extent the jury adjudicate the law; and it is that they receive authoritative direction from the court, and act in conformity with them, though by

their verdict they thus embrace the law with the fact, which they may rightfully adjudicate."

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To the same purport are the text writers. "In theory, therefore," says Judge Cooley, "the rule of law would seem to be that it is the duty of the jury to receive and follow the law as delivered to them by the court; and such is the clear weight of authority."

* * * * *

* * * We are of opinion that the law in England at the date of our separation from that country was as declared in the authorities we have cited. The contrary view rests, as we think, in large part, upon expressions of certain judges and writers, enforcing the principle that when the question is *compounded of law and fact* a general verdict, *ex necessitate*, disposes of the case in hand, both as to law and fact. That is what Lord Somers meant when he said in his essay on "The Security of Englishmen's Lives, or the Trust, Power, and Duty of the Grand Juries of England," that jurors only "are the judges from whose sentence the indicted are to expect life or death," and that, "by finding guilty or not guilty, they do complicately resolve both law and fact." In the speeches of many statesmen and in the utterances of many jurists will be found the general observation that when law and fact are "blended" their combined consideration is for the jury, and a verdict of guilty or not guilty will determine both for the particular case in hand. But this falls far short of the contention that the jury, in applying the law to the facts, may rightfully refuse to act upon the principles of law announced by the court.

* * * * *

Any other rule than that indicated in the above observations would bring confusion and uncertainty in the administration of the criminal law. Indeed, if a jury may rightfully disregard the direction of the court in matter of law, and determine for themselves what the law is in the particular case before them, it is difficult to perceive any legal ground upon which a verdict of conviction can be set aside by the court as being against law. If it be the function of the jury to decide the law as well the facts,—if the function of the court be only advisory as to the law,—why should the

court interfere for the protection of the accused against what it deems an error of the jury in matter of law?

Public and private safety alike would be in peril if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves. Under such a system, the principal function of the judge would be to preside and keep order while jurymen, untrained in the law, would determine questions affecting life, liberty, or property according to such legal principles as, in their judgment, were applicable to the particular case being tried. If because, generally speaking, it is the function of the jury to determine the guilt or innocence of the accused according to the evidence, of the truth or weight of which they are to judge, the court should be held bound to instruct them upon a point in respect to which there was no evidence whatever, or to forbear stating what the law is upon a given state of facts, the result would be that the enforcement of the law against criminals, and the protection of citizens against unjust and groundless prosecutions, would depend entirely upon juries uncontrolled by any settled, fixed, legal principles. And if it be true that a jury in a criminal case are under no legal obligation to take the law from the court, and may determine for themselves what the law is, it necessarily results that counsel for the accused may, of right, in the presence of both court and jury, contend that what the court declares to be the law applicable to the case in hand is not the law, and, in support of his contention, read to the jury the reports of adjudged cases, and the views of elementary writers. Undoubtedly, in some jurisdictions, where juries in criminal cases have the right, in virtue of constitutional or statutory provisions, to decide both law and facts upon their own judgment as to what the law is and as to what the facts are, it may be the privilege of counsel to read and discuss adjudged cases before the jury. And in a few jurisdictions, in which it is held that the court alone responds as to the law, that practice is allowed in deference to long usage. But upon principle, where the matter is not controlled by express constitutional or statutory provisions, it cannot be regarded as the right of counsel to dispute before the jury the law as declared by the court. Under the contrary view—if it be held that the court may not authoritatively decide all ques-

tions of law arising in criminal cases—the result will be that when a new trial in a criminal case is ordered, even by this court, the jury, upon such trial, may of right return a verdict based upon the assumption that what this court has adjudged to be law is not law. We cannot give our sanction to any rule that will lead to such a result. We must hold affirmatively to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by law is the underlying principle of our institutions.

* * * * *

We have said that, with few exceptions, the rules which obtain in civil cases in relation to the authority of the court to instruct the jury upon all matters of law arising upon the issues to be tried, are applicable in the trial of criminal cases. The most important of those exceptions is that it is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offense charged, or of any criminal offense less than that charged. The grounds upon which this exception rests were well stated by Judge McCrary, Mr. Justice Miller concurring, in *U. S. v. Taylor*, 3 McCrary, 50, 505, 11 Fed. 470. It was there said: "In a civil case, the court may set aside the verdict, whether it be for the plaintiff or defendant, upon the ground that it is contrary to the law as given by the court; but in a criminal case, if the verdict is one of acquittal, the court has no power to set it aside. It would be a useless form for a court to submit a civil case, involving only questions of law, to the consideration of a jury, where the verdict, when found, if not in accordance with the court's view of the law, would be set aside. The same result is accomplished by an instruc-

tion given in advance to find a verdict in accordance with the court's opinion of the law. But not so in criminal cases. A verdict of acquittal cannot be set aside; and therefore, if the court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly."

We are of opinion that the court below did not err in saying to the jury that they could not, consistently with the law arising from the evidence, find the defendants guilty of manslaughter, or of any offense less than the one charged; that if the defendants were not guilty of the offense charged, the duty of the jury was to return a verdict of not guilty.

* * *

The main reason ordinarily assigned for a recognition of the right of the jury, in a criminal case, to take the law into their own hands, and to disregard the directions of the court in matters of law, is that the safety and liberty of the citizen will be thereby more certainly secured. That view was urged upon Mr. Justice Curtis. After stating that, if he conceived the reason assigned to be well founded, he would pause long before denying the existence of the power claimed, he said that a good deal of reflection had convinced him that the argument was the other way. He wisely observed that: "As long as the judges of the United States are obliged to express their opinions publicly, to give their reasons for them when called upon in the usual mode, and to stand responsible for them, not only to public opinion, but to a court of impeachment, I can apprehend very little danger of the laws being wrested to purposes of injustice. But, on the other hand, I do consider that this power and corresponding duty of the court authoritatively to declare the law is one of the highest safeguards of the citizen. The sole end of courts of justice is to enforce the laws uniformly and impartially, without respect of persons or times or the opinions of men. To enforce popular laws is easy. But when an unpopular cause is a just cause; when a law, unpopular in some locality, is to be enforced,—there then comes the strain upon the administration of justice; and few unprejudiced men would hesitate as to where that strain would be most firmly borne." *U. S. v. Morris*, 1 Curt. 62, 63, Fed. Cas. No. 15,815.

The questions above referred to are the only ones that need be considered on this writ of error.

MR. JUSTICE JACKSON participated in the decision of this case, and concurs in the views herein expressed.

The judgment of the circuit court is affirmed as to Hansen, but is reversed as to Sparf, with directions for a new trial as to him.

BREWER, J., dissenting.

I concur in the views expressed in the opinion of the court as to the separate functions of court and jury, and in the judgment of affirmance against Hansen. * * *

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I am authorized to say that MR. JUSTICE BROWN concurs in these views.

GRAY, J., with whom concurred SHIRAS, J., dissenting.

* * * * *

It is our deep and settled conviction, confirmed by a re-examination of the authorities under the responsibility of taking part in the consideration and decision of the capital case now before the court, that the jury, upon the general issue of guilty or not guilty in a criminal case, have the right, as well as the power, to decide, according to their own judgment and consciences, all questions, whether of law or of fact, involved in that issue.

The question of the right of the jury to decide the law in criminal cases has been the subject of earnest and repeated controversy in England and America, and eminent jurists have differed in their conclusions upon the question. In this country, the opposing views have been fully and strongly set forth by Chancellor Kent in favor of the right of the jury, and by Chief Justice Lewis against it, in *People v. Croswell*, 3 Johns. Cas. 337; by Judge Hall in favor of the right, and by Judge Bennett against it, in *State v. Croteau*, 23 Vt. 14; and by Chief Justice Shaw against the right, and by Mr. Justice Thomas in its favor, in *Com. v. Anthes*, 5 Gray, 185.

* * * * *

Littleton, speaking of civil actions in which the jury, upon the general issue pleaded, might return a special verdict, says that, "if they will take upon them the knowledge of the law upon the matter, they may give their verdict generally, as is put in their charge." Co. Litt. § 368. And accordingly Lord Coke says: "Although the jury, if they will take upon them

(as Littleton here saith) the knowledge of the law, may give a general verdict, yet it is dangerous for them so to do; for, if they do mistake the law, they run into the danger of an attainder; therefore to find the special verdict is the safest, where the case is doubtful." Co. Litt. 227b.

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In the reign of Charles II. some judges undertook to instruct juries that they must take the law from the court, and to punish them if they returned a verdict in favor of the accused against the judge's instructions. But, as often as application was made to higher judicial authority, the punishments were set aside, and the rights of juries vindicated.

* * * * *

The reasons are more fully brought out in *Bushell's Case*, in 1670, not mentioned in the text of Lord Hale's treatise, and doubtless decided after that was written. William Penn and William Mead having been indicted and tried for a similar offense, and acquitted against the instructions of the court, Bushell and the other jurors who tried them were fined by Sir John Howell, recorder of London, and Bushell was committed to prison, in like terms, for not paying his fine, and sued out a writ of *habeas corpus*. *Penn and Meads's Case*, 6 How. State Tr. 951; *Bushell's Case*, Vaughan, 135, 6 How. State Tr. 999; 1 Freem. 1; T. Jones, 13.

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But Bushell was discharged from imprisonment, for reasons stated in the judgment delivered by Sir John Vaughan, chief justice of the common pleas, after a conference of all the judges of England, including Lord Hale, and with the concurrence of all except Chief Justice Kelyng. Vaughan, 144, 145; 1 Freem. 5; Lord Holt in *Groenvelt v. Burwell*, 1 Ld. Raym. 454, 470.

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It is difficult to exhibit the strength of Chief Justice Vaughan's reasoning by detached extracts from his opinion. But a few other passages are directly in point:

"A man cannot see by another's eye, nor hear by another's ear; no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning; and though the verdict be right the jury give, yet they, being not assured it is so from their own understanding, are forsworn, at least *in foro conscientiae*." Page 148.

"That *decantatum* in our books, '*ad quæstionem facti non respondent judices, ad quæstionem legis non respondent juratores*,' literally taken, is true; for if it be demanded, what is the fact? the judge cannot answer it; if it be asked, what is the law in the case? the jury cannot answer it." He then explains this by showing that upon demurrers, special verdicts, or motions in arrest of judgment "the jury inform the naked fact, and the court deliver the law." "But upon all general issues, as upon *not culpable* pleaded in trespass, *nil debet* in debt, *nul tort*, *nul disseisin* in assize, *ne disturba pas* in *quare impedit*, and the like, though it be matter of law whether the defendant be a trespasser, a debtor, disseisor, or disturber, in the particular cases in issue, yet the jury find not (as in a special verdict) the fact of every case by itself, leaving the law to the court, but find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicately, and not the fact by itself; so as though they answer not singly to the question what is the law, yet they determine the law in all matters, where issue is joined and tried in the principal case, but [i. e. except] where the verdict is special." Pages 149, 150.

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In 1791, the declaratory statute, entitled "An act to remove doubts respecting the functions of juries in cases of libel," and known as "Fox's Libel Act," was introduced in parliament, and was passed in 1792. St. 32 Geo. III, c. 60.

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Mr. Fox, upon moving the introduction of the bill in the house of commons in 1791, after observing that he was not ignorant that "power" and "right" were not convertible terms, said that, "if a power was vested in any person, it was surely meant to be exercised"; that "there was a power vested in the jury to judge the law and fact, as often as they were united, and, if the jury were not to be understood to have a right to exercise that power, the constitution would never have intrusted them with it"; "but they knew it was the province of the jury to judge of law and fact, and this was the case, not of murder only, but of felony, high treason, and of every other criminal indictment"; and that "it must be left in all cases to a jury to infer the guilt of men, and an English subject could not lose his life but by a judgment of his peers." 29 Parl. Hist. 564, 565, 597. * * *

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Pending the debate, the house of lords put questions to the judges, who returned an opinion, in which, after saying that "the general criminal law of England is the law of libel," they laid down, as a fundamental proposition, applicable to treason as well as to other crimes, "that the criminality or innocence of any act done (which includes any paper written) is the result of the judgment which the law pronounces upon that act, and must therefore be in all cases, and under all circumstances, matter of law, and not matter of fact." With such a basis, it is hardly to be wondered at that they "conceived the law to be that the judge is to declare to the jury what the law is," and "that it is the duty of the jury, if they will find a general verdict upon the whole matter in issue, to compound that verdict of the fact as it appears in evidence before them, and of the law as it is declared to them by the judge." The judges, however, "took this occasion to observe" that they had "offered no opinion which will have the effect of taking matter of law out of a general issue, or out of a general verdict," and "disclaimed the folly of undertaking to prove that a jury, who can find a general verdict, cannot take upon themselves to deal with matter of law arising in a general issue, and to hazard a verdict made up of the fact, and of the matter of law, according to their conception of that law, against all direction by the judge." 29 Parl. Hist. 1361-1369.

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John Adams, writing in 1771, said: * * * "Whenever a general verdict is found, it assuredly determines both the fact and the law. It was never yet disputed or doubted that a general verdict, given *under the direction of the court* in point of law, was a legal determination of the issue. Therefore, the jury have a power of deciding an issue upon a general verdict. And, if they have, is it not an absurdity to suppose that the law would oblige them to find a verdict according to the direction of the court, against their own opinion, judgment, and conscience?" "The general rules of law and common regulations of society, under which ordinary transactions arrange themselves, are well enough known to ordinary jurors. The great principles of the constitution are intimately known. They are sensibly felt by every Briton. It is scarcely extravagant to say they are drawn in and imbibed with the nurse's milk and first air. Now, should the melancholy case arise that the judges should give their opin-

ions to the jury against one of these fundamental principles, is a juror obliged to give his verdict generally, according to this direction, or even to find the fact specially, and submit the law to the court? Every man, of any feeling or conscience, will answer, 'No.' It is not only his right, but his duty, in that case, to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." "The English law obliges no man to decide a cause upon oath against his own judgment." 2 John Adams' Works, 253-255.

* * * * *

In 1808, Chief Justice Parsons, in delivering judgment in a civil action for slander, said: "Both parties have submitted the trial of this issue to a jury. The issue involved both law and fact, and the jury must decide the law and the fact. To enable them to settle the fact, they were to weigh the testimony. That they might truly decide the law, they were entitled to the assistance of the judge. If the judge had declined his aid in a matter of law, yet the jury must have formed their conclusion of law as correctly as they were able." And, as the reporter states: "In this opinion of the chief justice the other judges, viz. Sedgwick, Sewall, Thatcher, and Parker, severally declared their full and entire concurrence." *Coffin v. Coffin*, 4 Mass. 1, 25, 37.

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Some justices of this court, indeed, who, as already shown, admitted the general right of jurors in criminal cases to decide both law and fact, denied their right to pass upon the constitutionality of a statute, apparently upon the ground that the question of the existence or the validity of a statute was for the court alone. Paterson, J., in *Lyon's Case* (1798) Whart. St. Tr. 333, 336, Fed. Cas. No. 8,646; Chase, J., in *Callender's Case* (1800) Whart. St. Tr. 688, 710-718, Fed. Cas. No. 14,709; Baldwin, J., in *U. S. v. Shive* (1832) Baldw. 510, Fed. Cas. No. 16,278. It may well be doubted whether such a distinction can be maintained. *Com. v. Anthes*, 5 Gray, 185, 188-192, 262; Cooley, Const. Lim. (6th Ed.).

* * * * *

At the trial of Aaron Burr in the Circuit Court of the United States for the district of Virginia, in 1808, for treason for levying war in Blennerhassett's Island, Chief Justice Marshall, * * * while affirming that a question of the

admissibility of evidence must be decided by the court, because that question was whether the jury should hear the evidence or not, yet told the jury (in many forms, but of the same meaning) that upon a question compounded of fact and law, involved in the issue submitted to the jury, the court might give general instructions, but the jury must decide it; that such a question, compounded of law and fact, would be decided by the jury, with the aid of the court, so far as respects the law; that of such a question the jury, aided by the court, must judge; and that, having "heard the opinion of the court on the law of the case, they will apply," not "that opinion," but "that law," namely, the law as to which the court had expressed its opinion, "to the facts, and will find a verdict of guilty or not guilty as their own consciences may direct." The manifest intent and effect of all this were that the jury, after receiving the aid of the instructions of the court on matter of law, must judge of and determine, as their own consciences might direct, every question compounded of law and fact involved in the general issue of guilty or not guilty.

* * * * *

It is universally conceded that a verdict of acquittal, although rendered against the instructions of the judge, is final, and cannot be set aside; and, consequently, that the jury have the legal power to decide for themselves the law involved in the general issue of guilty or not guilty.

It has sometimes, however, been asserted that, although they have the power, they have no right to do this, and that it is their legal, or at least their moral, duty, in every criminal case, to obey and follow the judge's instructions in matter of law. The suggestion is not that the jury ought not to exercise the power wrongfully, but that they ought not to exercise it at all; that, whether the instructions of the court be right or wrong, just or arbitrary, according to the law as known of all men, or directly contrary to it, the jury must be controlled by and follow them.

But a legal duty which cannot in any way, directly or indirectly, be enforced, and a legal power of which there can never, under any circumstances, be a rightful and lawful exercise, are anomalies; "the test of every legal power [as said by Alexander Hamilton, and affirmed by Chancellor Kent, in *People v. Croswell*, 3 Johns. Cas. 362, 368, above cited] being

its capacity to produce a definitive effect, liable neither to punishment nor control," "to censure nor review."

It has been said that, if not their legal duty, it is their moral duty, to follow the instructions of the court in matter of law. But moral duties, as distinguished from legal duties, are governed, not by human, but by divine, laws; and the oath which the jurors in a capital case severally take to the Almighty Judge is to well and truly try and true deliverance make between the government and the prisoner at the bar, according to their evidence, not according to the instructions of the court, and to decide whether, in their own judgment and conscience, the accused is guilty or not guilty.

The rules and principles of the criminal law are, for the most part, elementary and simple, and easily understood by jurors taken from the body of the people. As every citizen or subject is conclusively presumed to know the law, and cannot set up his ignorance of it to excuse him from criminal responsibility for offending against it, a jury of his peers must be presumed to have equal knowledge, and, especially after being aided by the explanation and exposition of the law by counsel and court, to be capable of applying it to the facts as proved by the evidence before them.

On the other hand, it is a matter of common observation that judges and lawyers, even the most upright, able, and learned, are sometimes too much influenced by technical rules; and that those judges who are wholly or chiefly occupied in the administration of criminal justice are apt, not only to grow severe in their sentences, but to decide questions of law too unfavorably to the accused.

The jury having the undoubted and uncontrollable power to determine for themselves the law as well as the fact by a general verdict of acquittal, a denial by the court of their right to exercise this power will be apt to excite in them a spirit of jealousy and contradiction, and to prevent them from giving due consideration and weight to the instructions of the court in matter of law.

In civil cases, doubtless, the court, being authorized to grant to either party a new trial as often as the verdict appears to be contrary to the law, or to the evidence, may, in order to avoid unnecessary delay, whenever, in its opinion, the evidence will warrant a verdict for one party only, order a verdict accordingly. *Pleasants v. Fant*, 22 Wall. 116;

Hendrick v. Lindsay, 93 U. S. 143; *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125.

But a person accused of crime has a two-fold protection—in the court and the jury—against being unlawfully convicted. If the evidence appears to the court to be insufficient in law to warrant a conviction, the court may direct an acquittal. *Smith v. U. S.*, 151 U. S. 50, 14 Sup. Ct. 234. But the court can never order the jury to convict, for no one can be found guilty but by the judgment of his peers.

Decisions of courts, and especially of courts of last resort, upon issues of law, such as are presented by a demurrer or by a special verdict, become precedents to govern judicial decisions in like cases in the future. But the verdict of a jury, upon the general issue of guilty or not guilty, settles nothing but the guilt or innocence of the accused in the particular case; and the issue decided is so complicated of law and fact, blended together, that no distinct decision of any question of law is recorded or made. The purpose of establishing trial by jury was not to obtain general rules of law for future use, but to secure impartial justice between the government and the accused in each case as it arose.

As said by Alexander Hamilton in *Croswell's Case*, above cited, the power of deciding both law and fact upon the general issue in a criminal case is intrusted to the jury, "for reasons of a political and peculiar nature, for the security of life and liberty." 7 Hamilton's Works, 335; 3 Johns. Cas. 362.

* * * * *

There may be less danger of prejudice or oppression from judges appointed by the president elected by the people than from judges appointed by an hereditary monarch. But, as the experience of history shows, it cannot be assumed that judges will always be just and impartial, and free from the inclination, to which even the most upright and learned magistrates have been known to yield,—from the most patriotic motives, and with the most honest intent to promote symmetry and accuracy in the law,—of amplifying their own jurisdiction and powers at the expense of those intrusted by the constitution to other bodies. And there is surely no reason why the chief security of the liberty of the citizen—the judgment of his peers—should be held less sacred in a republic than in a monarchy.

Upon these considerations, we are of opinion that the learned judge erred in instructing the jury that they were bound to accept the law as stated in his instructions, and that this error requires the verdict to be set aside as to both defendants.

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⁷⁹ Compare *Horning v. District of Columbia*, (1920) 254 U. S. 135, and see comment on this case in 19 Mich. L. Rev. 325.

In some states constitutional or statutory provisions give juries a right in criminal cases or in prosecutions for libel, to judge of the law.—*Louisiana*, *State v. Ford*, (1885) 37 La. Ann. 443; *Illinois*, *Mullinix v. People*, (1875) 76 Ill. 211; *Indiana*, *Powers v. State*, (1882) 87 Ind. 144; *Connecticut*, *State v. Buckley*, (1873) 40 Conn. 247; *Iowa*, *State v. Heacock*, (1898) 106 Ia. 191; *New Jersey*, *Drake v. State*, (1890) 53 N. J. L. 23; *Michigan*, *Thibault v. Sessions*, (1894) 101 Mich. 279; *Kansas*, *State v. Verry*, (1887) 36 Kan. 416; *Missouri*, *State v. Armstrong*, (1891) 106 Mo. 395; *California*, *People v. McDowell*, (1886) 71 Cal. 194.

Under such a statute it is proper to instruct the jury that "if the jury can say on their oaths that they know the law better than the court does, they have the right to do so. * * * Before saying this on their oaths, it is their duty to reflect whether, from their habits of thought, their study and experience, they are better qualified to judge of the law than the court. If, under all these circumstances, they are prepared to say that the court is wrong in its exposition of the law, the statute has given them that right."—*State v. Heacock*, (1898) 106 Ia. 191, 200.

In jurisdictions where the jury are acknowledged to be judges of the law, it is proper to read and argue law to the jury, subject to the reasonable control of the court.—*Commonwealth v. Porter*, (1845) 10 Metc. (Mass.) 263; *State v. Verray*, (1887) 36 Kan. 416; *Harvey v. State*, (1872) 40 Ind. 516.

Even where the jury are required to take the law from the court, it is proper for counsel to so far argue the law to the jury as to explain the legal theory upon which the case is being tried and to state to the jury that he believes the court will instruct them in accordance therewith.—*Terrill v. Michigan Traction Co.*, (1921) 214 Mich. 478, 484. But reading to the jury from law books, particularly recitals of facts, is improper and may be reversible error.—*Ray v. Ches. & Ohio Ry. Co.*, (1905) 57 W. Va. 333, 339.

136 *John*

AARON v. MISSOURI AND KANSAS TELEPHONE CO.

Supreme Court of Kansas. 1911.

84 Kansas, 117.

JOHNSTON, C. J.: The appellees, Michael Aaron and Jeanette Aaron, recovered a judgment for \$10,000 against the

appellant, the Missouri and Kansas Telephone Company, for the violation of its duty to their son, Walter, through which he lost his life. The action was brought against the appellant and the Delaware Mutual Telephone Company, of Lansing, but before the case was submitted to the jury the Delaware Mutual Telephone Company was dismissed from the case. In the petition it was alleged that Walter Aaron was an employee of the Delaware company, which, under contract with appellant, had two wires upon the poles of appellant, and that it was the duty of appellant to have proper poles and maintain them in a safe condition for its own operatives as well as those of the Delaware company who found it necessary to climb and work upon them; that appellant had planted new poles along the line and had removed its own wires from the old and attached them to the new poles; that Walter Aaron came along afterward and was transferring the two wires of the Delaware company from the old to the new poles, and that when he had climbed an old pole for that purpose and had stripped the wires from that pole, to which he was strapped, it broke and fell, crushing and killing him.

* * *

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The testimony included two written contracts between appellant and the Delaware company relating to an interchange of business, the connections to be made, the use of telephones and switchboards, the maintenance of lines, the placing of the wires of one on the poles of the other and fixing the compensation for such use, a provision releasing one from loss or damage caused by wires or fixtures, and containing other stipulations as to the duties of each company and its obligations to the other.

In submitting the case to the jury the court instructed "that if you believe from the evidence in this case that it was the duty of the Missouri and Kansas Telephone Company, under a contract with the Delaware Mutual Telephone Company, to maintain the line of poles in question, including the particular pole in question, in a reasonably safe condition for the linemen of the Delaware Mutual Telephone Company to climb and operate upon; that it failed so to do, and because thereof the death of Walter Aaron was caused, without fault on his part, then I instruct you shall find for the plaintiffs," etc. * * *

The duty of appellant to the Delaware company in respect to the maintenance of the poles, including the one which fell, depended mainly upon the terms of the contracts between these companies. The contracts were in writing, and their meaning and effect were questions of law, exclusively within the province of the court. To send the jury to a written contract to find the respective duties and obligations of the contracting parties was to leave the jury to decide the law as well as the facts. It was the province of the jury to determine all questions of fact involved in the case, after the court had advised them as to the governing rules of law and instructed them how to apply those rules to the facts brought out in the testimony. To impose on the jury the task of interpreting a contract and of determining the duty and responsibility of appellant under the contract is to require them to perform a function which belongs to the court alone—a duty which it can not surrender or evade. In *Belil v. Keepers*, 37 Kan. 64, it was ruled that “when a written instrument is admitted in evidence, it then becomes the duty of the court to construe and determine its legal effect, the relation of the parties thereto, and to include such determination in the instructions to the jury.” (Syl. Par. 2; see, also, *Brown v. Trust Co.*, 71 Kan. 134.)

The duty of appellant to one employed by and working for another company is not only a matter of law, but it is one of vital consequence in the action. The instruction was little less objectionable than would have been one that if the jury believed the appellant was responsible for the injury and death the plaintiffs were entitled to recover. The instructions required the jury to cover the entire field, including the province of the court, and left them to determine both the law and the facts. It has been held that the failure of the court to define the issues in a case and state them to the jury is error, and likewise it has been decided that to send the jury to the pleadings to learn the issues or contentions of the parties is reversible error. (*Railroad Co. v. Eagan*, 64 Kan. 421; *Stevens v. Maxwell*, 65 Kan. 835; *Railroad Co. v. Dalton*, 66 Kan. 799.) The duty of the court to define to the jury the issues made by the pleadings is no more imperative than to determine the questions of law arising in the case and to state them to the jury. It is in fact a greater departure from good practice to leave the jury to interpret written contracts and

determine their effect on the relations and obligations of the parties than to leave them to ascertain the effect of the pleadings or the issues which they present.

* * * * *

For the error of the court in submitting the case to the jury the case is reversed and the cause remanded for a new trial.

137
Smith MITCHELL v. TOWN OF FOND DU LAC.

Supreme Court of Illinois. 1871.

61 Illinois, 174.

MCALLISTER, J.—This was assumpsit, brought by appellant as administrator of the estate of William Mitchell, deceased, against appellee, to recover for the support and maintenance by the intestate in his lifetime of one Eliza McFerren, from the 23d of March, 1857, to the 23d of January, 1858, said Eliza being an alleged pauper and resident of the said township.

* * * * *

The first instruction on behalf of appellee is as follows:

"If the jury believe, from the evidence, that the person, Eliza McFarren, was boarded and lodged and furnished with clothing by William Mitchell (whose administrator brings suit) from the 1st day of March, A. D. 1857, until his death in 1858, yet, unless they further believe, from the evidence, that during that time the said Eliza McFerren was a pauper for whose support the defendant was legally liable, or for whose support the defendant had, by its proper officer, contracted to pay the said William Mitchell for during said time, they will find for the defendant."

This instruction submits to the determination of the jury two questions of law, without any aid from the court, viz.:

First—What shall constitute the legal liability of a town to support a pauper?

Second—Who is the proper officer to make a binding contract on the part of the town for such support by another?

The impropriety of leaving questions of law to the determination of the jury has been so often decided by the courts that the citation of authorities seems unnecessary.

The court should have instructed the jury as to what facts were indispensable to create the legal liability of the town for the support of the person in question, and then told them that if such facts were not established by the evidence, to find for the defendant; and should likewise have informed the jury who the proper officer to bind the town for such support was, and what would be necessary to constitute a contract express or implied, and then left it for them to say whether such officer acted in the premises, and if he did nothing to create a contract within the definition given, that then they should find for the defendant. A majority of the court think the instruction erroneous.

For this error, the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

138 Cent
STANDARD COTTON MILLS v. CHEATHAM.

Supreme Court of Georgia. 1906.

125 Georgia, 649.

BECK, J. The petition of Cheatham contained substantially the following allegations; that he was employed by the Standard Cotton Mills to work at certain machines called "carders," which were operated by a belt from a pulley, and it was a part of his duty to clean the machines by opening certain lids thereon, placing his hand inside of the same, and taking therefrom accumulations of trash and lint called "strippings." In order to clean the carders it was necessary to stop them, and this was done by switching the belt from the tight pulley, upon which it worked, to a loose pulley. Plaintiff alleges that he had stopped the machines in the manner described, and had opened the lid and placed his hand inside of one of the carders, when the belt slipped from the loose pulley on to the tight one, the machine started, caught his hand, and mangled it severely * * *

* * * * *

Movant also complains that the court erred in charging the jury as follows: "If the carder machine was stopped by

slipping the belt from the tight to the loose pulley, and that was the proper way to stop the machine and keep it stopped until the operator himself slipped the belt from the loose to the tight pulley, if the plaintiff did not know, or ought to have known to the contrary, he would have the right to presume that the belt, once shifted from the tight to the loose pulley, and the machine thereby stopped, would remain stopped until again started. That I charge you as correct law, gentlemen, provided the defect was one that the plaintiff could not have discovered by the exercise of ordinary diligence." It is alleged that this portion of the charge was error, "because it was a question for the jury to determine whether the plaintiff would have the right to presume that the belt would stay shifted when once shifted, considering all the facts before them." And this point seems to be well taken. In charging as here alleged, the trial court went directly in the teeth of the statute which declares that it is error for a trial judge to express or intimate his opinion as to what has or has not been proved (Civil Code, Sec. 4334). We cannot imagine a more direct invasion of the province of the jury than for the court to instruct them that as to one of the facts material to be considered by the jury in passing upon the question as to whether or not the plaintiff himself was guilty of negligence, "he would have the right to presume that the belt, once shifted from the tight to the loose pulley, and the machine thereby stopped, would remain stopped until again started." This did not fall far short of instructing them that if the plaintiff took certain precautions while inserting his hand into a dangerous machine, he had the right to presume that the precautionary measure so taken would be equivalent to the exercise of due care and caution in guarding against an injury that might be brought about by the machine being set in motion. In brief, the court attempted to and did in one breath deal with and dispose of a vital question of fact. If any presumption at all arose as to what would be the effect of shifting the belt in question from the tight to the loose pulley, it was a presumption of fact, and should have been left for the jury's consideration alone, unaided by the court.

* * * * *

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

ILLINOIS CENTRAL RAILROAD CO. v. JOHNSON.

139 *Supreme Court of Illinois. 1906.*
Emit
 221 Illinois, 42.

CARTWRIGHT, C. J.—This is an action on the case brought by appellee, as administratrix of the estate of her son, Carl Robert George Johnson, in the circuit court of Cook county, to recover damages from appellant for causing his death.

The declaration alleged that the deceased, who was a minor, became a passenger on November 3, 1900, on one of defendant's trains, in the front car next to the engine, at West Pullman station, to be carried to Pullman station; that the train arrived at Pullman station about 7:45 in the evening; that at Pullman station was an elevated platform between the tracks for north-bound and south-bound trains for the use of passengers; that when the train stopped at Pullman the deceased left the car at the forward end, as was customary and as directed by defendant; that the train and car had passed by and beyond said elevated platform, and on leaving the car deceased found himself on the ground a few feet north of the elevated platform between said tracks, with the engine and cars on the east side and a vacant space on the west and a high picket fence across the platform on the south; that the depot and exit were on the west, and as the deceased went from the place where he alighted, in a westerly and southerly direction, toward the gates, using due care, one of the locomotive engines of the defendant going in a southerly direction on the south-bound track struck and killed him. The plea was the general issue, and upon a trial the jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at \$5000. Judgment was entered on the verdict, and the judgment was affirmed by the Appellate Court for the First District.

* * * * *

The instruction given at the request of the plaintiff which purported to state the relative duties of the parties, the theory of the plaintiff and ground for recovery alleged in the declaration, and the amount of damages which might be awarded, was as follows:

"The jury are instructed, as a matter of law, that if you

find, from the evidence, that the defendant corporation was engaged in the business of transporting passengers and freight, for hire, upon a railroad operated by said company, then the law denominated the defendant a common carrier. The court instructs the jury that common carriers of persons are required to do all that human care, vigilance and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accidents to passengers. So, too, persons who become passengers must at all times exercise ordinary care and caution for their own safety. And if the jury believe, from the evidence in this case, that the defendant was at the time of the accident a common carrier, and if you further believe, from the evidence, that the deceased was a passenger on the defendant's train and in the exercise of due care on his part, if the jury so believe from preponderance of the evidence, and that the defendant carelessly or negligently operated its said train or car by running the same past the station platform, so as to cause the deceased to alight upon the ground and tracks of the defendant instead of upon the platform where the passengers are usually unloaded, and that by reason of such negligent acts, if any are proven by the preponderance of the evidence in the case, of the defendant, their agents, and employees, the deceased, Carl Robert George Johnson, while exercising due care for his safety, if you so find from the preponderance of the evidence, was struck by an engine controlled and operated by the defendant and was then and there killed, then you may find the defendant guilty, and assess the plaintiff damages at such reasonable sum as she may be entitled to recover under all the facts and circumstances proved in the case, not exceeding \$5000."

The instruction was erroneous in three respects. It was proved, and not disputed, that the train ran three or four feet past the north end of the platform, and that deceased alighted upon the ground instead of on the platform where passengers were usually unloaded. The questions in dispute were whether the act of defendant in running past the platform constituted negligence on its part, and whether such act caused the deceased to alight upon the ground at an improper place, or whether he was negligent in going down the steps where he did. They were questions of fact for the jury to determine from the evidence, and it was the exclusive

province of the jury to determine whether the act of the defendant was negligent and whether the deceased was guilty of negligence. * * * On that question the instruction assumed both that the act was a careless and negligent one, and that it caused the deceased to alight upon the ground on the tracks of the defendant instead of upon the platform, and it afterwards refers to the acts as "such negligent acts." The plaintiff was entitled to recover if the jury should decide that the act of the defendant was negligent, that it caused the injury, and that the deceased was in the exercise of ordinary care; but it was the exclusive province of the jury to determine those facts, and they should have been submitted to the jury for determination without any intimation or assumption as to the proper conclusion. * * * Where the evidentiary facts will justify different conclusions the question of negligence is one of fact, and instructions should always be drawn so as to state the law upon a supposed or hypothetical state of facts, leaving the jury to find the fact. Instructions assuming the existence of any material fact have always been condemned. * * * Under this instruction, when the jury found that the train was run past the platform, they would understand that the court regarded such act to be a careless and negligent operation of the train, and that it caused the deceased to get off the train at the place where he did. It did not call upon the jury, as it should have done, to decide whether the act constituted negligence on the part of the defendant.

* * * * *

Because of the material and prejudicial errors which have been pointed out, the judgments of the Appellate Court and circuit court are reversed and the cause is remanded to the circuit court.

Reversed and remanded.

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9ab: NEW YORK FIREMEN INSURANCE CO. v. WALDEN.

Court for the Trial of Impeachments and the Correction of Errors in the State of New York. 1815.

12 Johnson, 513.

This cause came up from the Supreme Court on a writ of error.

* * * * *

For the plaintiffs in error, it was contended. 1. That there was a concealment of certain letters and matters, relative to the conduct and character of the master, which were material to the risk, and ought to have been disclosed to the plaintiffs in error, at the time the policy was underwritten. * * * 2. That under the circumstances of the case, the policy did not protect the ship against the barratry of Cartwright, the master; and that there was not sufficient evidence of barratry to entitle the plaintiffs below to recover on that ground * * *. 3. That the materiality of the concealment was a question of fact, and ought to have been left to the jury. * * *

THE CHANCELLOR. This case comes up upon a bill of exceptions, and we are accordingly to be confined to the objections taken at the trial, and appearing on the face of the bill. The question is, whether there was error in the charge which the learned judge delivered to the jury. This charge was, "that the several matters given in evidence on the part of the plaintiffs, were, in his opinion, conclusive evidence of the *barratry* of the master of the vessel, on the voyage; and that the plaintiffs were not bound to communicate, or disclose, to the defendants, any of the letters, matters, or circumstances, which were, at the time of the insurance, in their possession, relative to the master; and that the matters given in evidence, on the part of the defendants, were not sufficient to maintain the issue on their part, or to bar the action of the plaintiffs; and that if the jury agreed with him in opinion, they ought to find a verdict for the plaintiffs;" and with that charge, he left the matter to the jury.

The counsel went at large into the discussion of the question, whether the assured were bound to communicate to

the underwriters, at the time they applied for insurance, the letters and other knowledge they possessed of the improper conduct of the master. But it appears to me that this question is not for the decision of this Court, because, whether the circumstances relative to the master ought to have been disclosed, depends upon the question, whether those circumstances were material to the risk; and the materiality is a question of fact for a jury and not a question of law for the Court. It is a well-settled principle in the law of insurance, that what facts, in the knowledge of the assured, are material, and necessary to be communicated to the underwriter, when insurance is asked for, is for a jury to determine; and I will briefly notice a few cases, in illustration of this point. My whole opinion will rest upon the admission and the solidity of this principle.

* * * * *

It is thus settled, (as far as authority goes,) beyond all doubt or contradiction, that, whether the matters not disclosed in this case were material, was a question that ought to have been submitted to the consideration and decision of the jury; and here, I apprehend, lies the error committed by the learned judge, that he has given a binding direction to the jury, upon matter of fact, as if it had been matter of law. It appears to me, that the true and necessary construction of the charge, as stated in the bill, is, that it was a positive direction, in point of law, as to the materiality of the non-disclosure, and that it must have been so received and obeyed by the jury. If the charge had been intended as a mere opinion to the jury, on a matter of fact, on which they were to exercise their judgment, the jury would, undoubtedly, have been told, that the defense in the case rested upon the question of the materiality of the letters and facts not disclosed, and that it was for them to judge, from the evidence, whether the disclosure would have varied the premium, or increased the risk, in respect of the barratry of the master; and that if the jury should be of opinion that the facts not disclosed were in that sense material, they must find for the defendants; and that, if they thought otherwise, they must find for the plaintiffs. This would have been the language of a charge suited to the submission of such a point; and we have an example of this species of charge (if, indeed, an example can be wanting) in the bill

of exceptions taken in the case of *Smith v. Carrington*, (4 Cranch, 64.) If, then, the judge had deemed it proper to add his own opinion on that fact, for the assistance or satisfaction of the jury, it might have been done with utility, and with safety. But the charge, as stated in the case, is not of this nature, but it is in the usual style and language of a direction of the Court, on matter of law. The precedent of a bill of exceptions, which was cited from Buller's N. P. 317, and which is given as for misdirection, is in the language of the charge in this case. "And the said chief justice did then and there (says the precedent) declare and deliver his opinion to the jury, that the said several matters so produced and proved, on the part of the defendants, were not, upon the whole case, sufficient to bar the plaintiff of his action; and, with that direction, left the same to the jury." There is a precedent of a bill of exceptions given in 3 Burr. 1742, and which was taken to a charge on the subject of search-warrants, made by Lord Camden, when Ch. J. of the C. B., and the language of this very authentic precedent is almost in the very words of the one before us: "And the said chief justice did then and there declare and deliver his opinion to the jury, that the said several matters so produced and proved, on the part of the defendants, were not, upon the whole case, sufficient to bar the action, and, with that opinion, left the same to the jury."

In this case, from *Burrow*, it was never doubted but that the opinion of the chief justice, so stated in that bill, was taken and received as a direction in point of law; and if the charge in the case before us is not to be deemed of that character, it will be impossible, hereafter, to discriminate between a charge containing a positive direction in point of law, and mere advice on a matter of fact. I shall not enter into any minute criticism on words. No one who consults the precedents can well be at a loss for the meaning of this charge. The language of the learned judge was, that the plaintiffs were not *bound* or *required* to make the disclosure; that the matters offered in evidence were *not sufficient* to bar the action, and nothing was said about the *weight of evidence* for the consideration of the jury. If even it was doubtful, by the bill, whether the charge was intended as *direction*, or otherwise, the result of my opinion would be the same; because, when the judge interposes his

opinion to the jury, on a point of fact, it ought not to be left in doubt in what light they are to receive his charge. In order to preserve a just balance between the distinct powers of the Court and the jury, and that the parties may enjoy, in unimpaired vigor, their constitutional right of having the law decided by the Court, and of having the fact decided by the jury, every charge should distinguish clearly between the law and the fact, so that the jury cannot misunderstand their right or their duty, nor mistake the opinion of the judge upon matter of fact, for his direction in point of law. The distinction is all important to the jury. The direction of the judge, in the one case, is obligatory upon their consciences, and so they will, and so they ought to, regard it; but his opinion, in the other case, is mere advice, and the jury are bound to decide for themselves, notwithstanding the opinion of the judge, and to follow that opinion no farther than it corresponds with the conclusions of their own judgment. Unless this distinction be kept steadily in view, and be defined with all possible precision, the trial by jury may, in time, be broken down, and rendered nominal and useless.

I am far from wishing to restrain the judges of the Courts of law from expressing freely their opinions to the jury on matters of fact, and still less from interfering with their power of controlling the mistaken verdicts of juries, by a liberal exercise of the discretion of awarding new trials. No man can be more deeply sensible of the value and salutary tendency of this judicial aid and discretion, and none, certainly, can possess higher confidence in the character and wisdom of the Court whose judgment is now under review. All that I feel it my duty to contend for is, that whenever the judge delivers his opinion to the jury on a matter of fact, it shall be delivered as mere opinion, and not as direction, and that the jury shall be left to understand, clearly that *they* are to decide the fact, upon their own view of the evidence, and that the judge interposes his opinion only to aid them in cases of difficulty, or to inspire them with confidence in cases of doubt. It is for this principle that I feel solicitous, and not for anything that may have taken place in this particular cause. The case before us is, comparatively, of trifling consequence; but the distinction I have suggested goes to the very root and essence of trial by jury,

and may, indeed, become of inestimable value, and, perhaps, of perilous struggle, when the present generation shall have ceased to exist.

I am disposed to hand to posterity the institution of juries as perfect, in all respects, as we now enjoy it; for I believe it may, in times hereafter, be found to be no inconsiderable security against the systematic influence and tyranny of party spirit, in inferior tribunals.

* * * * *

I am, accordingly, of opinion, that the judgment of the Supreme Court be reversed, and that the cause be remanded, with directions that a *venire de novo* be awarded.

A majority of the Court being of this opinion, it was thereupon ordered and adjudged, that the judgment of the Supreme Court be reversed, and that a *venire de novo* be awarded, for the trial of the issue joined between the parties in the said Court; and that the costs in this Court abide the final decision of the cause.

*Judgment of reversal.*⁸⁰

⁸⁰ This rule obtains in the federal courts and is employed even in the face of local state legislation prohibiting courts from changing juries on questions of fact.—*St. Louis Iron Mountain & So. Ry. v. Vickers*, (1887) 122 U. S. 360.

For a discussion of the great advantages in the administration of justice resulting from the free expression of opinion by trial judges as to the facts in the case, see *Government by Jury*, by Lucilius A. Emery, 24 *Yale Law Jour.* 265-273; *The Inefficiency of the American Jury*, by Edson R. Sunderland, 13 *Mich. Law Rev.* 302-316; *Report of the Mass. Judicature Commission, 1921*, pp. 85-89 (same in 2 *Mich. State Bar Journal* 178).

Ihering gives a very interesting suggestion as to the causes for the development of the jury as a legal institution, viz., to free the administration of justice from two burdens,—(1) state domination or absolutism through its control of the judge, and (2) the mediaeval theory of evidence. Both, he points out, were temporary exigencies, and both having been fully outgrown in modern times, the real foundation and necessity for the jury has disappeared. *Law as a Means to an End*, pp. 304-314. Instead of the inefficient jury he would have an efficient bench-court of judges, p. 299.

Summing up evidence. The judge may sum up the evidence without infringing the rule against commenting upon the weight of the evidence, and in so doing he may properly "state, analyze, compare and explain the evidence." *Hamlin v. Treat*, (1895) 87 Me. 311, 32 Atl. 909. Some state constitutions couple with the prohibition against charging on the facts an express permission for the judge to state the evidence. Thus, the constitution of Tennessee, Art. 6, Sec. 9, provides: "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." The California constitution has identically the same provision. Art. VI, Sec. 19.

146
COMMONWEALTH v. BARRY.

Supreme Judicial Court of Massachusetts. 1864.

9 Allen, 276.

Indictment for keeping and maintaining a tenement in School Street in Boston, used for the illegal sale and illegal keeping for sale of intoxicating liquors.

At the trial in the superior court, before Vose, J., all the witnesses were policemen, two of them being officers whose daily beat included School street. The defendant's counsel, in his argument to the jury, commented with some severity upon their testimony, as the testimony of policemen. The judge in his charge told the jury that the same rules were applicable to policemen as to all other witnesses, in determining the credit to be given to their testimony; that in very many of the cases which had been tried at the present term of the court policemen had been the principal witnesses, and he thought the jury would agree with him in the opinion that in all these cases they had manifested great intelligence, and testified with apparent candor and impartiality.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

BIGELOW, C. J. Upon mature consideration we have come to the conclusion that we cannot give our sanction to the instructions under which this case was submitted to the jury. Viewed in either of the two aspects of which they are susceptible, it appears to us that they cannot be supported, consistently with the rules of law.

If they are to be regarded only as an expression of opinion by the court concerning the credibility of certain witnesses who had testified in other cases than the one on trial, they were clearly of a nature to mislead the jury. The implication from the language of the court is direct and positive, that the jury might properly infer that the witnesses in support of this prosecution were entitled to credit for the reason that other persons engaged in the same occupation had testified with candor and impartiality in the trial of other cases. The objection to this instruction is twofold. In the first place, it authorized the jury to draw

an inference which was not a legitimate deduction from the premises. It by no means follows naturally or logically that witnesses employed in the same or similar occupations will testify on all occasions with equal fairness and impartiality. In the next place, the instructions gave the jury to understand that they might travel beyond the case as proved before them, to seek for corroboration and support of the testimony adduced in behalf of the prosecution the facts which not only were not proved, but which could not have been properly offered in evidence by the government. Nor is this the whole extent of the objection. The facts thus introduced into the case were submitted to the jury with a distinct expression of opinion by the court as to the effect to be given to them, at a stage of the trial when the defendant could not controvert them, and without any opportunity being given to his counsel to address the jury on the weight which was due to them. Such a course of proceeding is certainly unusual, and, as we think, does not accord with the due and orderly conduct of a criminal trial.

But in another aspect it seems to us that the instructions were objectionable. The credibility of the witnesses who had testified in support of the charge in the indictment was a fact which it was the exclusive province of the jury to determine. As essentially affecting their bias, and the credit to be given to their testimony, their occupation and connection with the origin of the prosecution, against the defendant might be important elements, and, within proper limits, proper subjects of comment by counsel, and of consideration by the jury. If the instructions are to be construed, as we think they fairly may be as the expression of the opinion of the court on the degree of credit to which these witnesses were entitled, the court exceeded its authority in stating such opinion to the jury. By Gen. Sts. c. 172, Sec. 15, the duty of charging the jury in criminal cases is specially enjoined upon the court. By Gen. Sts. c. 115, Sec. 5, which is applicable alike to civil and criminal trials, the rule is prescribed by which courts are to be guided in the performance of this duty. It must be admitted that this provision of the statute is not expressed in terms which are free from ambiguity. But although there is a seeming repugnancy in the two branches of the section, we think that they are susceptible of a reasonable interpretation,

which will give full force and effect to both of them, and at the same time carry out what seems to have been the manifest purpose of the legislature. It is clear beyond controversy, that the first clause contains a distinct and absolute prohibition, that the "courts shall not charge juries with respect to matters of fact." To reconcile this with the clause that follows, which provides that the courts "may state the testimony and the law," the prohibition must be regarded as a restraint only on the expression of an opinion by the court on the question whether a particular fact or series of facts involved in the issue of a case is or is not established by the evidence. In other words, it is to be construed so as to prevent courts from interfering with the province of juries by any statement of their own judgment or conclusion upon matters of fact. This construction effectually accomplishes the great object of guarding against any bias or undue influence which might be created in the minds of jurors if the weight of the opinion of the court should be permitted to be thrown into the scale in deciding upon issues of fact. But further than this the legislature did not intend to go. The statute was not designed to deprive the court of all the power to deal with the facts proved. On the contrary, the last clause of the section very clearly contemplates that the duty of the court may not be fully discharged by a mere statement of the law. By providing that the court may also state the testimony, the manifest purpose of the legislature was to recognize and affirm the power and authority of the court, to be exercised according to its discretion, to sum up the evidence, to state its legal effect and bearing on the issues, and to indicate its proper application under the rules of law.

In the case at bar, the court exceeded the limit prescribed by the statute. If the language used by the court was intended to be applicable to the witnesses who had testified in behalf of the prosecution, it was an expression of opinion as to their credibility. As this was a matter of fact, within the exclusive province of the jury to determine, such expression of opinion went beyond a "statement of the testimony," and trenched on prohibited ground, being a charge to the jury "with respect to matters of fact."

We have already said that the occupation of a witness, in connection with other facts, may have a material bearing on

the credibility of his testimony in a particular case. But we feel bound to add that we do not intend to express an opinion on the question whether in the case at bar there was any valid ground for calling in question the veracity or candor of the witnesses whom the defendant's counsel sought to impeach. No such point seems to have been raised at the trial, nor are the facts bearing upon it stated in the exceptions. The inference from the course of the trial, especially from the line of argument which the counsel for the defendant was permitted to take, and from the instructions to the jury, is that the ground on which the impeachment of the witnesses was placed was deemed to have been proper matter for the consideration of the jury.

*Exceptions sustained.*⁸¹

⁸¹ In *Benner v. Benner*, (1921) 120 Me. 468, the court said: "When the legislature, in defining the respective functions of the court and the jury in the trial of a case, laid down the inhibition that the judge must not express opinion on arising issues of fact, it went no further in its meaning than that he should refrain from speaking of the facts in a manner implying his utterance entitled to obedience."

Where the court is not permitted to comment on the weight of the evidence, the error arising from such comment cannot be corrected by a statement from the court that the jury are not to feel bound by any opinion expressed by him.—*State v. Dick*, (1864) 60 N. C. 440.

142 (b) *Substance and Form of Instructions.*
 141 TRUSTEES OF SCHOOLS v. YOCH.

Appellate Court of Illinois. 1908.

133 Illinois Appellate, 32.

CREIGHTON, P. J. This was an action in case, in the Circuit Court of St. Clair county, by appellants against appellees, to recover damages alleged to have resulted to appellants' school house and premises by reason of the failure of appellees to leave proper and sufficient support for the "superincumbent soil" upon which the school house stood. Trial by jury. Verdict in favor of appellees. Judgment in favor of appellees in bar of action and for costs, and ordering execution to issue therefor.

* * * * *

The court gave to the jury the following erroneous instructions on behalf of appellee:

"The court instructs the jury that if you believe, from the evidence, that the pillars in said mine and the roof in said mine are intact and in good condition under the plaintiffs' premises and for a distance of three hundred feet beyond and adjacent to plaintiffs' premises, then you have a right to take this fact into consideration in determining the question whether the defendants have caused any subsidence of the surface of plaintiffs' land, as alleged in plaintiffs' declaration, or one count thereof, if you believe from the evidence there has been any subsidence in such surface.

* * * * *

The instruction first above quoted contains all the vices of that class of instructions so often condemned by the courts of this State. It singles out particular facts from the other facts in evidence and specially directs the attention of the jury to them. This instruction bore upon a close and controverted issue of fact in the case and it was equally as important in an honest effort to arrive at a just verdict that the jury should take each and every other pertinent fact in evidence "into consideration in determining the question whether the defendants have caused any subsidence of the surface of plaintiffs' land," as it was to take the facts particularly singled out in this instruction. All the evidence bearing upon that issue, was admitted for the consideration of the jury, and it was error to make any detached portion of it or to make any fact which any detached portion of it might tend to prove, more prominent than any other part of the evidence, or other pertinent fact. This instruction gave undue prominence to the facts specified, and magnified their importance, and tended to divert the minds of the jury from the main issue.

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For and on account of the errors in this opinion noted, the judgment of the Circuit Court is reversed and cause remanded.

*Reversed and remanded.*⁸²

⁸² It is equally erroneous to single out particular witnesses for special emphasis.—*Taubert v. Taubert*, (1908) 103 Minn. 247.

And the same error occurs where items of evidence are mentioned for the purpose of minimizing their effect, as where, in an action on a

life insurance policy involving the question of suicide, the court told the jury that the presence of strychnine in the stomach was not alone sufficient to prove suicide.—*Life Ins. Co. of Virginia v. Hairston*, (1908) 108 Va. 832.

"The practice of repeating instructions should be condemned. It is wrong to do this, and thereby prominently impress a single feature of a case upon a juror."—*State v. Legg*, (1906) 59 W. Va. 315. But if the repetition of instructions does not tend to mislead the jury it is not reversible error.—*Gran v. Houston*, (1895) 45 Neb. 813.

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Cint

MCBRIDE v. DES MOINES CITY RAILWAY CO.

Supreme Court of Iowa. 1907.

134 Iowa, 398.

MCCLAIN, C. J.—The facts appearing in the record which are essential to the determination of the questions of law raised on this appeal are as follows: Plaintiff's intestate was a member of the paid fire department of the city of Des Moines, and in response to a fire alarm, about half past ten in the morning, with eight other members of the department, he started on a hose wagon from the fire station on Eighth street going north. One Nagle was the driver of the wagon. Plaintiff's intestate rode in his proper place on a running board or step on the west side of the wagon, facing east and near the rear end. As the wagon approached the crossing of Grand avenue running east and west, on which there was a double track of defendant's railway, the driver saw a car coming from the west, and without checking the speed of the wagon drove on across the track on which the car was approaching. The car struck the rear wheel on the west side of the wagon, and deceased was violently thrown to the pavement and his skull was fractured. From this injury he died within a few hours.

1. After stating very elaborately and in great detail the claims of the parties as to the facts bearing upon the question of the negligence of the defendant's motorman, in charge of the car which collided with the hose wagon on which plaintiff's intestate was riding, and defining negligence, the court instructed the jury to consider "whether or not the motorman having charge of the running and

operating of the car in question was negligent or not in not stopping or checking the speed of the car before the collision with the fire hose wagon occurred"; and he then proceeded to detail a variety of circumstances which the evidence for plaintiff tended to establish, such as the clearness and calmness of the day, the ringing of the bell on the hose wagon, and the distance at which such bell might be heard, the rate of speed of the wagon, etc., none of which were controlling on the question of the motorman's negligence. And he concluded the instruction with this sentence:

"After carefully considering these facts, if they be facts, ~~and all other facts and circumstances~~ proved on the trial, if you believe from a preponderance of the evidence that the motorman by the use of the means at his command could have stopped the car, or checked the speed thereof, in time to have avoided the accident, and that he failed to do so, that would be negligence on his part; and his negligence, if he was so negligent, would be the negligence of the defendant, and your verdict should be for the plaintiff, unless you find the deceased, B. McBride, was negligent, and that his own negligence contributed to his injury in any degree, in which case you would find for the defendant."

The first objection urged to this instruction as a whole is that therein the court called to the attention of the jury the facts which the evidence tended to establish favorable to plaintiff's recovery, and omitted special reference to those relating to defendant's theory of the accident. This objection we think was well taken. An instruction was asked on behalf of defendant, calling attention to other circumstances which the evidence tended to establish, which should have been considered as bearing on the motorman's negligence, and which were favorable to defendant's contentions in the case. It was clearly improper for the court to thus emphasize the circumstances from which negligence might be inferred, and omit any reference to circumstances tending to support the opposite inference. Perhaps the court might properly have omitted to catalogue the circumstances which the testimony tended to establish bearing on the question of negligence, and simply have referred in a general way to the facts and circumstances proved on the trial. But in suggesting to the jury that they should take into consideration some of the circumstances which were favorable to

the plaintiff, and omitting reference to others favorable to defendant, he put the case unfairly to the jury.

Another serious objection to the instruction is that the portion thereof above set out withdraws from the jury the question whether the motorman was negligent in not stopping the car or checking the speed thereof in time to have avoided the accident. There could be no question under the evidence as to the ability of the motorman by the use of the means at his command to stop the car or check the speed thereof in time to have avoided the accident, if he had endeavored to do so a sufficient length of time before the accident occurred, nor was there any doubt that he failed to stop the car or check its speed so as to prevent the result of a collision; and the court specifically instructs the jury that this ability on the part of the motorman and his failure to act constituted negligence. The real question in the case was, not whether the motorman could have stopped the car, but whether he was negligent in not doing so; and this was a question for the jury, and not for the court. Had the evidence shown without controversy that the motorman, in the exercise of care, could and should have anticipated the collision long enough beforehand to enable him to stop the car or check its speed so as to avoid the accident, then the instruction might have been correct. But the facts were in dispute. There were circumstances supporting either conclusion, and the question of negligence should have been left to the jury.

It is no answer to this position to say that in the first part of the instruction the jury were told that they must consider whether or not the motorman was negligent in not stopping or checking the speed of the car. After this general statement, the court proceeded to enumerate a large number of circumstances indicating that the motorman was negligent, and then told the jury that if these circumstances were found to be established, and they believed from these and other circumstances proved on the trial that the motorman could have stopped the car, he was negligent. It was not the physical ability of the motorman to stop or check the speed of the car that was in question, but his failure to use due care. The instructions as a whole are lengthy and intricate in their statements, and the one now specially under consideration is particularly obscure, and the bald

statement at its conclusion that the motorman was negligent if he could have stopped or checked the speed of the car in time to avoid the accident and failed to do so, may very well have been seized upon by the jury as the solution of the whole difficulty. We reach the conclusion that in the two respects pointed out the instruction was erroneous and misleading.

* * * * *

For the errors pointed out in the first division of this opinion, the judgment is reversed.

144
JACKSONVILLE, TAMPA & KEY WEST RAILWAY CO.
v. NEFF.

False

Supreme Court of Florida. 1891.

28 Florida, 373.

MABRY, J. The appellee, Neff, in April, 1887, sued the appellant railway company in the Circuit Court for Clay County, Florida, for \$5,000 damages for the destruction of certain property of appellee by fire, caused by the alleged escape of sparks from a locomotive engine under the control of appellant. * * *

* * * * *

The third point calls in question the correctness of the second charge given for plaintiff below. This charge is as follows: "That if the jury believe from the evidence that without fault or neglect of the plaintiff, defendant's employes negligently permitted a lot of loose dry hay to remain for some time prior to the 18th of March, A. D. 1887, exposed in a box car near plaintiff's property which was set on fire on said day, and that the employes of said defendant railroad company negligently permitted said fire to be communicated from said car so left exposed by said employes to plaintiff's said property, and to burn and destroy the same, the verdict should be for the plaintiff." This charge was excepted to by defendant below. The objection urged by appellant to this charge is, that "it has no relation whatever to the issues raised by the pleadings, and the jury

were thereby instructed that if a loss resulted to the plaintiff by reason of a cause of action of which no mention was made in the pleadings, they should find for the plaintiff."

* * *

The declaration contains but one count, and the gist of the action as therein stated is, that the defendant company so neglected and unskillfully managed its engine and the fire and the burning matter therein contained, and said engine was so insufficiently and improperly constructed, that sparks from said fire and portions of said burning matter escaped and flew from said engine to and upon a building in which plaintiff's property was situated, whereby said building and property were burned and totally destroyed. Issue was joined upon all the pleas of defendant. The object of pleading is to ascertain with certainty and precision, the matters of fact which are affirmed on the one hand and denied on the other, and which are mutually proposed and accepted by the parties for decision. It is clear that plaintiff's cause of action is based upon the negligent construction or negligent use of defendant's locomotive engine, whereby sparks and burning matter escaped from it and caused the fire. The question submitted by the pleadings is whether or not defendant caused the fire by reason of a defective engine or the unskillful management of the engine. The negligence of defendant submitted to the jury for investigation by the charge under consideration consists not in causing the fire, but in allowing loose dry hay to remain in a box car near plaintiff's property, and in negligently permitting fire to be communicated from said car to plaintiff's property. The origin of the fire is lost sight of in this charge, and under it the jury were authorized to find for the plaintiff although the defendant did not in any way cause the fire, provided they believed that it negligently permitted loose dry hay to remain in the car near plaintiff's property, and negligently permitted the fire to be communicated from said car to plaintiff's property and destroy it. If it be conceded that this charge embodies a good cause of action against the defendant, it is evident that it is not contained within the issues made by the pleadings. Appellee contends, however, that his right to recover is co-extensive with the case made by the evidence introduced on the trial, and the trial judge was authorized to go outside

of the issues joined between the parties and instruct the jury to find for the plaintiff to the extent justified by the evidence. Respectable authorities hold that the pleadings are merely to notify the opposite party of the ground of action or defense, and where a party fails to object to evidence because it is not relevant to the issues, the court is justified in instructing the jury upon the whole evidence, and is not confined in his instructions to the issues made in the pleadings. The correct view, we think, is that the instructions must be confined to the issues made by the pleadings; and this rule has been recognized in our state. * * *

The judge who presided at the trial of this case presented by instructions to the jury defendant's liability under the issues raised by the pleadings, but the second instruction presented a view of the case not embraced in the issues and was calculated to mislead the jury in their verdict. We cannot say that the jury did not base their findings against defendant under this instruction. The view of this charge, that defendant is liable if its employes negligently permitted fire to escape from the car to plaintiff's property, would call for further consideration, even if the charge were not obnoxious to the rule above pointed out. Our decision is based, however, upon the view that the instruction under consideration was without the limit of the issues joined between the parties and was likely to mislead the jury in making up their verdict, and was for this reason erroneous.

* * * * *

For the error in giving the second charge in behalf of the plaintiff below, the judgment is reversed, and a new trial awarded.⁸³

⁸³ To the same effect see *Kunst v. City of Grafton*, (1910) 67 W. Va. 20, 67 S. E. 74; *W. L. Moody & Co. v. Rowland*, (1907) 100 Tex. 363, 99 S. W. 1112; *Latourette v. Meldrum*, (1907) 49 Ore. 397, 90 Pac. 503; *Goldman v. New York, N. H. & H. R. R. Co.*, (1910) 83 Conn. 59, 75 Atl. 148.

HANSON v. KLINE.

*Supreme Court of Iowa. 1907.**136 Iowa, 101.*

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Joke

Action at law to recover damages arising out of false representations in connection with an exchange of properties. The defendants, additional to Kline, are W. E. Gray and J. E. Gray, and at the time in question all the parties lived in Rockwell City, Calhoun county. The petition alleges that in July, 1904, plaintiff was the owner of a stock of merchandise in Rockwell City, valued by him at \$2,000, which he was induced by the defendants Gray to trade to the defendant Kline for a farm of one hundred and sixty acres situated in Hayes county, Nebraska. The specific averment is that defendants entered into a conspiracy to bring about such trade by false representations respecting the Nebraska farm, and that, pursuant thereto, the farm was falsely represented, and the trade thereby accomplished, greatly to his damage. The defendants answered separately, and each denied the charge of fraud as contained in the petition. On the trial plaintiff had a verdict as against all the defendants jointly, on which judgment was entered, and the defendants appeal.—*Reversed and remanded.*

✓ BISHOP, J. * * * The theory of the petition was that the representations claimed to have been made by defendants were made as from personal knowledge—such is the distinct allegation. * * * The jury was instructed strictly on the theory of the petition; that is, they were told that if defendants in representing the condition of the farm did so as of their own personal knowledge, and so stated to plaintiff, and the representation was false, and plaintiff relied on such representation to his damage, the defendant would be liable. And, *contra*, if the representations were not so made as alleged, then plaintiff could not recover. The jury was not otherwise instructed on the subject. We think here was error. Should it be conceded that the instruction given correctly stated the law applicable to the case, the defendants were entitled to a verdict. This is so because there was no evidence on which to base a finding to the contrary, but, as we have seen, plaintiff himself declares that in making the repre-

sentations alleged defendants expressly disavowed any and all personal knowledge. Hence the proof did not meet the issue. Accordingly, we must go back to the query: Did the instruction correctly state the law applicable to the case? If we are to judge alone from the issues made in pleading, the answer must be in the affirmative. If we are to judge from the issues as developed on the trial, then the call for a negative answer is imperative. We say issues developed on the trial, because it is plain that plaintiff did not go into the trial relying upon representations made as of the personal knowledge of the defendants. At the very outset, he testified that defendants denied having any personal knowledge. And it is evident that from beginning to end the defendants did not consider that they were called upon to face the strict issue as made by the pleadings. Plaintiff did rely on representations professedly made on information and belief, and defendants trained their forces accordingly. This being true, there arises the further question whether or not it was competent for the court, and its duty, to disregard the strict issue as made in the pleadings, and instruct according as the parties had made the issue on the trial. That it was competent for the court to do so we have no doubt. *Beach v. Wakefield*, 107 Iowa, 567; *Fenner v. Crips*, 109 Iowa, 455. So, also, we think it was its duty to do so, and, in view, of the case presented by the record, that failure amounted to error. Under our system, it is left for the parties to frame the issues, and, if they proceed without objection—and such is the case here—to the trial of an issue not presented by the pleadings, it amounts to a consent to try such issue. The issue is then rightfully in the case. *Mitchell v. Joyce*, 76 Iowa, 449; *Bank v. Boesch*, 90 Iowa, 47; *Beach v. Wakefield*, *supra*; *Erickson v. Fisher*, 51 Minn. 300 (53 N. W. 638). And, the issue being rightfully in the case, the court must instruct upon it. *Potter v. Railway*, 46 Iowa, 399; *Hill v. Aultmann*, 68 Iowa, 630. We must presume that the court was fully advised of the shift in the issue. Attention to the course of the trial as it proceeded was its duty. Moreover, there was before it the request for instruction presented by defendants, and, while not adequately stating the law it was sufficient to arrest attention and call for a proper instruction on the subject. *Kinyon v. Railway*, 118 Iowa, 349. We may add that as the issue made by the pleadings respecting the subject-matter under discus-

sion was, in effect, withdrawn by the parties, such issue should not in any event have been presented to the jury. *Lumber Co. v. Raymond*, 76 Iowa, 225; *Erickson v. Barber*, 83 Iowa, 367.

For the reasons pointed out in this opinion, the judgment appealed from must be, and it is, *reversed*, and the cause is ordered *remanded* for a new trial.⁸⁴

⁸⁴ To the same effect see *Mitchell v. Samford*, (1910) 149 Mo. App. 72, 130 S. W. 99; *Johnson v. Caughren*, (1909) 55 Wash. 125, 104 Pac. 170; *Central R. R. & Banking Co. v. Attaway*, (1892) 90 Ga. 656, 16 S. E. 956; *Brusie v. Peck Bros. & Co.*, (1892) 135 N. Y. 622, 32 N. E. 76; *Flanders v. Cottrell*, (1875) 36 Wis. 564.

In *Schwaninger v. McNeeley & Co.*, (1906) 44 Wash. 447, 87 Pac. 514, the court said: "When evidence is received without objection upon any particular ground not covered by the complaint, the court may assume that the complaint, is as broad as the evidence when charging the jury, and the complaint will be deemed amended to conform with the evidence and charge, since the amendment could have been made as of course at the trial."

But in *Budd v. Hoffheimer*, (1873) 52 Mo. 297, it was held that if a party wishes an instruction upon the matter duly proved but not alleged in his pleading, he must first ask leave to amend his pleading to conform with the proof, and unless he does so such an instruction is properly refused.

146 BUYKEN v. LEWIS CONSTRUCTION CO.
Emt

Supreme Court of Washington. 1909.

51 Washington, 627.

RUDKIN, C. J.—This was an action in trespass to recover damages for sluicing down and removing earth from a certain lot in the city of Seattle owned by the plaintiffs. The defendant admitted the commission of the acts complained of, though not in manner and form as alleged, and pleaded by way of justification that the sluicing was done pursuant to a verbal contract between the plaintiffs and the defendant which was afterward reduced to writing and signed by the defendant, though not by the plaintiffs. The reply denied the plea of justification as set forth in the answer. The cause was submitted to a jury under instructions from the court, and a verdict in favor of the plaintiffs in the sum of \$1,500

was returned. From a judgment on this verdict, the defendant has appealed.

The principal assignment of error arises out of the following charge of the court, which was duly excepted to:

"If you find from the evidence that there was no such contract as alleged by the defendant in its affirmative defense, which is exhibit No. 2 in the case, but do find from the evidence that the acts performed by the defendant upon the said premises of the plaintiffs were performed with the knowledge and consent of the plaintiffs, then I instruct you that the plaintiffs cannot recover for such acts even though in your opinion the plaintiffs have been damaged thereby, *unless you find from the evidence that defendant negligently or carelessly performed the acts and by reason of such negligence and careless performance the plaintiff's had been damaged.*"

The latter part of this instruction is clearly without the issues presented by the pleadings. The action was prosecuted by the respondents solely on the theory that the acts complained of were committed without their knowledge or consent and against their will, and all their testimony was directed toward establishing the allegations of the complaint and proving the amount of the resultant damages. The testimony on the part of the appellant, on the other hand, was in support of its affirmative defense, and in reduction of the claim for damages. The question of negligence in the prosecution of the work was not an issue in the case under the pleadings, nor was it made an issue at any stage of the trial. There was no claim that any particular act committed by the appellant was negligently or carelessly committed, nor was there any attempt to segregate damages resulting from negligence from damages resulting from other and independent causes. The instruction was therefore erroneous, and calls for a reversal of the judgment unless we are able to say that the error was not prejudicial, and this we cannot do. There was a direct conflict in the testimony, and the right of recovery was questionable at least. The jury may have found that the acts committed by the appellant were so committed with the knowledge and consent of the respondents, but that damages resulted from the performance of the work in a manner the jury deemed negligent. Under such circumstances, it is incumbent on this court to order a new trial.

* * * * *

For error in the instructions of the court, the judgment is reversed and a new trial ordered.

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Curt
KARRER v. CITY OF DETROIT.
Supreme Court of Michigan. 1905.

142 Michigan, 331.

[The plaintiff was injured by running his automobile into an excavation in the street at the intersection of Mack avenue and Grand Boulevard, while he was driving north up the boulevard at night. He saw a red light, but thinking it was in the west curb of the Boulevard he tried to pass to the east of it, putting on power for the purpose and proceeding at the rate of 8 or 10 miles an hour. In fact the light was at the west end of a trench which extended from the east almost across the boulevard. When the plaintiff discovered the trench he was going too fast to stop his car, which went into the excavation.]

HOOKEE, J. * * *

The court also said to the jury:

"The plaintiff in this case desires me to say that the boulevard is used especially for fast riding and for the use of automobiles, and I think, gentlemen of the jury, you may take that in consideration, if your own experience satisfies you of that. I don't remember what the ordinance is relative to that particular part of the street, but doubtless some of you do, and you may have your own experience with reference to the using of the boulevard for that purpose; but I think the whole question, gentlemen, as to the degree of care, becomes a question for you rather than for the court."

This was in effect allowing the personal knowledge of the jurors to have the weight of evidence in the case. It contemplated not only their determination as to the use of the boulevard from their personal observation, but also the character of the ordinances relating thereto. This was erroneous.

* * * * *

The judgment is reversed, and a new trial ordered.

MURPHY v. CENTRAL OF GEORGIA RAILWAY CO.

148
Enut Supreme Court of Georgia. 1910.

135 Georgia, 194.

BECK, J. The dispute between the parties in this case is over a strip of land 20 feet in width and about 1,381 feet in length extending from Glenn street on the north to Shelton street on the south, in the City of Atlanta, the issue being as to whether the same constitutes the eastern edge of a 100-foot right of way of the defendant railroad company or the western third of a 60-foot public road for said distance. The plaintiff, in 1881, acquired title to the lands lying east of and abutting on the strip of land in dispute. He alleged, that at that time this 20-foot strip was a road traveled by the public, and had been so used for more than twenty years; that in 1884, upon petition of citizens, the commissioners of roads and revenues of Fulton county passed an order formally opening and accepting the same as a public road; that upon the passing of this order the petitioner and other abutting landowners on the east, desiring that the road in front of their property should be 60 feet in width, dedicated an additional 40-foot strip for that purpose, adjoining said 20-foot road; that the county authorities took charge of and worked the entire 60-foot road; and that the same has ever since been a public road. A short time prior to the bringing of this suit the defendant railroad company began changing the grade of the 20-foot strip in question and laying its tracks thereon, and the plaintiff filed suit to enjoin any further interference with the alleged 60-foot road in front of his lands and the use of any portion of same by the defendant as its right of way.

* * * * *

It is complained that the court erred in refusing a written request to give in charge to the jury the following: "Any uninterrupted use by the public generally of lands as a roadway for a period of time extending through 20 years, accompanied by acceptance by public authorities, gives a prescriptive right to the public to such road or highway." We do not think that the failure of the court to instruct the jury in the language of the request was error. It is manifest that the charge which the court refused to give is ambiguous. It is susceptible of

two constructions. First, it might be construed to mean that an uninterrupted use by the public generally of lands as a roadway for a period of time extending through twenty years, accompanied by acceptance by the public authorities extending through that period of time, from the beginning to the end thereof, would give a prescriptive right to the public to such road. Second, it might be construed to mean that an uninterrupted use by the public generally of the strip of land in question as a roadway for a period of time extending through 20 years and acceptance by the public authorities at any time within that 20 years, even at or near the close of that period, would give a prescriptive right to the public to such road. These two constructions embody very different statements of the law upon the question involved. If the first construction which might have been placed upon the written request was the statement of the law desired by counsel offering the request to charge, then the principle embodied in the request was sufficiently covered by the charge as given; and as the court might fairly have placed this construction upon the written request, he should not be held to have committed error in refusing to give another charge upon a subject which was already sufficiently covered by his charge as given. If counsel had desired a charge laying down the doctrine as stated in the second construction of the written request, he should have framed it in terms more aptly embodying the principle which he sought to have incorporated in the court's instructions.

* * * * *

Judgment affirmed. All the Justices concur.

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gabo

PARKER v. NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION.

Supreme Court of Appeals of West Virginia. 1904.

55 West Virginia, 134.

POFFENBARGER, President:

* * * * *

Bill of exceptions No. 4 contains all the instructions in the

record. The argument and references in the bill of exceptions seem to proceed upon the theory of two instructions. Whether given as one or as two is unimportant. The matter is set out in the bill of exceptions as follows: "The court instructs the jury that where an agent is employed to sell real estate for his principal if the agent was the procuring cause of the sale of said real estate the agent is entitled to his commissions, without regard to the extent of his exertions, and although the contract commenced by said agent was consummated by the principal himself or through the intervention of another; and the court further instructs the jury that where a broker or agent employed to negotiate a sale procures a customer for the sale of the said property on the terms proposed by the owner and the principal takes the further proceedings out of the hands of the broker, and completes the sale himself, the agent is nevertheless entitled to his commissions, and the principal cannot deprive him of his rights to compensation by a discharge before the sale is consummated, and this is true where the principal completes the contract with the customer presented by the broker on different terms from those stipulated to the broker."

The legal propositions stated by these instructions are no doubt correct, but they are purely abstract. They make no reference whatever to the evidence, nor do they submit to the jury the finding from the evidence of the facts giving rise to the law enunciated in them. One of them says: "Where a broker or agent employed to negotiate a sale procures a customer for the sale of said property on the terms proposed by the owner, and the principal takes the further proceedings out of the hands of the broker," etc., the broker is entitled to his commission. Had the court given this instruction in the concrete instead of the abstract form it would have said: "If the jury believe from the evidence that the defendant employed the plaintiff to sell the property mentioned in the evidence at a certain price, and agreed to pay him, in case he made such sale, a commission, and, in pursuance thereof, the plaintiff procured a customer for the sale of the property on the terms fixed by the defendant, and the defendant prevented him from making the sale by interfering and consummating the sale himself with the customer, they should find for the plaintiff." This would have directed the minds of the jury to the facts necessary to be ascertained by them in order to

reach a proper conclusion. An instruction for the defendant embodying the same proposition of law might have been given, and in it the jury would have been told, in substance, that if the plaintiff, acting under such contract of employment, failed to procure such a purchaser, they should find for the defendant. Instructions should apply the law to the facts in the case. "It is not the proper course for the judge to lay down the general principles of law applicable to a case, and leave the jury to apply them; but it is his duty to inform them what the law is as applicable to the facts of the case. An instruction, however pertinent and applicable it may be, is abstract unless it be made to apply, in express terms, either to the attitude of the parties or to the very facts in issue." *Blashfield on Instr. s. 92.* "It is not the province of the judge to impress any particular view of the facts upon the jury, but it is his province to make his charge so directly applicable to the facts as to enable the jury to render a correct verdict. To leave as little room as possible for them to make mistakes in applying the law to the facts, which they may be very liable to do when they have only general abstract propositions given to them in charge, there ought, if possible, to be no room for misunderstanding the charge or its application, and to this end it ought to be specific and direct." *East Tennessee V. & G. R. Co. v. Toppins*, 10 Lea. (Tenn.) 64. "Courts should apply the principles to the facts in evidence, stating the facts hypothetically." *Blashfield on Instr. s. 92.*

* * * * *

On account of the misleading character of the instructions given and the want of sufficient evidence to support the verdict, the judgment must be reversed, the verdict set aside, a new trial granted, and the case remanded.

Reversed.

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Joke
WEST KENTUCKY COAL CO. v. DAVIS.
Court of Appeals of Kentucky. 1910.

138 Kentucky, 667.

WM. ROGERS CLAY, Commissioner. Appellee, J. B. Davis, instituted this action against appellant, West Kentucky Coal Company, to recover damages for personal injuries alleged to have been caused by appellant's negligence. The trial in the lower court resulted in a verdict and judgment in favor of appellee for the sum of \$1,600. To reverse that judgment this appeal is prosecuted.

The appellant is a corporation operating a coal mine near the town of Sturgis, Union county, Ky. It also owns and operates a mine at Wheatcroft, and at one or two other places. In connection with these mines it owns and operates a railroad. Under appellant's tipple, there are three railroad tracks upon which cars are transported and placed for the purpose of loading. These tracks are known as tracks Nos. 1, 2, and 3. The engine which appellant operates was taken daily down track No. 1 to the scale-house; thence it was run up track No. 2 to the tipple for the purpose of coaling before beginning its regular operations for the day. On the occasion in question, those in charge of the engine backed it down to the scale-house on track No. 1; thence up track No. 2, where appellee was at work at the tipple. It was appellee's duty to check the cars, and see that they were properly loaded. When the engine arrived at the tipple, it pushed the car which appellee was loading out of the way, placed its tender upon the tipple, and received its coal. It then went back, placed a partially loaded car in position, and proceeded to the scale-house. It was standing there when appellee resumed his labors of loading the car on track No. 2. According to its usual custom, the engine then started up track No. 1, pushing an empty car. While it was proceeding in the direction of appellee, the car which the latter was loading on track No. 2 became unmanageable. When this took place, appellee's assistant jumped upon the car for the purpose of stopping it. Appellee stepped back and moved up the track for the purpose of notifying the tipple men to stop the machinery. There was a distance of four or five feet between

tracks No. 1 and No. 2. When appellee rose up and stepped backward to give the tippie man the required notice, he came in contact with the car which was being pushed by the engine up track No. 1, and was injured. The evidence shows that there was a flagman on the front end of the car that was being pushed by the engine. His testimony is to the effect that appellee backed into the car so suddenly that it was impossible to stop the train after his peril was discovered. There was evidence to the effect that the whistle was not blown nor the bell rung as the engine approached the place of accident.

* * * * *

The instructions complained of are as follows:

"(1) Gentlemen of the jury, the court instructs you that it was the duty of the defendant's employee in charge of the engine and cars attached thereto at the time and place in question to exercise ordinary care, as hereinafter defined, in running and operating the same so as to prevent injury to its employes; so, if you shall believe from the evidence that defendant's said employes in charge of said engine and cars failed to exercise such care as above required, but negligently ran said cars against the plaintiff, thereby injuring him, while plaintiff was exercising ordinary care, as hereinafter defined, for his own safety, if he was then doing so, then in that event you should find for the plaintiff and award to him such an amount in damages as will fairly and reasonably compensate him on account of any mental and physical suffering endured by him as a direct result of such injury, if any, and also for the reasonable value of the time necessarily lost from his business on account thereof, if any, and also for any permanent reduction in his power to earn money, if any, as was the direct result of such injury, not exceeding the sum of \$2,000, the amount claimed in the petition. But unless you shall so find and believe from the evidence as above required, you must find for the defendant."

"(4) The court further instructs you that it was likewise the duty of the plaintiff performing his duties and doing the work in question to exercise ordinary care for his own safety, and, although you may believe from the evidence that the defendant's said employee was at said time negligent and careless, yet if you shall also believe from the evidence that plaintiff at said time when he was injured was also careless or

negligent, and that but for his own carelessness or negligence the accident and injury would not have occurred, then in that event you should find for the defendant."

It will be observed that the instructions complained of do not present to the jury the reciprocal duties of appellant and appellee. They are so general and abstract in form as to make the jury the judges of both the law and the facts. *Smith v. Cornett*, 38 S. W. 689, 18 Ky. Law Rep. 818; *C. N. O. & T. P. Ry. Co. v. Hill's Adm'r*, 89 S. W. 523, 28 Ky. Law Rep. 530. The jury may have concluded that certain acts constitute negligence, when, as a matter of fact, such was not the case. That this conclusion is sound may be gathered from the fact that one witness was permitted to testify that the car which struck appellee was not equipped with a fender or pilot; indeed, much stress is laid upon this fact in appellee's brief. Doubtless it was commented upon by counsel in their argument to the jury. We can not, then, say that the Jury were not influenced by this fact in returning a verdict in favor of appellee. Certainly the failure of appellant to equip the car in question with a fender or pilot was not negligence. To so hold would be to impose upon appellant a greater liability than has ever been imposed upon ordinary railroads, and would almost defeat the practical operation of its engines and cars.

Nor do we think the failure of appellant to offer more specific instructions than those given deprived it of its right to complain. The rule is that in civil cases the court is only required to give such instructions as are offered by the parties. If, however, an instruction offered is defective in form or substance, the court should prepare, or direct the preparation of a proper instruction on the point attempted to be covered by the instruction offered. *L. & N. R. R. Co. v. Harrod*, 115 Ky. 877, 75 S. W. 233, 25 Ky. Law Rep. 250; *Nicola Bros. v. Hurst*, 88 S. W. 1081, 28 Ky. Law Rep. 87.

But when no instructions are requested by either party, and the court on its own motion undertakes to instruct the jury, the instructions so far as they go should present correctly the law of the case. *South Covington & Cincinnati Street Ry. Co. v. Core*, 96 S. W. 562, 29 Ky. Law Rep. 836; *Swope v. Schafer*, 4 S. W. 300, 9 Ky. Law Rep. 160; *Turner, Jr. v. Terrill*, 97 S. W. 396, 30 Ky. Law Rep. 89.

Upon the next trial of the case the court will instruct the jury as follows:

"It was the duty of the defendant's agents in charge of its engine and cars on the occasion in question to give reasonable warning of the approach of the train by blowing the whistle or ringing the bell, and to keep a reasonable lookout in front of the train as it moved. It was the duty of the plaintiff to exercise reasonable care to watch for the approaching train and keep out of its way. If you believe from the evidence that a reasonable warning of the approach of the train was not given or a reasonable lookout was not kept, and that by reason of this plaintiff was struck and injured by one of defendant's cars, while exercising ordinary care for his own safety, you will find for the plaintiff. Unless you so believe, you will find for the defendant.

"(2) Although you may believe from the evidence that defendant's agents in charge of said train failed to give reasonable warning of its approach and failed to keep a reasonable lookout, yet if you believe from the evidence that the plaintiff himself failed to exercise ordinary care to discover the approach of the train and to keep out of its way, and that such failure on his part, if any, so contributed to his injury that but for said failure his injury, if any, would not have been received, you will find for defendant.

"(3) If you believe from the evidence that a reasonable lookout was kept, and that reasonable warning of the approach of the train was given, and that plaintiff went upon the track so close to the approaching train that the injury to him could not be avoided by the exercise of ordinary care upon the part of those in charge of the train after they perceived his danger, or could have perceived it by the exercise of ordinary care, you will find for the defendant.

"(4) Reasonable or ordinary care is such care as an ordinarily prudent person will usually exercise under circumstances the same or similar to those proven in this case.

"(5) If you find for the plaintiff, you will award him such sum in damages as you may believe from the evidence will fairly compensate him for his mental or physical suffering, if any; for his loss of time, if any; and for the permanent impairment, if any, of his power to earn money, which you may believe from the evidence was the proximate result of his

injury, if any; not exceeding in all, however, the sum of \$2,000."

No other instructions will be given.

The judgment is reversed, and cause remanded for a new trial consistent with this opinion.

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McDIVITT v. DES MOINES CITY RAILWAY CO.

False

Supreme Court of Iowa. 1909.

141 Iowa, 689.

EVANS, J.—* * *

* * * * *

The appellant complains further that the instructions of the court were contradictory, and that, although the court held the deceased to have been guilty of contributory negligence, it nevertheless laid upon the plaintiff the burden of proving freedom from contributory negligence before she could recover even upon the theory of the "last clear chance."

After a statement of the issues, the court presented its instructions in paragraphs numbered from 1 to 19, inclusive. The first six are as follows:

(1) The burden of proof is upon the plaintiff to establish by preponderance of the evidence each of the following propositions: First, that the deceased, Edith McDivitt Lawson, was struck and injured by the defendant's car about the time, at the place, and substantially in the manner alleged in plaintiff's petition; second, that said decedent was not guilty of negligence causing or contributing to her said injury; third, that the defendant was guilty of negligence substantially as alleged by plaintiff and hereafter in these instructions more fully specified; fourth, that said injuries so received by decedent were the direct and approximate result of the negligence of the defendant; fifth, that the estate of decedent has been damaged in some amount thereby. If you find affirmatively as to each and all of the above propositions, then your verdict will be for the plaintiff. If you fail to find affirmatively as to any one of the above propositions, your verdict will be for the defendant.

* * * * *

(4) The undisputed evidence in this case shows that the deceased approached the railway track of defendant, and, after having so approached the railway track of defendant, waited for the west-bound car to pass her, and that, after such car had passed, decedent immediately proceeded across the north track, and the intervening space of almost five feet between the north and south tracks, and stopped in front of an east-bound car on the south track, there passing, and was struck by said car without taking any precautions to avoid the accident. You are instructed as a matter of law that this action of decedent would constitute negligence, and plaintiff cannot recover unless you find as hereinafter instructed. The only question therefore which you have submitted to you for consideration is whether or not the defendant's employees in charge of the east-bound car, which came in contact with the deceased, were guilty of the negligence charged in failing to avoid the injury which resulted in the death of decedent after the deceased stepped from behind the west-bound car and onto the south track of defendant, and she was seen by the motorman in a position of danger * * *

(6) You have been heretofore instructed, gentlemen, that the decedent was negligent in going upon the track in front of the east-bound car, which struck her; but you are further instructed that, while the law holds that plaintiff cannot recover on account of the contributory negligence of the decedent in stepping in front of the east-bound car in the manner in which she did, yet if, after the motorman saw her in a place of danger or about to step upon the track in front of the approaching car, he negligently failed to stop said car within a reasonable time or distance under the circumstances shown by the testimony, and such failure was the direct and proximate cause of the injury which resulted in the death of decedent, then your verdict will be for the plaintiff.

From an examination of instruction 1, it will be observed that the jury was instructed, expressly, that, if it failed to find that the decedent was not guilty of contributory negligence, the verdict must be for the defendant. Instructions 4 and 6 expressly stated to the jury that the decedent was guilty of contributory negligence. This presents the alleged contradiction of which appellant complains. It is contended by appellee that instructions 4 and 6 expressly state to the jury that the plaintiff may recover notwithstanding contribu-

tory negligence, and this contention is correct; but this does not eliminate the contradiction in the instructions. Appellee contends that the instructions must be considered as a whole, and this is true. It is argued also, that the error in the first instruction is cured by the statement in the fourth and sixth; but it is cured only in the form of a contradiction. Our previous cases cited by appellee are not in point. It has been held that where an instruction is ambiguous, or where standing alone, it is erroneous because of some omission, it may be cured by other instructions that are clear upon the omitted or ambiguous point; but where an instruction is free from ambiguity, and is affirmatively erroneous, the error is not cured by a contradiction contained in another instruction. There is no way in such case to determine which instruction the jury may follow. The question presented in this case is almost parallel with *Christy v. City Railway Company*, 126 Iowa, 428, and the cases therein cited. The error in this case was somewhat emphasized by the sixteenth instruction, which contains the following: "Contributory negligence is such negligence as contributes to an injury"—a definition which was quite unnecessary in view of the withdrawal of the question from the consideration of the jury. The natural effect of it would be to impress the jury that the question was still in the case, and to emphasize the error contained in instruction 1.

* * * * *

The judgment below is reversed, and cause remanded for a new trial.—*Reversed*.⁸⁵

⁸⁵ When an instruction does not conclude with a direction to find for one party or the other, mere incompleteness will not make it erroneous if other instructions supply the missing information. But if it concludes with such a direction it must be complete in itself (except for mere matter of definition) and if incomplete will be erroneous.—*Klofski v. Railroad Supply Co.*, (1908) 235 Ill. 146.

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omit CENTRAL RAILROAD v. HARRIS.
omit Supreme Court of Georgia. 1886.

76 Georgia, 501.

Lucinda Harris brought suit against the Central Railroad to recover damages for the killing of her husband. The testimony for the plaintiff tended to show that the husband was in the depot in the city of Atlanta; that he walked alongside the train to go beyond the engine, which projected from the depot into a street-crossing at its end; that he undertook to cross the track at the street-crossing, when the train started rapidly without giving any signal and ran over him.

* * * * *

The jury returned a verdict for the plaintiff for one thousand dollars. The defendant moved for a new trial upon the following grounds:

* * * * *

(2) Because the court failed entirely to put before the jury the main defense relied upon by the defendant, and to sustain which abundant evidence had been introduced, to-wit, that defendant had boarded the passenger train in the depot without having purchased a ticket, and without having any intention of leaving the city thereon, but simply to say good-bye to a crowd of colored servants on their way to Florida, and that he had attempted to jump from said train when in motion, and from a platform having no steps attached thereto by which to descend to the ground, and having a railing extending around the entire platform to prevent persons from getting on and off the car to which it was attached, at that end. The charge of the court failed to call the attention of the jury in any way to these facts, but singled out the one element of negligence arising from the failure, if such failure existed, to toll the bell on crossing Pryor street.

* * * * *

JACKSON, C. J. The very able and distinguished counsel for defendant in error saw the force of this exception to the charge, and endeavored to meet it by the reply that the counsel for the plaintiff in error could not use the exception, because he did not call the attention of the court to the omission of which he now complains, and cited decisions of this

court bearing upon the necessity of his doing so before he could take advantage of the omission.

We think, however, that the cases cited, and the principles on which they rest, do not apply to the clear omission to notice in the charge a plain defense of the company arising out of his evidence so as not to escape the observation of the judge, but to omissions to expand the charge, so as to make more clear the point on which he has charged substantially, but not as fully as would have been done had attention been called to it. The courts will not allow a party to lie in wait for the judge when he charges substantially the law covering the case, and then object to the insufficiency of a portion of it; but in every case, the law of it must be given in substance to the jury, because if it is not given, the general verdict they give is not upon the law, the law of the case, but on facts without instructions on the law of the case. The ship is at sea without chart or pilot, and can never reach the port to which it is bound without their guidance. The verdict can never be a legal verdict unless instructions on the law of the case be given by him who presides for that purpose. The omission to cover the case substantially must always set it aside.

* * * * *

In all these cases, it is believed, from an examination of each, the principle is clearly deducible that without any request of counsel or reminder of the court by counsel, the instructions of the court must substantially embrace the rule of law on the issues between the parties which the evidence makes. If that be done substantially, then there is a line of decisions cited by counsel for the defendant in error, to the effect that if the charge be not full enough or clear enough or omits something that would put one side or the other more fairly before the jury than the charge given does, then the notice of the court must be called thereto, or the party complaining will not be heard here. If there be any exception to this general rule in this court from 11th Ga. down to 69th, it is very scarce, and will be found approximating closely to the rule laid down, if not clearly within it.

* * * * *

The judgment is reversed solely because the court in the charge ignored the defense set up by the defendant below, that plaintiff's husband's own negligence—his own rash act—

in jumping from the cars killed him, without any negligence at all of the defendant which contributed to that act of his,—the only negligence proved being the neglect to ring the bell, which did not affect in the least the disastrous result of the rashness of the deceased.

*Judgment reversed.*⁸⁶

⁸⁶ *Accord:* Owen v. Owen, (1867) 22 Iowa, 270; Capital City Brick & Pipe Co. v. Des Moines, (1907) 136 Iowa, 243, 113 N. W. 835; York Park Bldg. Ass'n v. Barnes, (1894) 39 Neb. 834, 58 N. W. 440.

153 MORGAN v. MULHALL.

Supreme Court of Missouri. 1908.

214 Missouri, 451.

LAMM, J.—Suing Mulhall, Ernest Morgan by his next friend asked \$20,000 damages, grounding his right of action on a negligent shooting and wounding. At a trial with the aid of a jury, he got a verdict of \$5,000. From a judgment entered, defendant appeals.

The petition follows:

“The plaintiff for his cause of action sheweth to the court that on the 24th day of May, 1905, upon the petition of said Ernest Morgan the said circuit court did appoint Joseph Morgan as his next friend to commence and prosecute this suit, and said Joseph Morgan has consented in writing to act as such next best friend for said purpose.

“And the plaintiff further sheweth to the court that on the 18th day of June, 1904, in said city of St. Louis and on the grounds of the Louisiana Purchase Exposition Company, the defendant by shooting into a crowd of people negligently shot the plaintiff, Ernest Morgan, with a pistol * * *

* * * * *

Defendant stood mute and neither prayed nor got any instructions whatever. Plaintiff asked none on the trial issue of negligence nor on issues relating to the defense. He asked and got two—one on the measure of damages, the other a rule of law relating to the credibility of the witnesses and the weight of their testimony. In this state of the record, de-

pendant does not contend the instructions given were bad law in and of themselves, but his counsel insist it was error to not give instructions bearing upon the issues and announcing rules of law by which the jury could be guided to a just verdict on them.

* * * * *

(b) An excellent law writer states the general doctrine in civil cases to be: "It is then, a general rule of procedure, subject, in this country, to a few statutory innovations, that mere *non-direction*, *partial* or *total*, is not ground of new trial, unless specific instructions, good in point of law and appropriate to the evidence, were requested and refused. A party cannot, by merely excepting to a charge, make it the foundation for an assignment of error, that it is indefinite or incomplete." (2 Thompson on Trials, sec. 2341). Judge Thompson supports his text by a wealth of authorities in a note, adding: "The English rule seems to be that non-direction, where specific direction is not requested, is no ground of a new trial, unless it produce a verdict against the evidence." (Citing *Ford v. Lacey*, 30 L. J. (Exch.) 351; *Railroad v. Braid*, 1 Moore, P. C. Cas. [N. S.] 101.)

To question that general rule in Missouri at this late day would be to spin cobwebs before the eyes of justice and mischievously unsettle the law. This is so because our statute on procedure in civil cases does not contemplate instructions whether or not. Parties litigant have their operation to ask or not ask for them. That statute ordains (R. S. 1899, sec. 748): "When the evidence is concluded, and before the case is argued or submitted to the jury or to the court sitting as a jury, either party *may* move the court to give instructions on any point of law arising in the cause, which shall be in writing and shall be given or refused. The court *may* of its own motion give like instructions, and such instructions as shall be given by the court on its own motion or the motion of counsel shall be carried by the jury to their room for their guidance to a correct verdict according to the law and evidence; which instructions shall be returned by the jury into court at the conclusion of the deliberations of such jury, and filed by the clerk and kept as a part of the record in such case."

In construing that section, the better view is that it is permissive, not mandatory. Doubtless it conduces to the science

of jurisprudence and the orderly administration of the law to have instructions defining the issues, putting it to the jury to find the fact and declaring the law on the fact when found, but it is within the knowledge of the profession (and our decisions show) that cases are not infrequently tried, *nisi*, without them. That mere non-direction is not misdirection is a familiar, settled rule of appellate procedure. Under that rule, before appellant can predicate reversible error on what a trial court does not say to the jury, he must first put the court in the wrong by asking it to say something, or else the court in trying to cover the case by instructions holds a false voice, or omits in general instructions essential elements of the case. (*Tetherow v. Railroad*, 98 Mo. 74; *Coleman v. Drane*, 116 Mo. l. c. 394; *Browning v. Railroad*, 124 Mo. 55; *Nolan v. Johns*, 126 Mo. 159; *Wilson v. Railroad*, 122 Mo. App. l. c. 672, *et seq.*, and cases cited; *Nugent v. Armour Packing Co.*, 208 Mo. l. c. 500; *Flaherty v. Railroad*, 207 Mo. l. c. 339.)

Here, manifestly, appellant was as much to blame as the court or respondent for the omission to instruct on vital issues; for he is by his silence joined in the general silence and made it more profound. At most it was common error, if any, and error common to all is not reversible error. He who does not speak when he should, will not be heard to speak when he would.

The premises considered, we have nothing to do but look to the record and see if it supports the verdict. We find ample testimony to support it.

Accordingly, the judgment is affirmed. It is so ordered.⁸⁷

⁸⁷ *Accord*: *Stuckey v. Fritsche*, (1890) 77 Wis. 329, 46 N. W. 59; *Osgood v. Skinner*, (1904) 211 Ill. 229, 71 N. E. 869; *Palatine Ins. Co. v. Santa Fe Mercantile Co.*, (1905) 13 N. Mex. 241, 82 Pac. 363; *Womack v. Circle*, (1877) 29 Gratt (Va.) 192; *Texas & Pacific Ry. Co. v. Volk*, (1894) 151 U. S. 73.

157 CITY OF CHICAGO v. MOORE.

Shope Supreme Court of Illinois. 1891.

139 Illinois, 201.

SHOPE, J.—This was a suit for personal injury, alleged to have been received by defendant because of a defective sidewalk over and upon which she was passing with due care and caution, and which appellant was required to keep in safe repair and condition. The trial resulted in a verdict for plaintiff, which on appeal to the Appellate Court, was affirmed.

* * * * *

The first point made which we will consider is that, the court erred in refusing all instructions asked, and giving one prepared by the court in lieu thereof. It is insisted with great earnestness, that under the practice in this State, and under the statute, the respective parties have the right to have instructions given or refused by the court as asked by them, and that it is error for the court to refuse an instruction containing a correct proposition of law applicable to the facts, although an instruction embodying every material phase thereof be given in an instruction or instructions prepared by the court. It is said "that there is no place under our law for instructions by the court *sua sponte*, except when counsel have failed to present proper instructions, and the justice of the case demands that the judge supply the omission." The contrary to this contention has been so repeatedly held, and the practice of giving a charge prepared by the court, and containing all of the material points covered by the instructions asked, has been so often commended by this court, that the question ought to be regarded as settled in this state. *Hill et al v. Parsons et al*, 110 Ill. 111; *Hanchett v. Kimbark et al*, 118 id. 132; *Birmingham Fire Ins. Co. v. Pulver*, 126 id. 329.

In the latter case, in speaking of this practice, we said: "The propriety of the practice thus adopted is challenged, the proposition contended for seeming to be, that in this State the functions of the court in the matter of instructing a jury are practically limited to giving or refusing the written instructions asked by counsel. Such, clearly, is not the case.

True, he may, if he sees fit, limit himself to giving the instructions submitted by the counsel which properly state the law, and then, even though the law be inadequately given to the jury, no error can ordinarily be predicated upon such action, because if counsel had deemed other instructions necessary, they might and should have asked them. But where the judge sees proper to do so, it is competent for him to prepare his own charge to the jury, but if he does so, he should embody in it, either literally or in substance, all proper instructions asked by counsel." See, also, *Chicago and Iowa Railroad Co. v. Lane*, 30 Ill. App. 443.

And it has been so repeatedly held that it is not error to refuse instructions, however applicable and pertinent, when the material parts are given in other instructions, that the citation of authority seems unnecessary. Here appellant asked seventeen instructions. A careful consideration of them will show, as it is conceded, that the instruction prepared and given by the court contained every important or material proposition embodied therein, except the fourth instruction asked and refused, in respect of which, as we shall see hereafter, appellant has no cause of complaint. If the jury were accurately instructed in respect of each proposition contained in the instructions asked, proper to be given, the party can not be heard to complain.

It is, however, said, that the instructions prepared by the counsel presented the questions sharply and incisively, while those of the court are more moderate in expression and less forceful. This may be conceded without affecting the result. As said by the Appellate Court: "The instructions handed up come to the judge from partisan hands, and have been drawn as carefully as the skill of a lawyer can accomplish it to present a partisan view, or to convey a hint, suggestion or intimation of advantage to his client. The same legal rule may be stated in a differently arranged combination of words by the judge, and be, as it is very likely to be, coldly impartial, and entirely colorless in its statements of facts on which it is based." The utmost care should be taken by the judge to include within the charge every proposition of law applicable to the facts of the case embraced within the instructions asked, and such others as he may deem necessary to the attainment of justice. His language should be clear and impartial, and convey to the jury the law of the case in terms

they will comprehend. When this is done the practice is to be commended, rather than the other, which too frequently leaves the mind of the juror in uncertainty as to what is meant by the disjointed, and to his mind, disconnected and conflicting, propositions of law, and which embarrass and mislead him perhaps quite as often as they lead him to correct conclusions.

* * * * *

Finding no error in this record for which the judgment should be reversed, it is affirmed.

*Judgment affirmed.*⁸⁸

⁸⁸ A number of courts have declared that the practice of charging the jury in the language of the court instead of in the language of counsel, is decidedly preferable, even where the requested charges are unexceptionable in law when separately examined, for the reason that thereby the charge can be made more orderly and harmonious and is freed from the partisan spirit and want of proper perspective which instructions usually show when prepared by counsel. *Rosenstein v. Fair Haven v. Westville R. R. Co.*, (1905) 78 Conn. 29, 60 Atl. 1061; *Kinney v. Ferguson*, (1894) 101 Mich. 178, 59 N. W. 401.

On the other hand, some courts hold that the court is bound to give a correct instruction in the language of the request. Thus, in *Morrison v. Fairmont & Clarksburg Traction Co.*, (1906) 60 W. Va. 441, 55 S. E. 669, the court said: "A party is entitled to an instruction in his own language, if it correctly propounds the law applicable to the case, and is not misleading and there are facts in evidence to support it. *State v. Evans*, 30 W. Va. 417; *Jordan v. Benwood*, 42 W. Va. 312. Where such instructions are asked a court should, without hesitation, give them. It is a right a party has to couch his instructions in his own language, and when he has done so, if they fulfill the legal requirements, they should be given. But while this is true, yet what should be the effect after verdict, where such instruction is refused, but modified and given? Can we say that it is reversible error for the court to make a slight or immaterial change in an instruction? Must instructions be given literally as offered, and if this is not done, must we overthrow the verdict? We cannot so hold. While such an instruction should be given, yet a verdict will not be set aside where this is not done, when it is modified and given, if we can clearly see that the instruction as modified is the same in legal effect as the one offered."

And in some states it is provided by statute that the court shall instruct in the language of the request when such request is correct in law. Alabama, Code, 1903, § 5364; North Dakota, Rev. Codes, 1905, § 7021; South Dakota, Code Civ. Pro., 1903, § 256.

If an instruction as requested is not correct, the court is under no obligation to modify it and give it as modified, but may properly refuse it altogether.—*Chesapeake & Ohio Ry. Co. v. Stock*, (1905) 104 Va. 97.

Number of Instructions. A rigid rule limiting the number of instructions which can be given for each party is unreasonable. Number alone is not always of importance. Several short and concise instructions are frequently better than one long, diffuse and complicated instruction.—*Chicago City Railway Co. v. Sandusky*, (1902) 198 Ill.

400. But the mass of instructions given may be so great as in itself to constitute reversible error. *Sidway v. Missouri Land & Live Stock Co.*, (1901) 163 Mo. 342, 376.

(c) *General Instructions.*

155
Circuit

SCURLOCK v. CITY OF BOONE.

Supreme Court of Iowa. 1909.

142 Iowa, 580.

EVANS, C. J.—The plaintiff was a resident of the defendant city. On February 26, 1907, she claims to have fallen upon one of the sidewalks by reason of a loose board thereon. The claim is that her grandson, who was walking at her side, stepped upon one end of the board, whereby the other end was thrown up against the plaintiff in such a way as to cause her to fall. It is claimed that she suffered internal injuries either by the fall or by the blow from the board. It was claimed at the time of trial that she was then in a poor state of health, and one of the issues of fact in dispute was whether her then condition was caused by the accident complained of.

* * * * *

II. It appeared from the testimony on behalf of the plaintiff that prior to the accident she had always maintained good health. On behalf of the defendant, Mrs. Miller and Mrs. Ball, her daughter, both testified that on one occasion, about two years previous, the plaintiff called at their home at Ames, and that she stated to them at that time that she was in very poor health. T. L. Jones, one of the city council, testified also that prior to the accident the plaintiff had frequently told him that she was not well. None of this testimony was denied by the plaintiff, either directly or indirectly; nor did she refer to it in any way in her rebuttal testimony. The court gave to the jury the following instruction. “(12½) There is some evidence in this case with respect to an admission by the plaintiff in regard to the condition of her health at a time prior to the accident. Verbal admissions, consisting of mere representa-

tions of oral statements, made a long time before, are subject to much imperfection and mistakes, for the reason that the person making them may not have expressed her own meaning, or the witness may not have understood her, or, by not giving her exact language, may have changed the meaning of what was actually said, and this is especially true where a long time has elapsed since the alleged admission was made. Such evidence should therefore be received by you with caution." This instruction is earnestly challenged by the appellant. We are constrained to hold that it cannot be sustained. This court has heretofore approved the rule on this point as laid down by Greenleaf. 1 Greenleaf, section 200; *Martin v. Town of Algona*, 40 Iowa, 392; *Allen v. Kirk*, 81 Iowa, 670.

It will be observed that the instruction under consideration, through probable oversight, falls short of stating the Greenleaf rule. As set forth in the *Martin* case, *supra*, the following should have been added: "But when such admissions are deliberately made or often repeated, and are correctly given, they are often the most satisfactory evidence, and the jury should consider all the circumstances under which they were made and give them such weight as they are justly entitled to receive." This latter proviso gives a proper balance to the rule. An instruction substantially in the form of the one under consideration was condemned by this court in *Hawes v. B., C. R. & N. Ry. Co.*, 64 Iowa, 315. See, also, *Castner v. Railway Co.*, 126 Iowa, 586. The natural effect of the court's instruction as given was to minimize unduly the testimony of the defendant on the subject referred to, and this is especially so in view of the fact that the plaintiff neither denied the statements attributed to her, nor denied recollection of them, nor offered any explanation.

The tendency of this instruction to minimize the evidence referred to was further emphasized by the use of the word "some" in the first sentence. This court has heretofore condemned the use of this word in this connection, in that its tendency is to belittle the evidence referred to. *State v. Donovan*, 61 Iowa, 369; *State v. Dorland*, 103 Iowa, 174; *State v. Rutledge*, 135 Iowa, 581. We feel constrained therefore to hold that defendant's exception to this instruction must be sustained.

* * * * *

For the error pointed out in instruction 12½ the judgment below must be *reversed*.⁸⁹

⁸⁹ *Accord*: Allen v. Kirk, (1891) 81 Iowa, 658, 47 N. W. 906; Stewart v. De Loach, (1890) 86 Ga. 729, 12 S. E. 1067; Tozer v. Hershey, (1870) 15 Minn. 257; Haven v. Markstrum, (1886) 67 Wis. 493, 30 N. W. 720.

156
gake KAUFFMAN v. MAIER.
Supreme Court of California. 1892.

94 California, 269.

HARRISON, J.—The plaintiff brought this action against the defendants to recover damages for personal injuries alleged to have resulted from their negligence. He was in their employ at the time of the injury, and the negligence charged upon them was their permitting the shaft of a wheel to protrude into the room where he was at work, by reason of which his sleeve was caught upon the jagged end of the shaft, causing him to be carried around it, whereby his arm was so injured as to require amputation. The plaintiff recovered judgment in the court below, and a new trial was granted upon the motion of the defendants, and from this order the plaintiff has appealed. In their statement upon the motion for a new trial, the defendants have assigned various errors of law on the part of the court, as well as many particulars in which the evidence is claimed to be insufficient.

* * * * *

5. Evidence was given at the trial tending to show that shortly after the injury the plaintiff had made statements to the effect that it was the result of his own fault, and that the accident had been brought about by a different cause from that shown at the present trial. In its instructions to the jury, the court said: "The court instructs the jury that although parol proof of the verbal admissions of a party to a suit, when it appears that the admissions were understandingly and deliberately made, often afford satisfactory evidence, yet, as a general rule, the statements of

the witnesses as to the verbal admissions of a party should be reviewed by the jury with great caution, as that kind of evidence is subject to much imperfection and mistake. The party himself may have been misinformed, or may not have clearly expressed his meaning or the witness may have misunderstood him; and it frequently happens that the witness, by unintentionally altering a few expressions really used, gives an effect to the statement completely at variance with what the party did actually say. But it is the province of the jury to weigh such evidence, and give it the consideration to which it is entitled in view of all the other evidence in the case."

In thus instructing the jury, the court disregarded the provision of the constitution that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."

While it is a matter of common knowledge that the statements of a witness as to the verbal admissions of another are liable to be erroneous, and for that reason should be received with caution, yet such conclusion is only an inference of fact which must be made by the jury, and is not a presumption or a conclusion of law to be declared by the court. The reasons which are to be urged in favor of receiving such statements with caution are based upon human experience, and vary in strength and conclusiveness with the facts and circumstances of each case, and their sufficiency in any particular case is an inference which the reason of the jury makes from those facts and circumstances; but there is no rule of law which directs the jury to invariably make such an inference from the mere fact that the proof of the admission is by oral testimony. That deduction called a presumption which the law expressly directs to be made from particular facts is uniform, and not dependent upon the varying conditions and circumstances of individual cases. To weigh the evidence and find the facts in any case is the province of the jury, and that province is invaded by the court whenever it instructs them that any particular evidence which has been laid before them is or is not entitled to receive weight or consideration from them: (*People v. Walden*, 51 Cal. 588; *People v. Fong Ching*, 78 Cal. 173; *Mauro v. Platt*, 62 Ill. 450; *Commonwealth v. Galligan*, 113 Mass.

202; *McNeil v. Barney*, 51 Cal. 603; *People v. Dick*, 34 Cal. 666.)

The instruction above quoted is, in substance, an argument to the jury with "respect to matters of fact" that had been presented at the trial, and a comment by the court upon the weight which they should give to that testimony. Whether the facts and circumstances proved in the case were sufficient to cause the reason of the jury to make this inference was fair matter of argument for the counsel of the respective parties; but the court forsook its judicial position when it assumed the office of commenting upon the weight and credibility of this evidence. The closing paragraph in the instruction, to the effect that it was for the jury to give to the evidence the consideration to which it was entitled, did not obviate the error, as by its remarks the court had, in substance, said to them that as matter of law the evidence was not entitled to any great consideration.

The order is *affirmed*.⁹⁰

⁹⁰ *Accord*: *Knowles v. Nixon*, (1896) 17 Mont. 473, 43 Pac. 628; *Johnson v. Stone*, (1892) 69 Miss. 826, 13 So. 850.

157
Crabtree

CRABTREE v. REED.

Supreme Court of Illinois. 1869.

50 Illinois, 206.

BREESE, C. J.—The only question between the parties to this record was, as to the value of a mule the appellee acknowledged he had struck with a heavy stick, and which belonged to the appellant, causing its death.

The action was case, for killing the mule, and the court, on behalf of defendant, instructed the jury that the burden of proof rested upon the plaintiff, and that he was bound to maintain, by a clear preponderance of evidence, the allegations in the declaration, and that unless they find such a preponderance, they will find for the defendant. Though the defendant had admitted he struck the mule in disciplin-

ing him, he not having been broke to work, and that from the blow the mule died, he contested the fact of killing before the jury, and under the above instruction, the jury found for him.

This instruction must certainly have misled the jury. The law is not, in such a case, that there shall be a clear preponderance of evidence in favor of the plaintiff to entitle him to recover. It is sufficient, if the evidence creates probabilities in his favor—that the weight of the evidence inclines to his side.

For this error the judgment must be reversed and the cause remanded.

*Judgment reversed.*⁹¹

⁹¹ In *Altschuler v. Coburn*, (1894) 38 Neb. 881, it was held proper to tell the jury that the plaintiff must establish his case by a "fair" preponderance of the testimony.

15-8
Fake

MADDEN v. SAYLOR COAL CO.

Supreme Court of Iowa, 1907.

133 Iowa, 699.

SHERWIN, J. * * *
* * * * *

The second instruction given by the court was in the following language: "By the term 'preponderance of evidence' as used in these instructions, is meant the greater weight of testimony. The preponderance of evidence is not alone determined by the number of witnesses testifying to a particular fact or state of facts. It is determined by fully and fairly considering and weighing all of the testimony of each witness, and the aggregate testimony of all the witnesses, giving to their testimony, and to the testimony of each, such weight as you may deem it entitled to when taken in connection with the other facts and circumstances, proven upon the trial of the case. But, in weighing the testimony, after having applied all the tests as to its credibility and weight found in these instructions for your guidance, while the weight of the testimony is not necessarily determined by the

number of witnesses on either side of a controverted proposition of fact, yet when the witnesses are of equal credibility, and the circumstances equally consistent with the evidence of each, then the number of witnesses would fairly determine the preponderance." The appellant complains of this instruction, because it invaded the right of the jury to determine the weight to be given to the testimony of witnesses, and the right to determine all fact questions in the case without any direction or attempt on the part of the court to control its action in that respect. While we regret the necessity of reversing the case because of error in this instruction, we are constrained to do so, for the reason that it was clearly prejudicial to the defendant. The court alone determines the competency of witnesses, and of the testimony which shall be admitted upon the trial of a case; but the credibility of witnesses, and the weight which shall be given to their testimony, when considered in the light of all of the surrounding facts and circumstances appearing in the case, is the exclusive province of the jury, and with this the court has no right to interfere by instruction or otherwise. The first part of the instruction is not complained of, and we set it out only for the purpose of presenting the instruction as an entirety. It is the second clause of the instruction that is claimed to be erroneous. The court therein in effect told the jury that if the witnesses were of equal credibility, and the circumstances proved equally consistent with the testimony of each witness, then "the number of witnesses would fairly determine the preponderance" of the evidence, as defined in the fore part of the instruction. The statement thus made to the jury was manifestly prejudicial. When we speak of the credibility of a witness, it refers only to his integrity, and to the fact that he is worthy of belief. The term does not imply that he has intelligence, or knowledge, or opportunity for knowledge of the particular facts in the case. *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19; *Peck v. Chambers*, 44 W. Va. 270, 28 S. E. 706; *Noland v. McCracken*, 18 N. C. 594. And see, on the subject generally, 2 Words & Phrases, 1710, 1711. Witnesses may be equally entitled to credit in so far as their being truthful is concerned, and still the testimony given by such witnesses may not be of equal value as proof of certain facts although the circumstances may be equally consistent

with the testimony of each, for the reason that the intelligence of such witnesses and their means of observation may be entirely different. Their memories may not be of equal strength, and many other elements may appear to the jury which would have weight in determining the value of the testimony of each witness; in other words, while witnesses may be equally worthy of belief, the value which is ultimately to be placed upon the testimony of each witness can alone be determined by the jury, and, when a trial court says to a jury that where the witnesses are of equal credibility the number thereof should determine the preponderance of the evidence, it clearly invades the province of the jury. It is never the province of the court to say to the jury what evidence shall or shall not be given weight. The testimony of an entirely credible witness may be as thoroughly contradicted by circumstances as by the testimony of other credible witnesses, and it is always dangerous for a trial court to indicate to the jury, by instruction or otherwise, its own conclusion as to where the weight of the testimony lies. Whether or not the preponderance of evidence in a particular case depends alone upon the number of witnesses is a question of fact to be determined by the jury, and the court has no right to instruct them as a matter of law where the preponderance may be. *Pennsylvania Co. v. Hunsley*, 54 N. E. 1071, 23 Ind. App. 37. On the error in the instruction, see the following cases: *Delvee v. Boardman*, 20 Iowa, 446; *Franks v. State*, 1 G. Greene, 541; *Robinson v. Illinois Cr. Co.*, 30 Iowa, 401; *Miller v. Mutual B. & L. Ins. Co.*, 31 Iowa, 216, 7 Am. Rep. 122; *Saar v. Fuller*, 71 Iowa, 425, 32 N. W. 405; *Johnson v. Whidden*, 32 Me. 230; *Johnson v. People*, 29 N. E. 895, 140 Ill. 350; *Bierbach v. Goodyear Rubber Co.*, *supra*.

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15-9
encl
McLEAN v. ERIE RAILROAD CO.

Supreme Court of New Jersey. 1903.

69 New Jersey Law, 57.

FORT, J.—This was an action for damages alleged to have resulted from an injury caused by the train of the defendant company running into a wagon of the plaintiff, in which the plaintiff was, at the crossing of the said company, at or near Soho, in Essex county.

* * * * *

Another alleged error was on account of the refusal of the trial judge to charge the following request: "That affirmative evidence of the ringing of the bell and blowing of the whistle is generally entitled to more weight than evidence that it was not noticed or heard." We are unable to see upon what principle a judge is justified in stating to a jury that one piece of evidence, which is legitimate, is not to be treated by the jury the same as other evidence in the cause. It is for the jury to say whether the testimony of a witness having an equal opportunity to hear and whose hearing is equally good, and who testifies that he did not hear the blowing of a whistle or the ringing of a bell, notwithstanding he listened, shall or shall not be given equal credit with the testimony of a witness, similarly situated, who testifies that he did hear.

There was no error in the refusal of the trial judge to charge the request excepted to.

The judgment of the Circuit Court is *affirmed*.⁹²

⁹² *Accord*: Atlantic Coast Line R. R. Co. v. O'Neill, (1906) 127 Ga. 685, 56 S. E. 986; St. Louis & San Francisco R. R. Co. v. Brock, (1904) 69 Kan. 448, 77 Pac. 86.

IN RE ESTATE OF WHARTON.

160

Supreme Court of Iowa. 1907.

Quint

132 Iowa, 714.

This is a proceeding for the probate of the will of Stephen Wharton, deceased, offered for probate by A. M. Harrah, devisee, who is also named as executor, to act without bond, and contested by George Wharton, his son, and Esther Wharton, his widow, who, having been adjudged insane, is represented by a guardian. The grounds of contest were want of mental capacity, and undue influence. There was a special finding of want of mental capacity by the jury, a general verdict in favor of contestants, and a judgment entered on such verdict, denying and refusing admission of the will to probate. Proponent appeals.

MCCLAIN, C. J.—Many errors are assigned as to the action of the trial court, and it will only be possible to discuss those which seem to this court to be of controlling importance.

* * * * *

VI. Another instruction is complained of which directed the jury that, other things being equal, affirmative testimony is in general entitled to more weight than negative testimony, and that, if a witness testifies that he did see certain things, and another witness of equal credibility testifies that he did not see such things, then if everything else is equal and such witnesses on either side are of equal credibility, the witness testifying negatively is entitled to less credit than the one testifying affirmatively. It is said that this rule, which certainly has some support in our decisions, has been discredited in *Stanley v. Cedar Rapids & Marion City R. Co.*, 119 Iowa, 526, 533, and *Selensky v. Chicago G. W. R. Co.*, 120 Iowa, 113, 116. But in each of these cases the instruction asked to this general effect was held properly refused, because witnesses who gave the so-called negative evidence, or some of them, were in as good a position to hear the sounds and signals referred to in the testimony of the witnesses giving the affirmative evidence as the latter were. But the instruction given in this case is not open to any such objection, and, under the evidence to which the

instruction could have been understood by the jury as having reference, there was no error in giving it.

* * * * *

The judgment of the trial court is *affirmed*.⁹³

⁹³ *Accord*: Louisville, New Albany & Chicago Ry. Co. v. Shires, (1884) 108 Ill. 617; Jones v. Casler, (1894) 139 Ind. 382, 38 N. E. 812.

110 - acc, 159

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CLINE v. LINDSEY.

Supreme Court of Indiana. 1886.

110 Indiana, 337.

ZOLLARS, J.—Lewis J. Cline died on the 26th day of January, 1884. By his last will, executed on the 22d day of that month, he bequeathed all of his property to appellants, children of a brother.

Appellees brought this action to set aside that will on the ground that at the time it was executed, the testator was a person of unsound mind, and hence incapable of making a valid will. With the will out of the way, appellees and the father of appellants are entitled to the property left by Lewis J. Cline, as his heirs at law, being his brothers, sister, and the descendants of deceased sisters.

Upon a verdict of the jury in favor of appellees, the court below, over appellants' motion for a new trial, set aside the will. Appellants ask for a reversal of the judgment upon the alleged error of the court in charging the jury.

Our attention is first called to the twentieth instruction given by the court. It is as follows:

"20th. In weighing the testimony of witnesses, the jury should consider their capacity to understand the facts about which they testify, their opportunity of knowing the mental condition of the testator. The testimony of the testator's neighbors, who have long been acquainted with him, and have had frequent intercourse with him, and whose attention has been particularly called to the testator, who have had frequent opportunities of observing his mind, is entitled to greater weight than that of a witness of equal

sagacity, whose opportunities were more limited. The facts upon which the witnesses' opinions are based have been given you, and of these you are the judges, weighing the facts as they have been given, in order to determine the condition of the testator's mind. You are to weigh each particular incident and fact stated to you by the witnesses, and to determine from the whole whether or not the testator, at the time of the execution of the will, was or was not of sound mind. You are to take into consideration the will itself and its provisions, its unjustness or hardships, if any exist, to determine the soundness or unsoundness of the testator's mind."

The objection urged to the instruction by appellants' counsel is, that the court thereby invaded the province of the jury by charging, as a matter of law, that the testimony of the testator's neighbors, who had long been acquainted with him, etc., was entitled to more weight than the testimony of other witnesses of equal sagacity, whose opportunities had been more limited.

Considered without reference to any other charge that may have been given, the above instruction, in our judgment, is open to the objection urged against it.

It may be true, as a matter of fact, that the testimony of the neighbors of the testator, who had the advantages and opportunities named, was entitled to more weight than the testimony of other witnesses of equal sagacity, who had had less opportunities because of less acquaintance with the testator. But that was a fact to be determined by the jury as a fact, and not by the court as a question of law.

The instruction, it will be observed, leaves out of view the essential element of credibility. The neighbors of the testator may have had greater opportunities and may have been of equal sagacity with other witnesses having had less opportunities, and yet be less worthy of credence.

Nor does it follow necessarily, and as a matter of law, that the testimony of one of two witnesses, of equal sagacity, is entitled to greater weight simply because he may have had more acquaintance with, and more frequent opportunities to observe, the person whose sanity is in question. The witness who has had less acquaintance, and less opportunities, may yet be the most reliable witness, because of some special training, experience, or habit of closely observ-

ing persons whom he meets. In all such cases it is for the jury to determine for themselves to what witness they will give the most credence. They have a right to consider the fact that some of the witnesses may have had greater opportunities than others. The court may instruct them that they have such right, but it ought not to invade their province, and undertake to determine for them what witness is the most reliable.

* * * * *

It appears here that an erroneous instruction was given, but it is not shown by the record that the giving of it was prejudicial to appellants. The evidence is not in the record, nor is there anything in the record showing, or tending to show, that the witnesses spoken of in the charge as the neighbors of the testator, were witnesses below in behalf of appellees. For aught that is shown by the record, they may have been called by appellants, and may have testified in their behalf, that the testator was a person of sound mind, and hence capable of making the will.

* * * * *

Upon the whole case, we think that the judgment ought to be affirmed.

162 HIGGINS v. WREN.

Supreme Court of Minnesota. 1900.

79 Minnesota, 462.

Action in the district court for Wright county to recover \$200, and interest, damages for the conversion of a note and mortgage. Lizzie Stowell intervened. The case was tried before Giddings, J., and a jury, which rendered a verdict in favor of plaintiff and against defendant and the intervenor for \$263. From an order denying a motion for a new trial, the intervenor appealed. *Reversed.*

COLLINS, J. On the trial of this cause there was testimony received tending to impeach one of the defendants who had testified as a witness, as unworthy of credit, on the ground of general bad reputation for truth and veracity in the neigh-

borhood wherein he resided. The court subsequently charged the jury as follows:

"If the jury believe from the evidence in this case that the reputation of any witness in this case for truth and veracity in the neighborhood where they reside is bad, then the jury have a right to disregard his whole testimony, and treat it as untrue." At this point defendant's counsel called special attention to the words "treat it as untrue," and thereupon the court resumed thus: "That is, you have a right to treat his testimony as untrue; that is, you have the right—the law does not require that you must, but that you have the right—to treat it as untrue, except where it is corroborated by other credible evidence, or by facts and circumstances proved on the trial."

To this part of the charge counsel reserved an exception. We are of the opinion that this statement of the law was altogether too broad. This instruction authorized the jury to wholly disregard and reject all of the testimony given by the witness if satisfied that his general reputation for truth and veracity was bad in the neighborhood in which he resided, no matter how truthful all or a part of such testimony might in itself, and standing alone, appear to be. It is true that this language was taken bodily from a well-known work on instructions to juries, but the author cites no authority in support of it. Nor do we find any. We are of opinion that the instruction upon this point approved in *State v. Miller*, 53 Iowa, 209, 4 N. W. 1083, is one which will be better understood and much better serve the purpose, as follows:

"Where it is shown that the reputation for truth of a witness is bad, his evidence is not necessarily destroyed, but it is to be considered under all the circumstances described in the evidence, and given such weight as the jury believe it entitled to, and to be disregarded if they believe it entitled to no weight."

The successful impeachment of a witness merely affects his credibility. *Order reversed.*

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FIFER v. RITTER.

Supreme Court of Indiana. 1902.

159 Indiana, 8.

HADLEY, J. * * *

Complaint is made of certain instructions given to the jury. Number two informed the jury that they were the exclusive judges of the credibility of the witnesses and of the weight of their testimony, and that in determining these things they must take into consideration the interest, the appearance upon the witness stand, the intelligence, the opportunities for learning the truth concerning the things testified about, the apparent candor and correctness of the statements as compared with the usual and ordinary nature of things. The particular assault upon the instruction is directed against the word *must*, as being an encroachment upon the absolute and exclusive right of the jury. We can not adopt this view. *Must* is here employed in the sense of duty, and the term is equivalent to telling the jury that it was their duty to consider the matters enumerated in estimating the credibility and weight of the testimony. And it clearly was their duty.

* * * * *

We find no error in the record. *Judgment affirmed.*

164
CHICAGO AND ALTON RAILROAD CO. v. KELLY.

Supreme Court of Illinois. 1904.

210 Illinois, 449.

HAND, J.—This was an action on the case brought by the appellee to recover damages for the death of his intestate, Joseph G. Kelly, occasioned, as is alleged, by the negligence of the appellant in failing to stop its train, upon which Kelly was a passenger, at Braidwood station a sufficient length of time to enable Kelly to alight therefrom with safety, by means whereof said Kelly, while in the exercise of due care

for his own safety and while attempting to leave said train at said station, was thrown beneath the wheels of said train and run over and killed. * * *

There was upon the question of the length of time the train stopped at the Braidwood station,—which was a material question,—a sharp conflict in the evidence, and in that state of the record it was important that the jury should have been correctly instructed as to the law of the case, especially as to the rule which should govern them in weighing the evidence of the respective witnesses. On behalf of the appellee the court gave to the jury the following instruction, the giving of which has been assigned as error:

"If the jury believe, from the evidence in this case, that any witnesses who testified in the case has willfully sworn falsely as to any matter or thing material to the issues in this case, then the jury are at liberty to disregard the entire testimony of such witness, except in so far as it may have been corroborated by other credible evidence which they do believe, or by facts and circumstances proved on the trial."

It has been repeatedly announced as the law of this State, that the jury are at liberty to disregard the evidence of a witness who upon the trial has willfully sworn falsely to a material fact, except in so far as such witness has been corroborated by other credible evidence or by facts and circumstances proven upon the trial. (*Crabtree v. Hagenbaugh*, 25 Ill. 233; *Swan v. People*, 98 id. 610; *Hoge v. People*, 117 id. 35; *Bevelot v. Lestrade*, 153 id. 625.) The instruction is much broader than the rule announced in the foregoing cases, as it informed the jury they were at liberty to disregard the testimony of any witness who had willfully sworn falsely to any matter or thing material to the issues, except in so far as such witness had been corroborated by other credible evidence *which they do believe*, the effect of which was to eliminate from the consideration of the jury the evidence of any witness, if any such there were, who had willfully sworn falsely upon a material matter, even though he were corroborated by other credible evidence, unless the jury believe such other credible evidence to be true. If the jury may disregard the testimony of such a witness unless he is corroborated by other credible evidence which they believe, then the jury may disregard the evidence of such a witness even though he be corrob-

rated by other credible evidence, which would be in violation of the rule established by this court. It is not the duty of the jury to accept as true the testimony of a witness who has testified willfully falsely as to a material fact simply because he is corroborated by other credible evidence, but when such witness has been corroborated by other credible evidence it is the duty of the jury to consider his testimony in connection with such corroborating evidence and the other evidence in the case, and to give to it such weight as they may be of opinion it is entitled to receive at their hands. The error in the instruction under consideration is found in this: that it permits the jury to refuse to consider the testimony of a witness who has willfully sworn falsely with reference to a material fact, although he is corroborated by other credible evidence, unless the jury believe the other credible evidence to be true. Credible evidence is not evidence which is necessarily true, but is evidence worthy of belief,—that is, worthy to be considered by the jury. If it were held the jury were not to consider the evidence of a witness who had willfully sworn falsely to a material fact unless he was corroborated by other credible evidence, and then only when they believe such credible evidence to be true, it would, in effect, be to hold that the testimony of such a witness is only to be considered by the jury after they have become satisfied of the truth of the facts testified to by the corroborating witnesses. If this were the rule, the jury would have reached a conclusion as to the truth of the matter about which the witness testified before they would be required to consider the evidence of the witness, which would make the consideration of the testimony of such witness unnecessary, even though his testimony were corroborated by other credible evidence.

We are of the opinion the instruction is in conflict with a long established rule of evidence in force in this State and that the giving thereof constituted reversible error.

The judgment of the Appellate and circuit courts will be reversed and the cause remanded to the circuit court for a new trial.

*Reversed and remanded.*⁹⁴

⁹⁴ It is error to instruct a jury that where it is *probable* that a witness has deliberately sworn falsely as to some material matter and is not corroborated by other evidence, the jury is warranted in *disregarding*

his entire testimony, and changing *probable* to *palpable* will not cure it.—Cameron v. Wentworth, (1899) 23 Mont. 70.

SECTION 8. THE VERDICT.

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(a) *How Arrived at.*

HEFFRON v. GALLUPE.

Supreme Judicial Court of Maine. 1868.

55 Maine, 563.

KENT, J.—The motion for a new trial, now before us, is based on the following facts, which are undisputed. In the evening after all the evidence, in the trial of the cause between these parties, had been given, and before the arguments commenced, a jurymen called at the defendant's house and asked him if he had one of the pamphlets containing the evidence given at a former trial. The defendant said he had one, and gave it to the jurymen. The defendant did not at first recognize the applicant as a juror in the case, but did so before he gave him the pamphlet. Defendant hesitated, but the juror remarked that there was nothing wrong, and thereupon the copy was delivered by defendant to the jurymen. This document had been used by the counsel, during the trial, for reference, and the testimony given at the former trial by several witnesses was read by consent therefrom, as testimony in the case on trial. The jurymen read and examined it in part, before the verdict was rendered, and formed the conclusion that the testimony of some of the witnesses varied from that given at a former trial as there recorded. He named Dr. Brown and Dr. Coe as two of such witnesses.

* * * * *

The theory of our jury trials is, that all parties and witnesses are to be heard in open Court, in the presence and under the direction of the presiding Judge. The law is extremely tenacious of this cardinal doctrine, and looks with distrust and aversion upon any departure in practice from

its strictness. The oath of the juror is to decide according to the law and the evidence given to him—given to him according to the rules of evidence in open Court and with the parties face to face. It surely cannot mean evidence given to a jurymen by a party outside of the court room, to be read and pondered upon in secret, before joining his fellows in deliberation on the verdict.

This pamphlet had been legitimately used on the trial. The testimony of witnesses at former trial had been read by consent, but not the testimony of either of the two surgeons named by the juror. His purpose in seeking the possession of this printed document was to compare the testimony given at this trial with the testimony of the same witnesses contained in the volume given to him.

The legitimate way to show this is by the testimony of a witness who heard him testify. But it is often proved, by consent, by reading the minutes of testimony taken at the time by the Court or counsel.

It is a species of evidence which particularly requires explanation and elucidation by the Court,—aided by the arguments of counsel. It is not in itself evidence of the facts testified to in a former trial, but simply evidence to be considered only as it affects the credibility of the witness, in his, then, present testimony. But often facts are stated as true in the former testimony, which are ignored or not remembered in the subsequent examination. But the jury, in the second trial, cannot legitimately consider such facts as established by the first testimony. It often requires great care and effort on the part of the Judge to make the jury understand this distinction.

It may be assumed that the report of evidence in the pamphlet was substantially correct. But the essential wrong or injury is, that illegal testimony, calculated to affect the juror's mind, has been read and considered by him, as facts proved in the case. They might be true and legitimate testimony, if offered in the regular course. But the jurymen had no right to know them, when obtained or communicated in this manner. The other party had a right to object to the admission of the testimony, if regularly offered. The printed document in itself was not evidence. If admitted, the counsel had a right to comment, and to show, if he could, in his argument, that there was no material discrepancy

between the evidence before given and that then given by the witness. But here the juror was left to form his conclusions from a source unknown to one party, and of course without any explanation or argument from that side. It was a violation of the juror's obligations to seek for the document. It was as clearly an unjustifiable act for the defendant to furnish it to him, knowing him to be a juror.

* * * * *

The evidence in this case does not disclose any seeking out of the jurors by the defendant. The juror applied to him, and he gave him, at his request, the pamphlet. He, through his counsel, now admits that it was an improper act, and one which, if he had taken a moment's time to reflect, he would not have then done. But he did it, and he must abide the consequences of his hasty act.

Motion sustained.—New trial granted.

166 DORR v. FENNO.
Sube
Supreme Judicial Court of Massachusetts. 1832.

12 Pickering, 521.

MORTON, J. * * * The defendant also moves to set aside the verdict on account of the misconduct of the jury. The conduct complained of related to the assessment of damages. Immediately after the affirmance of the verdict the chief justice, who presided at the trial, "at the request of the defendant and with the consent of the plaintiff," made inquiries as to the manner in which they had computed interest. "The foreman, in the presence and hearing of the jury, answered that upon the subject of damages there was great diversity of opinion among the jury, that they acted upon no uniform rule but each juror fixed the sum he thought right, and these were all added together and the aggregate divided by twelve, and that the average thus ascertained was the sum inserted in the verdict as damages."

Two inquiries naturally suggest themselves in the consideration of this motion. Were the facts properly ascer-

tained? And if so, do they amount to such misconduct as will vitiate the verdict?

* * * * *

But even if we receive and examine the statement of the jury, we do not perceive in it evidence of misbehaviour. Although the average of the individual opinions of all the jurors was finally adopted, yet it does not appear that there was any previous *agreement* to be bound by such results. To suppose this would be to put upon the language used by the foreman a construction most unfavorable to the jury, whereas we ought to adopt the most favorable one,—to impute misconduct, where we are bound to presume good conduct. We think, therefore, that all that can fairly be understood from the statement of the foreman, was, that the jury agreed that each should express his individual opinion,—that the average of the whole should be ascertained, which should be a proposition for the consideration of the jury, and which they might accept, modify, or reject, as they should think best, upon discussion and deliberation. The final adoption of the average does not imply impropriety of conduct, as it must be presumed that ultimately each juror freely assented to it. In this view of the answer of the jury, even if it were regularly before us, we can see no cause for setting aside the verdict.

No authority need be cited to show, that a verdict determined in any form or degree by chance or lot, cannot be sustained. In *Warner v. Robinson*, 1 Root, 194, and *Harvey v. Rickett*, 15 John. R. 87, where the jurors *agreed* that they should each mark on a paper the sum which he thought the plaintiff ought to recover, then add the whole together and divide by the number of jurors, and that the *quotient* should, *without alteration*, be the amount of the damages, the court could do no less than set aside the verdicts. There can be no doubt that such a practice might lead to great injustice. For it would enable any one juror, by marking a very large sum, to produce an average which would be unreasonably high and contrary to the opinion of the other eleven jurors.

The impropriety consists in the *agreement* to be *bound* by the result. It may be assumed as a truth established by experience, that the judgments of twelve men never will exactly agree upon any doubtful subject. It can never be expected that any set of jurors, in their first opinion, ever

will exactly agree as to the amount of damages, which any plaintiff ought to recover. They can only hope to bring their judgments together by making known their respective opinions and views, by comparing them together, and by discussing the whole matter with feelings of conciliation and of deference and respect for each others' judgments. And perhaps a better mode of ascertaining the unbiassed opinion of each individual juror cannot be found, than was resorted to in this case. No one was bound by the result. And if the average was finally adopted as the amount of the verdict, it was after a comparison of the different views of all, after due deliberation and full discussion of the whole subject, and by means of reciprocal concessions among the different jurors. It appears to have been freely assented to by all. And we can perceive no impropriety in the mode of reaching the result or in the final adoption of the amount as the sum of the damages. *Goodwin v. Philips*, Lofft, 71; *Lawrence v. Boswell*, Sayer, 100; *Dana v. Tucker*, 4 John. R. 487; *Grinnell v. Phillips*, 1 Mass. R. 541.

The motion for a new trial is overruled.

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SHEA v. UNITED STATES.

United States Circuit Court of Appeals, Ninth Circuit. 1919.

260 Federal Reporter, 807; 171 Circuit Court of Appeals, 533.

Before GILBERT, ROSS and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was charged with the murder of Rance W. Book on November 14, 1917, at Cordova, Alaska. * * *

Error is assigned to the following instructions given to the jury after they had deliberated for a time upon their verdict and were brought into court upon the court's order:

"You have now been out about 30 hours on this case, and while I have no doubt that any differences between you are honest and sincere, I want to call your attention to the fact that in no case can absolute certainty be expected. * * * If a large number or majority are of a certain opinion, the juror dissenting should carefully consider whether his doubt or

difference from such opinion is a reasonable one, which makes no impression upon the minds of so many men equally honest and equally intelligent as himself. Upon the question of the expense in the trial of this case, I deem it proper to call your attention to the fact that this case has involved a very great expense upon the government. A large number of witnesses have been called from their homes and business important to themselves already for a considerable time; that they reside at Cordova, and a steamer is expected to pass through Valdez en route to Cordova within the next 12 hours, and there will probably not be another steamer for a week or more; also, in connection with the matter of expense, I call your attention to the difficulty of getting qualified jurors in a case of this kind, in so small a community, after so many have been disqualified, having already been called and excused on this case. We all desire to see justice administered, honestly and fairly. At the same time, justice to both the government and defendant requires that it be not attended with too great outlay or expense. The defendant has already been in custody over six months, and is entitled to have the case speedily determined. I call these facts to your attention as matters for your careful and honest consideration; but I wish to impress upon you that nothing that I have said should be understood as seeking to influence the conscientious and honest opinion which you or any one of you, as reasonable men, may entertain. If you have a reasonable doubt of the defendant's guilt, as the same is defined to you in the instructions already given, you should acquit the defendant; if you have not, you should convict him, and the degree of the crime is a matter which should not cause you to entirely disagree and fail to reach a proper verdict."

We are not convinced that the court in so instructing the jury committed reversible error. In 16 C. J. 1091, it is said:

"It is proper for the court, after the jury have deliberated for some time, to recall them to ascertain why they cannot agree, and to inquire as to whether there is any likelihood of an agreement. Providing nothing is said to coerce an agreement, or to indicate what verdict should be rendered, or that may be considered as an appeal to the jury to decide the case in some way even at the expense of honest convic-

tions, the court may give the jury further instructions or advice calculated to assist them in coming to an agreement, may call their attention to the time taken in the trial and the great expense incurred therein, or which would be incurred by a retrial, may impress upon them the importance of the case, and urge them strongly to come to some agreement."

We do not think that the instruction here in question was more coercive or more invasive of the province of the jury than the instruction to the jury in *United States v. Allis* (C. C.) 73 Fed. 182, which was approved in *Allis v. United States*, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91, where the court said:

"It is a familiar practice to recall a jury after they have been in deliberation for any length of time for the purpose of ascertaining what difficulties they have in the consideration of the case, and of making proper efforts to assist them in the solution of those difficulties. It would be startling to have such action held to be error, and error sufficient to reverse a judgment."

Again in *Allen v. United States*, 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528, the court approved an instruction of the court in which the jury were told it was their duty to decide the case if they could conscientiously do so, and that they should listen, with a disposition to be convinced, to each other's arguments; that in case the larger number were for conviction, a dissenting juror should consider why, if his doubt was a reasonable one, it made no impression upon the minds of so many other men equally honest and equally intelligent with himself. The court said:

"It certainly cannot be the law that each juror should not listen with deference to the arguments, and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment, or that he should close his ears to the arguments of men who are equally honest and intelligent as himself."

In *Suslak v. United States*, 213 Fed. 913, 130 C. C. A. 391, this court, reviewed and held proper instructions to the jury not dissimilar from those which are here under review.

The plaintiff in error relies upon *Peterson v. United States*,

213 Fed. 920, 130 C. C. A. 398, in which we held certain instructions to the jury reversible error. In that case the court had inquired of the jurors as to how they were divided, and was informed that they stood five to seven; thereupon the court said to the jury, among other things, "The government has a right * * * to a verdict without further expenditure of time and money," and in conclusion the court expressed the belief that the jurors could honestly come to an agreement. We adverted to the fact that nowhere did the court make it clear that, however desirable it might be to avoid another trial and finally to terminate the prosecution, an agreement should not be reached in violation of the honest conviction of any one of the jurors.

* * * * *

We find no error. *The judgment is affirmed.*⁹⁵

⁹⁵ In *People v. Strzempkowski*, (1920) 211 Mich. 266, it was held that the threat of the court to discharge the jury for the remainder of the term unless they arrived at a verdict was such coercion as to call for a new trial. See note on this case in 19 Mich. Law Rev. 228.

168 (b) *Delivery.*

g.c.h. BISHOP v. MUGLER.

Supreme Court of Kansas. 1885.

33 Kansas, 145.

JOHNSTON, J. The district court of Saline county, Kansas, granted a peremptory writ of *mandamus* against the plaintiff in error, who is a justice of the peace of Saline county, Kansas, commanding him to receive and file a verdict alleged to have been agreed upon by a jury in a certain cause tried before him as a justice of the peace, where the defendant in error was plaintiff and one William Huebner was defendant. From the pleadings and the evidence in the record, it fairly appears that the cause was submitted to the jury late in the evening, and the justice of the peace, with the consent of the counsel, instructed the jurors that, if they agreed upon a verdict during the night, they might seal the

same and separate, returning the verdict into court on the next morning, at 9 o'clock, to which time the court adjourned. The jury reached an agreement during the night, when the verdict was signed and given to the bailiff, and the jurors dispersed. The bailiff carried the verdict in his pocket for a short time, and then returned and deposited it upon a desk in the office of the justice of the peace. The attention of the justice of the peace was called to it in the morning, and he was informed that it was the verdict agreed upon the previous night. Upon the convening of the court on the next morning, the jury failed to appear, and the justice directed the bailiff to bring the jury into court. After some effort to find the jurors, the bailiff returned, and reported that only four of the jurors could be found. It was then suggested that the verdict which had been returned by the bailiff to the justice be received and filed, but the counsel for defendant objected to its reception because it had been out of the hands of the jury, and insisted that it could not be received unless presented by the jury, with all of the jurors present. The court was then adjourned until 3 o'clock of the afternoon of the same day, and the bailiff was instructed in the meantime to make search for the absent jurors, and bring them into court at that time. The court reconvened at 3 p. m., when five of the jurors appeared, the bailiff reporting that he was unable to find one of the jurors, or learn anything of his whereabouts. The justice then refused to receive the verdict, declared a mistrial, discharged the jury, and continued the case for future disposition. Whereupon, the defendant in error instituted this proceeding in *mandamus*, and obtained a peremptory writ, as above stated. The plaintiff alleges error.

The question presented for our determination is, was it the duty of the justice of the peace to receive and file the verdict brought into court in the manner hereinbefore stated; and can its reception and filing be compelled by *mandamus*? It will be observed that the agreement of counsel and the direction of the court did not go further than to permit the jury, when they had agreed upon a verdict, to seal it and separate for the night. This did not operate as a discharge of the jury, but it remained in existence as an organized body, and it was the duty of the jurors to have appeared at the convening of the court the following morning, and there,

through their foreman, to present and publicly announce the verdict previously agreed upon. The permission to seal the verdict and separate for the night, did not dispense with the necessity of their attendance upon the court at the time to which it had adjourned. The determination of a jury, although formally stated in a verdict, and signed and sealed, is not final with them, but it remains within their control, and subject to any alteration or amendment they desire to make, until it is actually rendered in court and recorded. It is well settled that any member of the jury is at liberty to withdraw his consent from a verdict already agreed upon, at any time before it is received and recorded, (*Root v. Sherwood*, 6 Johns. 68; Proff. Jury, § 449;) and until a sealed verdict is properly received and recorded in court, it is without force or validity. *Id.* § 460. Except by consent the verdict can only be rendered by a full jury. Every member should be present when it is received, so that the parties may avail themselves of the right to examine each juror, and learn if he concurs in the verdict announced.

The main purpose in requiring the jury to bring in their verdict and personally present it in open court is that the parties may have an opportunity to poll them, or to correct any informality found in the verdict presented. The polling of the jury is not a mere matter of discretion with the court, but is an absolute right of the parties to the suit. As was said in *Maduska v. Thomas*, 6 Kan. 159: "A party has in all cases a right to know whether a supposed verdict is the verdict of each juror, or of only one or more of the jury; and if sections 283 and 284 of the Civil Code do not apply where the jury decide without retiring from the jury-box, still the common law would give each party the right to know the verdict of each juror." *Thornburgh v. Cole*, 27 Kan. 499. Of course, some of these requirements and rights might have been waived and dispensed with by the agreement or conduct of the parties. Here there was no such agreement or waiver; the defendant in the action stood upon his rights, and strenuously objected to the reception of a verdict unless it was regularly presented by the jury, as an organized body, with every member present. With the aid of the bailiff, five of the jurors were found and brought into court, but the sixth could not be found. The determinations

of the five jurors was not a valid verdict, and the court could not receive it as such. *Maduska v. Thomas, supra.*

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The judgment of the district court will be *reversed*.⁹⁶

⁹⁶ As to how far these rules may be waived or changed by stipulation, see *Dubuc v. Lazell, Dalley & Co.*, (1905) 182 N. Y. 482.

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STATE v. MILES.
Supreme Court of Missouri. 1906.

199 Missouri, 530.

GANTT, J. * * *
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8. It is next urged as a ground for reversal that the circuit court erred in refusing to accept the verdict of the jury, which was first returned into court finding the defendant guilty of manslaughter in the second degree and assessing his punishment at a term of 30 years, and directing the jury to retire for further consideration, after which they returned a verdict of murder in the second degree assessing the punishment of the defendant at 30 years in the penitentiary. From the testimony taken on the motion for new trial, it appeared that when the jury returned into court, they handed their verdict to the clerk, and it was in this form: "We the jury find the defendant guilty of manslaughter in the second degree, and do assess his punishment by imprisonment in the penitentiary for a term of 30 years." At this point the judge said to the clerk: "Hand me those instructions." Thereupon the judge informed the jury that their verdict did not conform to the instructions of the court; that, under the law given them by the court, they could not assess the punishment for manslaughter for 30 years. The foreman of the jury testified that at the close of the argument by counsel, the court handed the jury blank forms for their verdict with the instructions in the case. He states that when the verdict for manslaughter was read over by the clerk, by the direction of the judge, several of the jury at least told

the court that that was not their verdict; that there was a mistake. The court thereupon stated to the jury that it could not receive the verdict, and directed them to retire and consider of their verdict. Afterwards, on the same day, the jury returned a verdict of guilty of murder in the second degree, and assessed the defendant's punishment at 30 years in the penitentiary. It is clear from all the testimony on the motion, as well as from the statement of the judge in the bill of exceptions, that the court did not receive the verdict. It seems perfectly plain that the verdict of manslaughter was not intended by the jury, but was the result of having a form of a verdict of manslaughter, as well as one for murder in the second degree furnished them by the court when they retired, and that they had filled out the blanks in the manslaughter verdict instead of the one for murder in the second degree by oversight of the foreman, and that when their attention was called to it by the reading of the verdict by the clerk, the jury never declared it was their verdict in court. And the court advised them that they could not affix a punishment of 30 years for manslaughter, and directed the sheriff to return the jury to their room, to consider further of their verdict. And afterwards they returned into court the verdict of murder in the second degree, which was read over to them and they all declared in the presence of the court, that this was their verdict, and they were then discharged.

Mr. Bishop, in his *New Criminal Procedure* (volume 1, § 1003), says: "Until the announcement that the verdict is recorded, * * * or some such period, as to which the cases are not distinct or uniform, the jury may change it at their pleasure, or one may defeat it by dissent; but after they have dispersed, they cannot be recalled to alter or amend it, nor can the juror object that he did not consent thereto." And, in section 1004, he says: "A verdict inadequate in form or substance should not be received, but the jury should be required to perfect it, either in the presence of the court, or by returning for the purpose to their room, due consultation having been had with the judge, and if necessary further evidence delivered." The authorities fully sustain the text of the learned author.

In *State ex rel. v. Clementson*, 69 Wis. 635, 35 N. W. 59, the court says: "All the authorities hold that a jury may,

after announcing a verdict, if they see fit, before they are discharged, change the same, and render a different verdict. And in many cases where the jury have manifestly made an omission or mistake in their verdict it is the duty of the presiding judge to call their attention to that fact, and return it to the jury for correction." Many cases are cited by the court in support of this statement and the court concludes: "These cases show the power of the court as well as the jury over their verdict, and that the verdict which binds all parties, is that at which the jury finally arrive and deliver to the court."

* * * * *

The following from Bishop's Criminal Procedure directly applies: "When the jury comes in with a verdict, it is not as of course to be immediately received in the form in which it is rendered. And it is probably the correct doctrine that the judge may require the jury to pass on the verdict upon the whole indictment in such form or words as shall constitute a sufficient finding in point of law; or, if they refuse, decline altogether to accept the verdict. It seems quite plain that in every case of a verdict rendered, the judge or prosecuting officer, or both, should look after its form and its substance, so as to prevent a doubtful or insufficient finding from passing into the record of the court." Volume 1, § 1004. "It is settled by repeated decisions where the jury returns an incomplete verdict, or one not responsive to any charge in the indictment, the court may direct them to retire and bring in a proper verdict. It follows that the court may inform the jury without necessarily suggesting what shall be the verdict, why it is that the verdict is incomplete or not responsive to the charge."

* * * * *

* * * That the finding of the jury in the first verdict, that the defendant should be imprisoned in the penitentiary for 30 years for manslaughter, was contrary to the law, and the instructions of the court, there can be no doubt, and it was clearly in the power of the court, and it was his duty to decline to receive the verdict in that form, independent of the fact that the jury had made a mistake in filling out the blank verdict for manslaughter instead of the one for murder in the second degree, and when the jury discovered their mistake, it is also obvious that it was in the power of the

jury to correct it when they retired to further consider their verdict.

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⁹⁷The rule is the same in civil cases.—Hatch v. Attrill, (1890) 118 N. Y. 383.

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(c) *General Verdict.*

COMMONWEALTH v. CAREY.

Supreme Judicial Court of Massachusetts. 1869.

103 Massachusetts, 214.

Indictment on the St. of 1868, c. 141, with three counts, the first charging the defendant with unlawfully exposing intoxicating liquors for sale, and the second and third respectively with making different unlawful sales of intoxicating liquors. Trial in the superior court, before Brigham, C. J., who allowed a bill of exceptions of which the following is the material part:

"The jury returned a general verdict of guilty. Before the verdict was affirmed, the defendant's counsel suggested a doubt whether the jury intended to convict on all the counts. The judge then said to the jury, 'You mean guilty on each count?' The foreman said that the jury did not pass upon them separately. The defendant's counsel then requested the judge to ask the jury to consider the several counts, if they had not already done so; or to inquire of them what they really intended by their verdict. The judge replied that the jury had already been sufficiently instructed as to their duties in relation to the several counts, and had rendered a general verdict; and that he should say no more, and ask no more questions, unless the jury had some suggestions. No member of the jury said anything further; and the judge ordered the verdict to be affirmed and recorded, to which the defendant excepted. The judge gave instructions to the jury upon the several counts, which were not excepted to. The defendant filed a motion to set aside the

verdict upon the above grounds which motion was overruled. To all these rulings and refusals the defendant excepts."

MORTON, J. It is well settled that several offenses may be charged in separate counts of the same indictment, if they are of the same general character and subject to the same kind of punishment; and whether they shall be tried separately or together is a matter within the discretion of the presiding judge. But if they are tried together, the cardinal principles of the criminal law apply in the same manner as if each offense was charged in a separate indictment and tried separately. Each offense charged must be proved beyond reasonable doubt, by evidence legally applicable thereto. It necessarily follows that the jury must pass upon each count separately, and apply to it the evidence bearing upon the defendant's guilt of the offense therein charged. And if they fail to do so, their verdict cannot be sustained.

In the case at bar, the jury returned a general verdict of guilty, but, before it was affirmed and recorded, their foreman stated, in answer to a question by the court, that they did not pass upon the counts separately. It was thus made to appear in a proper manner, that the jury, probably through misapprehension of the instructions given, had failed to perform the duty required of them, and that their verdict was unauthorized by law. It was undoubtedly a matter within the discretion of the presiding judge whether inquiry should be made of the jury as to the grounds or counts upon which they found their verdict; and if no inquiry had been made, the general verdict of guilty would apply to each count, upon the presumption that the jury had correctly understood and applied the instructions given them. But, the inquiry having been made, and having elicited the fact that the verdict had not been found in a manner authorized by law, it was erroneous in the court to order the verdict thus found to be affirmed and recorded.

Exceptions sustained.



GLINES v. SMITH.

*Supreme Judicial Court of New Hampshire. 1869.**48 New Hampshire, 259.*

Case for slander. The writ was dated Sept. 8th, 1866. The declaration, excepting the fourth and seventh counts, which were stricken out by amendment, is made a part of the case. The defendant pleaded the general issue, with a justification alleging the truth of the words. The jury rendered a verdict for the plaintiff. The defendant now moves in arrest of judgment on the ground that the declaration does not contain any allegation or allegations, showing that the defendant charged the plaintiff with a crime, nor any showing special damages.

SARGENT, J. * * *

Where there are several distinct counts, as in this case, each one stating a distinct and separate cause of action, and there be a general issue pleaded to all, and a general verdict upon all the counts, and an assessment of damages generally, and one of the counts be bad, judgment will be arrested, unless the judge who tried the cause, can and does certify, that all the evidence introduced applied to the good counts only, in which case the verdict may be amended so as to apply to the good counts only. *Atkinson v. Scammon*, 22 N. H. 40, where it is said by Perley, J., that "by a well settled and familiar rule of pleading, the verdict for the plaintiff being general, and one count bad, the judgment must be arrested." *Peabody v. Kingsley*, 40 N. H. 416, and numerous authorities cited by counsel and court.

So *Richardson v. Mellish*, 3 Bing. 334, (11 E. C. L. 167) is a leading case on that subject, where it is held that, in order so to amend a general verdict as to have it apply to a good count only, when there are both good and bad counts in the declaration, it must appear that the good count was fully sustained in all its material allegations by the evidence at the trial, and also that all the evidence given at the trial was admissible under that count. *Sullivan v. Holker*, 15 Mass. 374; *Pattee v. Guernsey*, 17 Mass. 182. In this case no such certificate of the presiding judge is given, and we infer that none could properly be given, because so far as the evidence

in the case is reported, it seems to bear more directly upon the bad counts, or one of them (the 5th), than any other. In the absence of such certificate by the judge who tried the cause, judgment must be arrested. *Small v. Rogers*, 46 N. H. 176.

I am aware that in some jurisdictions they have relaxed this rule somewhat. In New York, *Sayre v. Jewett*, 12 Wend. 135, it is held that where the certificate of the judge who tried the cause is, that all the evidence on the trial would properly apply to the good count as well as to the bad one, there the verdict may be amended so as to apply to the good count only, upon payment of the costs of the motion in arrest.

And in Vermont, in *McDuffie v. Magoon*, 26 Vt. 523, after deciding that in that case no presumption could be allowed that the verdict was taken upon the bad counts, inasmuch as from the whole case it appeared that the evidence was entirely and solely applicable to the good one, which is all, perhaps, that would be required here, Judge Redfield adds the following *dictum*: "In cases where nothing appears to show on which count a verdict is taken, and some of the counts are good and some bad, we now allow the same presumption in favor of the proceedings, which we do in favor of all other proceedings of this character, and which was always allowed in criminal proceedings, that it is more likely that the verdict was taken on the good counts than upon the bad ones." That doctrine has never been adopted in this State.

Here we have followed the rule as stated by Chitty in his work on Pleading, vol. 1, page 411, (9th Am. Ed.). The reasons assigned for this practice, where there is a general verdict upon several counts, some of which are good and others bad, is that the court do not and cannot know upon which count the damages were assessed; the court cannot tell but all the damages were assessed by the jury upon evidence introduced solely to establish the charge made in the counts which are bad. But when the court can be made reasonably certain as to that fact, as by the jury's finding for one party on one count, and for the other party upon the other, or by assessing damages on the sufficient counts, saying nothing of the others, or by the certificate of the judge who tried the case, that the evidence on trial was all

applicable to the good counts, then the verdict may be amended when necessary; but the judgment will not be arrested. *Blanchard v. Fisk*, 2 N. H. 398.

The reason for the distinction in this respect between declarations with several counts, some good and some bad, with a general verdict, and indictments, where it is held that if there be one good count and others bad and a general verdict of guilty, judgment will not be arrested, as stated by Chitty in his *Crim. Law*, vol. 1, p. 249, is that in the civil case the jury find entire damages and the court cannot apportion them, whereas, in the criminal case, the court themselves regulate the severity of the sentence, and can do so according to their discretion upon these points of the indictment which are supported; and he refers to 1 Salk. 384, *Regina v. Ingram*, which was a case of assault and battery, where it was said: "In a civil action where one part of the declaration is ill, and the jury find entire damages, the judgment must be arrested, because the court cannot apportion them; but in indictments the court assess the fine, and they will set it only according to those facts which are well laid. If an offense sufficient to maintain the indictment be well laid 'tis enough."

In *People v. Curling*, 1 Johns 322, the court of New York held that the reason for this rule in criminal cases was that the prisoner has been convicted of the *whole matter* included in the good as well as the bad counts, and that if judgment were only entered on the good counts, no injustice could be done. In this view, perhaps, some reason may appear for the different rule applied in the two cases.

As we understand the rule, it does not appear particularly objectionable. In an indictment, only one offense is charged. The different counts are only different forms of describing or setting forth the same charge. If one of these counts is good, and the others bad, and the evidence sustains the good one, that would be enough. But if there is a general verdict, finding the respondent guilty of all the charges, that covers the good count and all the bad ones. But he is only charged with one offense, and in one count that offense is properly described and set forth, and he is only to be sentenced for one offense, no matter in how many different forms it is charged.

The established rule is clearly right so far that in indict-

ments, containing several counts, with a general verdict of guilty, the verdict will stand if there is one good count in the indictment.

But take a civil cause like the present, where there are several counts, and each count charges, as seems to be the case here, a separate and distinct conversation in which defendant is charged with slandering the plaintiff, and upon any one of which alone an action might be maintained, and upon each and all of which separate and distinct damages were claimed, there a general verdict on all the counts would be a finding that the jury found all the charges proved and had assessed damages upon all, and that the sum of all these damages added together, was the amount of their general verdict.

In such case, unlike the indictment, plaintiff may join these several distinct causes of action in one suit, and may properly recover all his damages in a single verdict. But if there are several counts, upon each and all of which damages are assessed in a general verdict, and some of these counts prove to be bad, then the amount of damages assessed on that count should be deducted; but as that cannot be done, the court having no knowledge of the different amounts found by the jury on the several counts, and no means of properly apportioning the damages, the whole verdict must be set aside. We can certainly see no ground to complain of the rule in such a case. So in a civil suit for damages for several assaults and batteries, where each of several counts set forth a separate and distinct battery, for which separate damages were claimed, the rule would hold good.

But in case there are several counts in slander or trespass, and all the counts set forth the same charge, only in different form, and that fact is understood, then there being but one cause of action, there could be an assessment of damages only for one cause, on all the counts, and if either one of the counts were good, then, as in the case of the indictment, the verdict ought to stand. In such case, it would be in fact immaterial whether all the counts were good or only one of them, the same damages would be assessed in either case.

But in such a case, the court would give the jury such instructions as would make the case and the verdict intelligible, ordinarily; or if not, and the jury found a general

verdict on all the counts, and it afterwards proved that some of the counts were bad, and there was no other way in which the court, at the law term, could tell from the case whether damages were claimed on all the counts, or only on one, then a certificate of the judge who tried the case would generally set the matter right, so that the verdict might be amended so as apply to the good counts only.

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⁹⁸ In many states statutes declare that a general verdict is good if there is one good count in the declaration.—*Ray v. Ches. & Ohio Ry. Co.*, (1905) 57 W. Va. 333; *Frankfort Bridge Co. v. Williams*, (1840) 9 Dana (Ky.) 403; *Varn v. Pelot*, (1908) 55 Fla. 357; *Hayes v. Solomon*, (1889) 90 Ala. 520.

Some courts hold such a general verdict good even in the absence of a statute.—*Hoag v. Hatch*, (1855) 23 Conn. 585; *Bradshaw v. Hubbard*, (1844) 6 Ill. 390; *Louisville, N. A. & C. Ry. Co. v. Fox*, (1884) 101 Ind. 416.

Chancellor Kent severely criticized the common law rule in *Bayard v. Malcolm*, (1807) 2 Johns. (N. Y.) 550.

Referring to the rule that a general verdict upon several counts, one of which is bad, will be held good in criminal cases but bad in civil cases, the Supreme Court of Vermont said, in *Camp v. Barker*, (1849) 21 Vt. 469:—"It is a remarkable fact in English jurisprudence, and in that of a majority of the American states, that while in an indictment for crime, affecting a man's liberty, and even life, if it contains one defective count, among others which are sufficient, upon a general verdict the court consider it rendered upon the good counts, upon the very natural inference, that a general verdict finds all the facts alleged in the declaration, yet in an action upon contract judgment is arrested for one defective count, upon the ground that the verdict may have passed upon that count. It is the pertinacious adoption and perpetuation of such gross absurdities and inconsistencies, which tend so obviously to bring all special pleading into disrepute."

If any count is bad, judgment may be arrested on that count.—*State v. Tibbetts*, (1893) 86 Me. 189. *Contra*,—*Louisville, N. A. & C. Ry. Co. v. Fox*, (1884) 101 Ind. 416, on the ground that a motion in arrest addresses itself only to the entire complaint.

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COMMONWEALTH v. HASKINS.

Supreme Judicial Court of Massachusetts. 1880.

128 Massachusetts, 60.

LORD, J. There is in this case no question affecting the power of the district attorney to enter a *nolle prosequi*; such

an entry affects only the proceedings subsequent to it, but the record of what is antecedent to it remains.

By that record it appears that there had been the larceny of a cow, and but one larceny of that cow. The defendants were charged in one count of the indictment with such larceny, and in the second count with having received her knowing her to have been thus stolen. It is certain that the defendants could not be guilty upon both counts, because in law the guilty receiver of stolen goods cannot himself be the thief; nor can the thief be guilty of a crime of receiving stolen goods which he himself had stolen.

The presiding judge, as the record shows, instructed the jury that there was no evidence upon which they could convict upon the second count. Still, however, without directing a verdict of acquittal upon the second count, he submitted to the determination of the jury the question of the defendants' guilt upon that count. The fact that the verdict which they rendered was inconsistent with the views of the presiding judge does not invalidate it as a verdict after it had been recorded and affirmed. The record, therefore notwithstanding the entry of the *nolle prosequi* shows that the defendants had been convicted by the jury upon both counts; and although, as a legal effect of a conviction upon each count it cannot be said strictly that it is an acquittal upon the other, yet the finding of guilty upon both is inconsistent in law, and is conclusive of a mistrial. It would have been quite proper, before the record and affirmation of the verdict, for the presiding judge to have called the attention of the jury to their misunderstanding of his previous instructions, and to have explained to them the mode by which it became their duty, if they convicted upon either of the counts, to acquit upon the other, and to have required of them to retire for further deliberation; if, after such instructions, the jury persisted in returning a general verdict of guilty upon both counts, it would have been proper in the presiding judge, if not his duty, to set aside the verdict as the only means of securing to the defendants their rights. After the affirmation of the verdict, when there was no means of knowing of record upon which count the jury intended to convict, as there was no right in them to convict upon both, to assume that the error is corrected by a *nolle prosequi* of either count by the district attorney, is to permit

the district attorney to determine, instead of the jury, upon which count the defendants were guilty. But the *nolle prosequi* corrects no error, and has no effect upon the record as it stood prior to its entry. The record showed a verdict so inconsistent with itself, and so uncertain in law, that no judgment could be entered upon it. The *nolle prosequi* does not change that record, nor make the verdict which the jury rendered any less inconsistent with itself, nor any more certain in law than it was before such entry.

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PATTERSON v. UNITED STATES.

Supreme Court of the United States. 1817.

2 Wheaton, 221.

WASHINGTON, J.—This was an action of debt, instituted in the district court of Maryland, by the United States, against Robert Patterson, the plaintiff in error, upon a bond, dated the 2d of August, 1809, in the penalty of \$35,000, with condition that certain merchandise, which had been imported into the United States, and which the said Patterson had then reshipped, in order to export the same to Tonnington, should not be relanded in any port or place within the United States, and that the certificate and other proofs required by law of the delivery of the same, at some place without the limits of the United States, should be produced at the collector's office of the port of Baltimore, within one year from the date of the bond.

* * * * *

A jury was afterwards impanelled to try the issue, who found the following verdict, viz: "that the within-mentioned writing obligatory is the deed of the within-named Robert Patterson, &c., and they find there is really and justly due upon the said writing obligatory the sum of \$23,989.58." Upon this verdict, the court gave judgment in favor of the United States, for \$35,000, to be released on the payment of the above sum assessed by the jury, from which judgment,

a writ of error was obtained to remove the cause to this court.

The court considers it to be unnecessary to decide the questions which were argued at the bar, as the verdict is so defective that no judgment can be rendered upon it. The issue, which the jury were sworn to try, was, whether the certificate, and other proofs required by law, of the delivery of the cargo, at some place without the limits of the United States, were produced at the collector's office at Baltimore, within one year from the date of the bond. The verdict does not find the matter in issue, one way or the other, but finds that the bond in the declaration mentioned is the deed of the defendant, and that there is justly due to the United States upon the said bond, a certain sum of money. But whether the bond was the deed of the defendant, or not, was not a matter in issue between the parties, and consequently, it was a false conclusion to say, that, because it was his deed, therefore, he was indebted to the United States.

The rule of law is precise upon this point. A verdict is bad, if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue. The reason of the rule is obvious; it results from the nature and the end of the pleading. Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue; and although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet, if it appears to that court, or to the appellate court, that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict. It is true, that if the jury find the issue, and something more, the latter part of the finding will be rejected as surplusage; but this rule does not apply to a case where the facts found in the verdict are substantially variant from those which are in issue.

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FRIES v. MACK.

Supreme Court of Ohio. 1877.

33 Ohio State, 52.

SCOTT, J. * * *

2d. It remains to consider whether the court erred in entering judgment upon the verdict of the jury.

It is claimed by counsel for plaintiff in error, that the verdict does not respond to the issue made by the pleadings. The main, if not the sole, issue joined between the parties, was upon the plaintiff's ownership of the judgment upon which suit was brought. The language of the verdict is "we the jury do find for the plaintiff"—and then it proceeds to state the amount to which they find him entitled. We think this must be understood as a finding for the plaintiff upon the issues joined between the parties. Even if there had been several distinct issues made by the pleadings, such a verdict would be regarded as a substantial finding upon all the issues. *Calvin et al. v. The State*, 12 Ohio St. 60.

But it is further objected to the verdict that it is too indefinite and uncertain to justify the rendition of the judgment which was entered upon it. And this objection we find it difficult to answer to our own satisfaction.

If the meaning of the jury in their verdict is certain from its terms, or becomes so when read in the light afforded by the pleadings, of which it is the duty of the court to take judicial notice, and if the judgment is in conformity with their finding, it ought not to be set aside. The Supreme Court of Kentucky has laid down the rule that: "In considering the verdict itself, with a view to its sufficiency, the first object is to ascertain what the jury intended to find, and this is to be done by construing the verdict liberally, with the sole view of ascertaining the meaning of the jury, and not under the technical rules of construction which are applicable to pleadings." *Miller v. Shackelford*, 4 Dana. 271. And it has been said that every reasonable construction is to be adopted in support of a verdict. There can also be no doubt that the maxim: "*Id certum est, quod certum reddi potest*," is applicable to a verdict. For example, in a suit upon a promissory note, a verdict in favor of the

plaintiff for the amount of the note in suit, with interest from its maturity, would be certain, because it could be made certain in amount, by any competent accountant. *Burton v. Anderson*, 1 Texas, 98; *Stevens v. Campbell*, 6 Iowa, 538.

There is no uncertainty in the verdict of the jury in this case, except in the assessment of the amount to be recovered. The code requires that, "when, by the verdict, either party is entitled to recover money of the adverse party, the jury in their verdict must assess the amount of the recovery." (Sec. 278.) The question, then, is: Do the terms of the verdict in this case render the amount assessed by the jury ascertainable with certainty? The verdict is quite certain and definite as to the principal sum found due to the plaintiff. That is \$7,000, on which the verdict gives interest up to March 2, 1874. The only uncertainty is as to the date or dates at which the computation of interest is to commence. The verdict awards "interest from the date of the maturity of the seven notes of \$1,000 each, given February 2, 1860." Seven promissory notes are here referred to and described by a statement of their respective amounts and date. The jury find, substantially, that there is due to the plaintiff \$7,000, the aggregate principal of these notes, and interest on them from the time when they respectively mature.

But the action was not brought upon promissory notes, nor were any such notes referred to in the pleadings, and the verdict neither gives copies of them nor states the times at which they are respectively payable. Was it then within the province of the court to identify the notes referred to by the jury, and ascertain the times when they severally matured, by reference to the evidence offered on the trial?

We are constrained to answer this question in the negative. The facts found by the court formed no part of the record, and were found only from the memory or minutes of the judge who tried the case. Without a knowledge of these facts, no one could tell from the verdict, considered *per se*, or in connection with the record, from what time the jury intended the computation of interest to be made.

The court found, from facts outside of the record, that the jury intended by their verdict to refer to certain notes, which had been offered in evidence upon the trial. Perhaps they did so intend, though the verdict does not say so. The

facts found in regard to it are, neither expressed nor necessarily implied in its language. But, even if it had been expressly stated in the verdict that the notes therein referred to were the same which had been offered in evidence, would it have been competent for the court to look to the evidence, or to any matter *dehors* the record, for the purpose of fixing that which it was the sole province of the jury to determine? We think not.

The judgment should follow as a logical sequence, from the issues of fact disclosed by the pleadings and the findings of the jury thereon. If the judgment is warranted by the pleadings and verdict, it should be sustained; but if it has no such basis it can not be supported. In several cases cited by counsel for plaintiff in error, the very question now under consideration has been determined, in accordance with this principle.

In *Smith v. Tucker*, 25 Texas, 594, a part of the syllabus is as follows: "Where, in an action of trespass to try title, the verdict of the jury found for the plaintiff, 'the land described in the petition, less seven hundred and sixty-seven and a half acres, as described in the deed read in evidence from B. F. Hooper to C. M. Adams,' and the pleadings contained no description of the land conveyed by that deed; *Held*, that the court could render no judgment upon such finding of the jury, because it could only do so by looking out of the record to the evidence given on the trial."

* * * * *

In *Fromme v. Jones*, 13 Iowa, 474, it was held that, "A verdict, defective in form, may be reformed by the court when the intention of the jury can be ascertained from data given in the verdict, or referred to in the pleadings; but the court cannot supply an omission to name the amount of the finding by reference to the evidence outside the record."

See, also, *McArthur v. Porter's Lessee*, 1 Peters, 626, and *Lee v. Campbell's Heirs*, 4 Porter, 198.

These authorities, and the principle on which they rest, constrain us to say, that the verdict of the jury was too uncertain, as to the amount assessed in favor of the plaintiff below, to form a legitimate basis for the judgment entered upon it. And that it was not within the province of a court to make it certain by reference to the evidence offered in the case.

Judgment reversed, and cause remanded.

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Take
 REDMOND v. WEISSMAN.
Supreme Court of California. 1888.

77 California, 423.

THORNTON, J. This action was brought to recover \$948.60 for work and labor and materials furnished to defendant in the construction of the foundation of the Garfield monument in Golden Gate park. The first point regards the verdict of the jury herein, which is in these words: "We, the jury in the above-entitled action, find for the plaintiff." It is urged that the amount of the recovery of plaintiff is not found by the verdict; that issue was joined on the amount due; and in failing to find it the verdict does not respond to all the issues in the case, is therefore insufficient, and judgment should not be entered on it.

On examining the complaint and answer, we are not prepared to say in view of the decisions of this court in *Wells v. McPike*, 21 Cal. 219, and *Lightner v. Menzel*, 35 Cal. 460, that the position above stated in regard to the pleadings is correct.

But be that as it may, it appears that at the commencement of the trial a discussion took place between the counsel of the respective parties as to the issues to be tried in the cause, and that they concurred in the opinion that the only issue to be tried was whether plaintiff contracted with defendant or some one else. No reference was made in this discussion to any issue as to the amount claimed or due. The only issue spoken of as awaiting trial, referred to in the discussion, was the one above stated. To this issue the testimony was directed, and, when the court came to instruct the jury, its directions were in accordance with this view of the issue they were to pass on. We quote here that portion of the charge of the court which relates to this subject. It is as follows: "The only question for you to pass upon is this: Did the plaintiff and the defendant in this case make an agreement for the building of the second foundation? That is the question for you to pass upon,—whether the plaintiff and the defendant made that agreement, as testified to by the plaintiff, and that the plaintiff entered upon this contract under the agreement between the plaintiff and defendant. The only question of fact for you to

pass upon is, did the plaintiff and defendant enter into a certain contract for the completion of the second foundation? If you find from the evidence that the defendant agreed with the plaintiff, for the plaintiff to build the second foundation, and that the plaintiff did build the same, then your verdict must be for the plaintiff for the amount claimed in the complaint; for the defendant does not deny that the work done was of the value claimed. If, on the other hand, you believe the evidence of the defendant, that he did not make any contract with the plaintiff, then your verdict must be for the defendant. Now, gentlemen, you cannot consider the difference between the price of the first foundation and the second; you must not consider that at all. If the plaintiff is entitled to anything, he is entitled to the whole amount claimed. There is no question about the value of the work at all."

There was no exception by counsel for defendant reserved to the charge, but it was accepted by him as correctly presenting the law of the case to the jury. Under the state of the case here presented, the counsel for defendant having agreed that the only issue to be tried was that which was tried, that the court charged the jury that the only issue to be determined by them was that which they did determine, and that the counsel for defendant did not in any manner object to or except to the charge, we are of opinion that the cause should be regarded as one where the amount of money claimed was not in issue, that the only matter counsel intended to contest was the responsibility of his client, the defendant, and that, being found against him, the verdict should be for the amount claimed. There being no controversy as to the amount claimed by plaintiff, the verdict did embrace all there was in dispute in the cause, did cover all the issues, and was sufficient.

Considering the peculiar features of this case, we see no good reason for sending it back for a new trial, because the jury under the charge of the court did not follow the direction of the statute, (Code Civil Proc. § 626), and by their verdict "find the amount of the recovery." We have considered the other points made on behalf of appellant, and find nothing which would authorize a reversal.

*Judgment and order affirmed.*⁹⁹

⁹⁹ A verdict should be construed and may be corrected by the court

in accordance with undisputed evidence.—W. H. Shenners Co. v. Delzer, (1919) 169 Wis. 507; Jones v. Norfolk So. R. R. Co., (1918) 176 N. C. 260; Williams v. Thrall, (1918) 167 Wis. 410; Harvey v. Head, (1881) 68 Ga. 247; Vanvalkenberg v. Vanvalkenberg, (1883) 90 Ind. 433; Consol. G. & S. Min. Co. v. Struthers, (1910) 41 Mont. 565.
Compare Cohues v. Finholt, (1907) 101 Minn. 180.

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PLYMOUTH COUNTY TRUST CO. v. SCANLAN.
Supreme Judicial Court of Massachusetts. 1917.

227 Massachusetts, 71.

Contract, the first and only material count of the declaration being upon a promissory note for \$550 signed by the defendant's husband and indorsed in blank by the defendant as described in the opinion. Writ dated April 15, 1913.

In the Superior Court the case was tried before Dubuque, J. The material evidence is described in the opinion.

At the close of the evidence the defendant asked the judge to rule as follows:

"1. That upon all the evidence the plaintiff is not entitled to recover upon the first count in its declaration.

"2. That the note declared upon by the plaintiff in its first count, being a note payable on demand, and dated November 29, 1910, and endorsed by the defendant, upon which no demand was made on the maker until January 29, 1912, was one which required a demand to be made upon the maker within sixty days of the date in order to charge the indorser. No such demand was made, and there is no evidence introduced by the plaintiff, which excuses the plaintiff from making such demand."

The judge refused so to rule. Appropriate instructions not excepted to were given to the jury.

The jury found for the plaintiff on the first count in the sum of \$580.48.

After the return of the verdict and before the recording thereof, the trial judge under St. 1915, c. 185, "reserved leave, with the assent of the jury, to enter a verdict for the defendant, if, upon the exceptions taken or the questions

of law reserved," the Superior Court "or the Supreme Judicial Court should decide that such verdict for the defendant should have been entered," and reported the case to this court, "to dispose of the same as it deems proper."

* * * * *

DE COURCY, J. The main question raised by the exceptions is whether the demand note in suit was presented for payment "within a reasonable time after its issue," as required by the negotiable instruments law. R. L. c. 73, § 88. * * * We are of opinion, however, that on the undisputed facts in the present case a demand made fourteen months after the issue of the note was not made "within a reasonable time;" and that the judge should have ruled as requested by the defendant. * * *

In accordance with the report, a verdict for the defendant shall be entered in accordance with R. L. c. 173, § 120, as amended by St. 1915, c. 185, 1.

*Ordered accordingly.*¹

¹ In commenting on the practice employed in this case, Ezra R. Thayer, in *Judicial Administration*, 63 *Pennsylvania L. Rev.* 585, said:—"The importance of obtaining from the jury the necessary material for a final decision has always been understood by English courts. They have never tolerated the wasteful and unintelligent practice to which we tamely submit of taking a general verdict and letting the case go up on exceptions; on the contrary it has been their regular practice, as a reference to the English reports for a hundred years before the Judicature Act will show, to take a verdict from the jury with leave to enter a different verdict thereafter if the law required it. This simple and flexible method, which can be made to fit all sorts of situations, gave the judge time to consider the law after the verdict without delaying the trial, and left the matter in such shape that any error could be corrected by the appellate court. It did this, too, without trenching in the least on the jury's powers. Even those whose sensitiveness concerning judicial encroachment makes them object to the judge's charging on the facts cannot reasonably criticize this feature of the English practice. It exalts, not limits, the jury's function, for it provides that their labors shall not be in vain, but shall settle the case according to the law."

In a note to the above article the method of employing this remedy is outlined by Mr. John L. Thorndike, of the Boston bar, as follows:—"The jury find for the plaintiff and assess damages in the sum of eight hundred and eighteen dollars, seventy-two cents.

"W. B. Foreman.

"*Question*—In case the jury find for the plaintiff, what additional damages should be given for the dualin manufactured before the abandonment of the contract, if the plaintiff is entitled to recover for such dualin?

"*Answer*—Three hundred and fifty dollars." See *Dittmar v. Norman*, 118 *Mass.* 319, 323 (1875).

"When the jury announce their verdict in court, the judge will say

to them that a question of law has been reserved for consideration by the court, and that leave will be reserved with the assent of the jury to enter the verdict for three hundred and fifty dollars in addition to the damages found by them, if upon the question of law reserved the court shall decide that the verdict ought to have been so entered. The jury will assent, and a note of the leave so reserved will then be made at the foot or on the back of the verdict or on the docket, and the verdict entered subject thereto, as follows:

"Leave being reserved with the assent of the jury to enter the verdict for three hundred and fifty dollars in addition to the eight hundred and eighteen dollars and seventy-two cents damages found by them, if upon the question of law reserved the court shall decide that the verdict ought to have been so entered."

"Leave to reduce the damages would be similarly reserved, as in *Hobbs v. London & Southwestern Ry. Co.*, L. R. 10 Q. B. 111, 113 (1875)."

"In a case like *Negus v. Simpson*, 99 Mass. 388, 391-392 (1868), the damages would be ascertained according to the contentions of both parties, and leave reserved to enter the verdict according to the proper rule, which would have saved the second trial."

"So a verdict being directed for the defendant, leave could be reserved to enter the verdict for the plaintiff for the amount of a draft, upon the decision of a question of law, as in *Treacher v. Hinton*, 4 B. & Ald. 413 (1821). So, if the jury find for the plaintiff in a case like *Slocum's Case*, 228 U. S. 364 (1913), the verdict would be entered for the plaintiff with leave reserved to enter the verdict for the defendant if the court should decide that the jury ought to have directed such a verdict."

177 (d) *Special Verdict.*

FIRST NATIONAL BANK v. PECK.

Am. Ct.

Supreme Court of Kansas. 1871.

8 Kansas, 660.

BREWER, J.: * * *

In this case a special verdict was returned at the instance of the plaintiff. Objection was made to the verdict on the ground that it did not state all the facts established by the evidence. Special verdicts and findings upon particular questions of fact are by the laws of 1870 matters of right. Laws 1870, p. 173, sec. 7. It is no longer discretionary with the court to require them or not. Under these circumstances it becomes important to determine the scope of a special verdict as fixed by our statute. Considerable difference of opinion has existed in reference to it and a judicial construction in this court with doubtless be of service

in many cases. What is a special verdict? Under our statute the jury can be called upon to respond in three ways—by a general verdict, by a special verdict, and by returning answers to particular questions of fact. True, this latter mode of interrogating the jury can be resorted to only in conjunction with the first, but it is nevertheless a distinct mode. A general verdict embraces both the law and the facts. It states the result of the whole controversy. It determines the ultimate rights of the parties. It combines the decisions of the court with the opinions of the jury. True, the jury receive the law in the instructions of the court, but they apply the law to the facts, and, having combined the two, declare the result. So that under such a verdict they really perform two functions, that of finding the facts, and then that of applying the law to those facts. Any one at all familiar with the experiences of a court-room is aware that the errors of the jury result oftener from their misapplication of the law as stated, to the facts, than from their misapprehension of the facts. A special verdict, on the other hand, finds only the facts, and leaves to the court the duty both of determining the law and of applying it to the facts. It is thus defined in sec. 285 of the code of civil procedure, Gen. Stat., 684: "A special verdict is that by which the jury finds facts only. It must present the facts as established by the evidence, and not the evidence to prove them." It was decided in 1 Miles, 26, that "if instead of finding facts the special verdict set out the evidence, a new trial will be granted." Whether that be the necessary result or not, it is clear that a special verdict should not be a recital of testimony, but a finding of certain facts as established by such testimony. But what facts? How minutely may they, must they, be subdivided? The facts stated in the pleadings; as minutely, and no more so in the special verdict, than in the petition, answer, and reply. The special verdict must conform to the pleadings. The word "facts" is used in this section in the same sense, and refers to the same things as when used in sec. 87 of the code, which declares that a "petition must contain a statement of the *facts* constituting the cause of action, in ordinary and concise language without repetition." There are in every cause of action certain essential substantive facts, certain elements, so to speak. Every pleader knows this

when he prepares a petition. The omission of any one of these elements renders the petition defective. The failure to prove one defeats the cause of action. Now these essential elemental facts are the ones the special verdict must find, no more, no less. A history of the case in the nature of a recital of the testimony, or a detail of the various steps in the transaction is not the function of a special verdict. It responds to the various facts of the petition like a special denial, touching each separately. The statute clearly points to this construction. It says, (Laws 1870, p. 173, ch. 87, sec. 7, amending sec. 286 of the code,) "the court shall direct the jury to find a special verdict in writing upon all or any of the issues in the case." The *issues* are to be passed upon in the special verdict. In Bacon's Abridgment, vol. 10, p. 313, it is said, citing as authority *United States v. Bright*, Bright's Trial, 199, "If in a special verdict the jury find the issue, all they find beyond is surplusage." The special verdict is simply the response of the jury separately to the several issues presented by the pleadings. * * * The judgment will be *affirmed*.

All the Justices concurring.*

* A discussion of the purpose and superior effectiveness of the special verdict in civil causes, with suggestions for making it safer and more convenient for practical use, may be found in Verdicts, General and Special, by Edson R. Sunderland, 29 Yale L. Jour. 253-267. See also, A Brief History of Special Verdicts and Special Interrogatories, by Edmund M. Morgan, 32 Yale L. Jour. 575-592.

A few states have abolished special verdicts by statute; others have made them discretionary with the jury, as at common law; others make them discretionary with the jury in actions for the recovery of money only or of specific real property; others leave them to the discretion of the court; and others require the court to order them on the request of either party. See Clementson on Special Verdicts, pp. 172-177.

The same tests applicable to special verdicts are to be employed in connection with findings of facts made by the court in cases tried without a jury.—*Utah National Bank v. Nelson*, (1910) 38 Utah, 169; *Darling v. Miles*, (1911) 57 Ore. 593; *Graham v. State ex rel.*, (1879) 66 Ind. 386.

It is commonly required that findings of fact and findings of law may or shall be made separately by the court when trying cases without a jury.—*Slayton v. Felt*, (1905) 40 Wash. 1; *City of Buffalo v. Delaware, L. & W. RR. Co.*, (1907) 190 N. Y. 84.

•But omission of such findings is not reversible error in equity cases.—*Gaines & Co. v. Whyte Grocery Co.*, (1904) 107 Mo. App. 507.

And no findings are required where there is an agreed statement of facts.—*City of Owensboro v. Weir*, (1893) 95 Ky. 158.

In Ontario the special verdict has practically supplanted the general verdict except in cases of slander.—*The Courts of Ontario*, by W. R. Riddell, 62 Univ. of Penn. L. Rev. 27.

STANDARD SEWING MACHINE CO. v. ROYAL INSURANCE CO.

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Take*Supreme Court of Pennsylvania. 1902.**201 Pennsylvania State, 645.*

MESTREZAT, J.—This was an action of assumpsit on a fire insurance policy issued by the defendant. On the trial the court below instructed the jury to return a special verdict and to answer the following questions:

1. Did Bedient take possession of the property in the interest of the machine company, and let Markle and Merryman hold it for the company after the assignment for the benefit of creditors and prior to the fire in question?

2. Did the machine company thus acting through Bedient subject the property to hazard not contemplated by the policy and stipulated against by the provisions thereof?

3. What was the loss? This is to be estimated by the cost of repairing or replacing the property with material of like kind and quality so as not to exceed the limit thus indicated.⁸

The first question was, by agreement of counsel, answered in the affirmative; the jury returned a negative reply to the second question; and to the third question, the answer was \$1,747. Subsequently the court entered judgment on the verdict in favor of the plaintiff for \$1,747.

This appeal is by the defendant and error is alleged in the ruling of the court on the measure of damages, in the construction put upon the policy of insurance by the court, and in entering judgment on the special verdict, the defendant claiming that the facts found were not sufficient to sustain the judgment.

The last reason assigned for reversing the judgment of the court below may be considered first.

It is the province of a special verdict to find and place on record all the essential facts in the case. This includes the disputed as well as the undisputed facts. What is not found by the verdict is presumed not to exist, and no inferences as to matters of fact are permitted to supply the facts themselves which the verdict should have found. In entering judgment, the court is confined to the facts found by the

special verdict, and unless they are sufficiently found no judgment can be entered. The jury must find the facts and the court declare the law on the facts so found. Such are the requisites of a special verdict as held in all our cases. In *Wallingford v. Dunlap*, 14 Pa. 33, it is said: "It is of the very essence of a special verdict that the jury should find the facts, on which the court is to pronounce judgment according to law. And the court will not intend anything, especially any fact not found by the jury. * * * The undisputed facts ought to have been incorporated in the special verdict. * * * The court is confined to the facts found by the special verdict. And when a special verdict is given, the court ought to confine its judgment to that verdict. * * * But this special verdict is so defective and erroneous, and the judgment so anomalous in being entered partly on the verdict and partly on what was called undisputed facts, that we must do what has often been done before, reverse the judgment and send the case back for a new trial." Mr. Justice Mercur, delivering the opinion of the court in *Vansyckel v. Stewart*, 77 Pa. 126, says: "It (special verdict) must include both disputed and undisputed facts. The court will not infer a fact not found by the jury. It must declare the law on these facts alone. As all the essential facts must be found in the verdict, it follows that it cannot be aided by intendment or by extrinsic facts appearing upon the record." In *Twigg v. Treacy*, 104 Pa. 498, Clark, J., speaking for the court, says: "We cannot resort to the testimony, or to such extrinsic matters as were undisputed at the trial, or avail ourselves of such even as appear upon the record. It is of the very essence of a special verdict, that the facts found are those upon which the court is to pronounce judgment, according to law. What is not thus found is presumed not to exist, the verdict being conclusively the complete result of the jury's deliberation upon the whole case presented."

In delivering the opinion of the court in the comparatively recent case of *McCormick v. Royal Insurance Company*, 163 Pa. 194, Chief Justice Sterrett says: "Nothing is better settled, on principle as well as authority, than that all the facts upon which the court is to pronounce judgment should be incorporated in the special verdict. It is the exclusive province of the jury, in the first place, to determine

all disputed questions of fact, from the evidence before them; and then their special verdict is made up of those findings of fact, together with such undisputed facts as may be necessary to a just decision of the cause. * * * The court, in considering a special verdict and entering judgment thereon, is necessarily confined to the facts found and embodied in the verdict; the latter cannot be aided by intendment or extrinsic facts that may appear in the evidence."

Applying these principles to the case in hand, it is apparent that the verdict here is fatally defective. As said by Chief Justice Black in *Thayer v. Society of United Brethren*, 20 Pa. 63, "the jury found a special verdict, but it omits almost every important fact." Here the verdict found but three of the many facts necessary to support a judgment. It is silent as to whether a policy of insurance, the basis of this action, was issued to the plaintiff, and the terms of the policy; as to what property was insured and where situated; as to the loss of or damage to the insured property and whether it occurred within the life of the policy; and as to the cause of the loss, whether by fire or otherwise. Other omissions of fact might be suggested, but those named are sufficient to show that the verdict is wholly inadequate to sustain the judgment entered by the court below. A special verdict more barren of facts is not to be found in the reported cases.

* * * * *

* * * the judgment is reversed and a *venire facias de novo* is awarded.⁴

³ *Form of special verdict.* This method of preparing a special verdict, —in the form of questions to be put to the jury upon all the material facts in the case, is a common and convenient one. It is sometimes prescribed by statute.

In any event, the jury cannot be expected to draw up their own form of special verdict, and it must be done by counsel. As said in *Pittsburgh, Ft. W. and C. Ry. Co. v. Ruby*, (1871) 38 Ind. 294, "Jurors are very competent to understand the evidence, find facts, and draw conclusions from the facts found; but as a general rule, and especially in complicated cases, they are not equal to the task of preparing a special verdict. They do not know what facts should be found to cover the issues, nor the manner of stating them."

Another familiar method is for counsel on each side to prepare a special verdict in the form of a statement of the facts which they believe have been established by the evidence, and submit the same to the trial judge, who thereupon hands both forms, with or without amendment, as he deems proper, to the jury under proper instructions, and

the jury may then adopt either one, in the form presented to them or with such changes as they wish to make, as their verdict. *Pittsburgh, Ft. W. & C. Ry. Co. v. Ruby, supra*; 22 Encyc. Pl. & Pr. 993.

4 There is some authority to the contrary, as in Wisconsin, but see *Hodges v. Easton*, (1882) 106 U. S. 408, where it was held that the practice of rendering judgment on a special verdict which found only the disputed facts but not those undisputed, was a denial of the right of trial by jury.

Where, however, the party who does *not* have the burden of proof asks for a judgment upon a special verdict, the want of a finding upon any material fact will entitle him to such judgment.—*Wabash RR. Co. v. Ray*, (1899) 152 Ind. 392.

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BAXTER v. CHICAGO & NORTHWESTERN RAILWAY
CO.

False

Supreme Court of Wisconsin. 1899.

104 Wisconsin, 307.

Action by an employe of defendant to recover compensation for personal injuries received by him by the explosion of a locomotive engine, claimed to have been caused by defendant's keeping it in use with knowledge, or reasonable means of knowledge, that it was defective to a degree which rendered such an accident among the natural and reasonable probabilities, and one which, in the exercise of ordinary care, it should have apprehended.

* * * * *

MARSHALL, J. The chief controversy on the trial was as to whether the defective condition of the boiler, which caused the explosion, ought to have been discovered by the defendant before that event, and guarded against. To cover that field by the special verdict, defendant's attorneys requested the court to submit for answers these four questions: "Could the defects have been discovered without removing the flues from such boiler?" "Was it the ordinary custom and practice among persons generally, using locomotive boilers of a like kind, under similar circumstances, to remove the flues for the purpose, only, of inspecting the shell of such boiler?" "Was the boiler of engine No. 249, up to the time it exploded, used, operated, treated, and inspected by the defendant in the manner usually and ordinarily followed by persons generally, who

use, operate, treat, and inspect locomotive engine boilers of a like kind under similar circumstances?" "If you answer 'Yes' to question No. 10, did such use, operation, treatment, and inspection cause or reveal any defects which caused the injury to plaintiff?" Such questions were rejected and in lieu thereof, following the question of whether the boiler was defective in fact and the nature of the defects, this question was submitted: "If you find in answer to question No. 5 that the boiler was defective at the time of said explosion, then could the defendant company through its agents and servants, by reasonable and proper care, tests, or inspection, have discovered such defects before the explosion?" In connection with such question the jury were instructed as follows: "Reasonable care as used in this question means such care as ordinarily careful persons exercise under like circumstances, and reasonable tests and inspections mean such tests and inspections as are made and employed by ordinarily prudent persons engaged in the same business and under like circumstances." That ruling is assigned as error and it appears to be one of the chief grounds of complaint. Appellant's counsel do not contend but that the real fact in issue was, by the court's question as explained, placed before the jury for determination, but they contend that the right of defendant to a special finding as to every material fact in issue, stripped of all conclusions of law, was violated because the question required the application of legal definitions and explanations in order to enable the jury to properly answer it, the result being that the final conclusion embodied in the answer was rather a conclusion of law than one of fact; and in support of that a lengthy argument upon the character of a special verdict under the statute was presented.

* * * * *

The idea advanced by counsel for the defendant that the statutory right to a special verdict is only satisfied by questions that do not need to be considered in the light of legal principles given to the jury by the court, is contrary to the universal practice and the settled law upon the subject. Often, whether certain conduct complained of is negligence, where the evidentiary facts are all established, is a question of fact, in respect to which different minds may reasonably come to different conclusions. In that situation it is necessary to carefully instruct the jury regarding the standard of

care necessary to the performance of the duty alleged to have been violated, leaving it to them to determine whether the alleged wrongdoer came up to the legal standard in the particular instance complained of. The question of contributory negligence, of proximate cause, and what is reasonable, are only, ordinarily, determinable by viewing evidentiary facts in the light of legal principles. The ultimate fact being only properly determinable by viewing evidentiary facts in the light of legal standards, instructions by the court in regard to such standards are necessary. When such ultimate facts are established, the legal liability follows as a conclusion of law. At that point the jury should not be instructed. They are to find the facts, guided by the law regarding such facts, but regardless of the legal effect of their conclusions. The issues of fact raised by the pleadings are to be passed upon by the jury. The legal conclusion to be drawn from such findings is to be referred to the court with an additional conclusion by the jury, express or implied, that if the court should be of the opinion, upon the whole case, as found, that plaintiff has a good cause of action, they find for the plaintiff, otherwise for the defendant. *Suydam v. Williamson*, 20 How. 427.

* * * * *

* * * Further, it is proper, and on request it is error to refuse, to give instructions requested as to each question submitted, that may be reasonably necessary to enable the jury to answer it intelligently and according to the law governing the subject. But no instructions as to the effect of an answer upon the ultimate rights of the parties is proper. *Ryan v. Rockford Ins. Co.*, 77 Wis. 611; *Ward v. C., M. & St. P. R. Co.*, 102 Wis. 215.⁵

* * * * *

⁵ General instructions, on the law of the case are never proper where the jury are required to return a special verdict. *Stayner v. Joyce*, (1889) 120 Ind. 99, 22 N. E. 89.

189

(e) *Special Interrogatories.*CHICAGO AND NORTHWESTERN RAILWAY CO. v.
DUNLEAVY.*Supreme Court of Illinois. 1889.**129 Illinois, 132.*

BAILEY, J.—This was an action on the case, brought by Annie Dunleavy, administratrix of the estate of John Dunleavy, deceased, against the Chicago and Northwestern Railway Company, to recover damages under the statute for the death of the plaintiff's intestate. The declaration consisted of nine counts, to the fifth, sixth and seventh of which a demurrer was sustained. To the remaining counts the defendant pleaded not guilty, and on trial before the court and a jury, the issues were found for the plaintiff and her damages assessed at \$1800, and for that sum and costs, the court, after denying the defendant's motion for a new trial, gave judgment for the plaintiff. Said judgment was affirmed by the Appellate Court on appeal, and by a further appeal the record is now brought to this court.

The first count of the declaration alleges that the defendant, on the 26th day of July, 1886, by its servants, ran one of its locomotive engines with a train of freight cars thereto attached, from east to west over one of its tracks under a viaduct at Blue Island avenue, in the city of Chicago; that the plaintiff's intestate was then and there in the employ of said city, cleaning and painting the iron columns, etc., of said viaduct, and that "the said train was, by and through the negligence, carelessness and improper conduct of the said defendant, through its servants in the premises, run at a high and dangerous rate of speed," and that while being so run, it was driven against and upon said Dunleavy, whereby he was instantly killed. The second count alleges that the defendant, through its servants, "so carelessly, improperly and unskillfully managed and conducted said engine and train, that the said John Dunleavy was forcibly knocked down by said engine and train" and thrown under the wheels of the train and instantly killed. The third count sets up an ordinance of said city requiring the bell of each locomotive engine to be

rung continually while running within the city, and alleging that the defendant's servants in charge of said train failed to comply with said ordinance, and that in consequence of such failure said Dunleavy was killed. The fourth count is substantially like the second. The eighth count alleges that the engineer and fireman could, by looking, have seen Dunleavy standing at his work, and by sounding a whistle have given him notice of the approach of a train, but that they failed to sound the whistle, and that in consequence of such failure said Dunleavy was killed. The ninth count alleges substantially the same act of negligence as the eighth, though in different language. Each count alleges in proper form that Dunleavy at the time he was killed, was in the exercise of due care.

* * * * *

The next questions to be considered are those which relate to the special findings of the jury. Upon this branch of the case it is urged, first, that the court improperly refused to submit certain questions of fact to the jury; second, that certain of the questions of fact submitted were not properly answered; and third, that the special findings of fact are inconsistent with the general verdict. The statute under which special findings may be required is but recent, and the rules of practice thereby established have never before been presented to this court for its consideration. We must therefore look mainly to the statute itself for our guide in determining the propositions now raised. The statute is as follows:

Section 1. "That in all trials by jury in civil proceedings in this State in courts of record, the jury may render, in their discretion, either a general or a special verdict; and in any case in which they render a general verdict, they may be required by the court, and must be so required on request of any party to the action, to find specially upon any material question or questions of fact which shall be stated to them in writing, which questions of fact shall be submitted by the party requesting the same to the adverse party before the commencement of the argument to the jury.

Sec. 2. "Submitting or refusing to submit a question of fact to the jury when requested by a party as provided by the first section hereof may be excepted to and be reviewed on appeal or writ of error as a ruling on a question of law.

Sec. 3. "When the special finding of fact is inconsistent

with the general verdict, the former shall control the latter and the court may render judgment accordingly."

This statute, so far as it relates to special verdicts, is merely declaratory of the common law. It has been competent for juries at common law, since the statute of 13 Edward 1, to find a general verdict, or when they have any doubt as to the law, to find a special verdict, and refer the law arising thereon to the decision of the court. By a special verdict, the jury, instead of finding for either party, find and state all the facts at issue, and conclude conditionally, that if upon the whole matter thus found, the court should be of the opinion that the plaintiff has a good cause of action, they then find for the plaintiff, and assess his damages; if otherwise, then for the defendant. 2 Tidd's Practice, (Am. ed.) 897, and note.

It is manifest of course that a special finding by a jury upon material questions of fact submitted to them under the provisions of the statute is not a special verdict, but an essentially different proceeding. A special verdict cannot be found where there is a general verdict, but the special findings of fact provided for by the statute can be required only in case a general verdict is rendered. But while this is so, much light in relation to special findings upon questions of fact, and their office and objects may be derived from the rules applicable to special verdicts. Both forms of verdict are provided for by the same statute, and they must therefore be construed as being *in pari materia*.

In giving construction to the statute, the first, and perhaps the most important question, relates to the scope and meaning of the phrase, "material question or questions of fact." May such questions relate to mere evidentiary facts, or should they be restricted to those ultimate facts upon which the rights of the parties directly depend? Evidently the latter: Not only does this conclusion follow from analogy to the rules relating to special verdicts, but it arises from the very nature of the case. It would clearly be of no avail to require the jury to find mere matters of evidence, because, after being found, they would in no way aid the court in determining what judgment to render. Doubtless a probative fact from which the ultimate fact necessarily results would be material, for there the court could infer such ultimate fact as a matter of law. But where the probative fact is merely *prima facie* evidence of the fact to be proved, the

proper deductions to be drawn from the probative fact presents a question of fact and not of law, requiring further action by the jury, and it cannot therefore be made the basis of any action by the court. Requiring the jury to find such probative fact is merely requiring them to find the evidence and not the facts, and results in nothing which can be of the slightest assistance to the parties or the court in arriving at the proper determination of the suit.

The view we take is strongly fortified by the provision of the third section of the statute, that, when a special finding of fact is inconsistent with the general verdict, the former shall control. This necessarily implies that the fact to be submitted shall be one which, if found, may in its nature be controlling. That can never be the case with a mere evidentiary fact. A fact which merely *tends* to prove a fact in issue without actually proving it, can not be said to be, in any legal sense, inconsistent with a general verdict, whatever that verdict may be. Such inconsistency can arise only where the fact found is an ultimate fact, or one from which the existence or non-existence of such ultimate fact necessarily follows, and that is never the case with that which is only *prima facie* evidence of the fact sought to be proved.

The common law requires that verdicts shall be the declaration of the unanimous judgment of the twelve jurors. Upon all matters which they are required to find they must be agreed. But it has never been held that they must all reach their conclusions in the same way and by the same method of reasoning. To require unanimity not only in their conclusions but in the mode by which those conclusions are arrived at would in most cases involve an impossibility. To require unanimity therefore, not only in the result but also in each of the successive steps leading to such result, would be practically destructive of the entire system of jury trials. To illustrate, suppose a plaintiff trying his suit before twelve jurors, should seek to prove a fact alleged in his declaration by giving evidence of twelve other facts, each having an independent tendency to prove the fact alleged. The evidence of each probative fact, or the conclusions to be drawn from it, might appeal with peculiar force to the belief or judgment of some one of the jurors, but less so to his fellows. The cumulative effect of all the evidence might be such as to leave no doubt in the mind of any member of the panel as to the

truth of the fact alleged, still, if the jury were required to find specially as to each probative fact, no one of the twelve facts would be at all likely to meet with the unanimous concurrence of the entire jury. As to each they would be compelled to confess their inability to agree, or what would be its equivalent, say they did not know or could not tell, which, if we apply the rules governing special verdicts, would be tantamount to a finding that the fact was not proved or did not exist. If such finding should be required, and should be given the effect of controlling the general verdict, the result would be, that under such system of trial, general verdicts could but seldom stand.

However natural the curiosity parties may have to know the precise course of reasoning by which jurors may arrive at verdicts either for or against them, they have no right, under guise of submitting questions of fact to be found specially by the jury, to require them to give their views upon each item of evidence, and thus practically subject them to a cross-examination as to the entire case. Such practice would subserve no useful purpose, and would only tend to embarrass and obstruct the administration of justice; and we may further say that such practice finds no warrant in our statute.

In the present case the defendant's counsel prepared and submitted fifteen questions of fact upon which the court was asked to require the jury to make special findings. Of these the eleventh and twelfth were refused. The first was modified and submitted to the jury in its modified form. The residue of the questions were submitted as asked. We do not understand that the defendant is now complaining of the action of the court in relation to its eleventh and twelfth questions of fact. The first, as prepared by the defendant's counsel, was as follows:

1. "What precaution did the deceased take to inform himself of the approach of the train which caused the injury?"

This was modified by the court so as to read as follows:

1. "Was the deceased exercising reasonable care for his own safety at the time he was killed?"

The ultimate fact which it was incumbent upon the plaintiff to prove, and which the defendant sought to disprove, was that the deceased, at the time he was killed, was in the exercise of due care. That was one of the issues made by the pleadings, and it was one of the ultimate facts upon which

the plaintiff's right to recover necessarily depended. What the deceased did to inform himself of the approach of the train was material only as tending to show reasonable care on his part or the want of it. His acts in that behalf, then, whatever they may have been, were facts which were merely evidential in their nature, and while they doubtless would have had a tendency to prove reasonable care or the contrary, there were none of them, so far as the evidence shows, which would have been conclusive of that question. The question then, as submitted by the defendant's counsel, sought to obtain a finding as to mere probative facts, and the court therefore properly refused to require the jury to answer it. The question substituted by the court submitted to the jury a material and controlling fact, and one which could be properly made the subject of a special finding.

Complaint is made to the answers given by the jury to the fourth and fifth questions. Those questions were as follows:

4. "Did the deceased look to ascertain if the train in question was approaching?"

5. "Did the deceased listen to ascertain if said train was approaching?"

To both of those questions the jury answered: "Don't know." It is perhaps questionable whether the defendant, in order to avail itself of the objection that no proper answer was made to these questions, should not have made it at the time the verdict was returned and before the jury were discharged, for then the jury might have been required to complete their verdict by making proper answers. *Moss v. Priest*, 19 Abb. Prac. 314. But however that may be, it is manifest that the error, if it be one, cannot have been prejudicial to the defendant unless it can be seen that answers to said questions most favorable to the defendant, which of course would have been answers in the negative, would have constituted a finding inconsistent with the general verdict.

If then we treat said questions as having been answered in the negative, would such answers, either alone or in connection with the answers to the other questions, have constituted a finding necessarily inconsistent with the general verdict? To the second question, viz., "If the deceased had looked before the accident, could he have discovered the approach of the train in time to have avoided the accident?" the jury answered, "Yes," and to the third question, viz., "If the deceased

had listened before the approach of said train, could he have discovered the approach of the train in time to have avoided the accident?" they answered, "If he had concentrated his attention in that particular direction, yes." The first question, viz., "Was the deceased exercising reasonable care for his safety at the time he was killed?" was also answered, "Yes."

The question then presents itself, whether, if it be admitted that the deceased neither looked or listened for the train, and also that if he had looked he could have seen it, and if he had listened with his attention concentrated in that direction, he could have heard it in time to avoid the accident, such facts would constitute such conclusive proof of contributory negligence on the part of the deceased as would have barred a recovery. Undoubtedly a failure to look or listen, especially where it affirmatively appears that looking or listening might have enabled the party exposed to injury to see the train and thus avoid being injured, is evidence tending to show negligence. But they are not conclusive evidence, so that a charge of negligence can be predicated upon them as a matter of law. There may be various modifying circumstances excusing the party from looking or listening, and that being the case, a mere failure to look or listen cannot, as a legal conclusion, be pronounced negligence *per se*.

In determining whether the special findings are inconsistent with the general verdict so that the latter must be held to be controlled by the former, this court cannot look at the evidence. All reasonable presumptions will be entertained in favor of the verdict, while nothing will be presumed in aid of the special findings of fact. The inconsistency must be irreconcilable, so as to be incapable of being removed by any evidence admissible under the issues. *Pennsylvania Co. v. Smith*, 98 Ind. 42; *McComas v. Haas*, 107 id. 512; *Redelsheimer v. Miller*, id. 485. Under these principles it must be held that there is no necessary or irreconcilable inconsistency between the special findings and the general verdict, especially in view of the fact that the jury, notwithstanding their finding that the deceased did not look or listen, also found that he was in the exercise of reasonable care.

* * * * *

We are of the opinion that the record contains no material

error, and the judgment of the Appellate Court will therefore be affirmed.⁶

⁶ Clementson, in his work on Special Verdicts and Findings, ingeniously observes:—"The submission of interrogatories under the statute is a sort of 'exploratory opening' into the abdominal cavity of the general verdict (if I may be pardoned a surgical metaphor) by which the court determines whether the organs are sound and in place and the proper treatment to be pursued." Page 45.

The constitutionality of the practice of employing special interrogatories was sustained in *Walker v. New Mexico & S. P. R. R. Co.*, (1897) 165 U. S. 593.

Some courts do not disapprove of questions which are merely evidentiary.—*Atchison, T. & S. F. RR. Co. v. Ayers*, (1895) 56 Kan. 170. Such questions could not serve as the basis for a judgment contrary to the verdict, but would be available only as the basis for granting a new trial.

Putting a question in the leading form is improper.—*Atchison, T. & S. F. RR. Co. v. Ayers*, (1895) 56 Kan. 176.

State statutes differ as to whether the submission of special interrogatories is discretionary with the court. A considerable number make it discretionary in every case; others make it discretionary unless either party requests such submission, in which case the court is required to accede. See Clementson on Special Verdicts, pp. 49-56, citing many statutes and cases.

It is entirely competent without any authorizing statute, for the court to put questions to the jury to be answered in connection with their general verdict, and new trials may be granted on the basis of such questions and answers.—*Freedom v. New York, N. H. & H. RR. Co.*, (1909) 81 Conn. 601; *Walker v. New Mexico & So. Pac. RR. Co.*, (1897) 165 U. S. 593.

Where special findings by the jury are inconsistent with each other, some cases hold that they destroy themselves and leave the general verdict unimpaired.—*Drake v. Gold Min. Co.*, (1904) 32 Colo. 259; while other courts hold that such special findings not only destroy themselves but also destroy the general verdict.—*St. Louis & San Francisco Ry. Co. v. Bricker*, (1899) 61 Kan. 224.

181 gahc
LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY
CO. v. WORLEY.

Supreme Court of Indiana. 1886.

107 Indiana, 320.

ELLIOTT, J. * * *

The appellant submitted to the court interrogatories, and asked that they should be submitted to the jury, but the court, instead of submitting those asked by the appellant,

prepared and submitted interrogatories of its own. The prayer for the submission of the interrogatories to the jury was not a proper one, for the court was not asked to instruct the jury to answer the interrogatories in the event that they returned a general verdict. *Taylor v. Bruk*, 91 Ind. 252.

We have, however, examined the interrogatories, and find that those propounded by the court substantially covered those asked by the appellant, so far as they were competent and material. Our decisions are that it is proper for the trial court to revise interrogatories submitted by the parties, and to prepare and propound for itself proper interrogatories to the jury. *Killian v. Eigenmann*, 57 Ind. 480.

The court submitted this interrogatory: "Could the defendant have lawfully fenced its track at the point where said mules entered upon the track?" It is contended that this interrogatory is not a proper one, as it calls upon the jury to decide a question of law, and not of fact, and thus casts upon them a duty that the court should perform. We can perceive no answer to this contention, and appellee's counsel have not suggested any. * * *

That principle governs here. The jury should be required to state facts, and not conclusions of law, and the answer to the question propounded in this instance could be, as it was, nothing more than the statement of the jury's conclusion as to whether the railroad company could lawfully fence its track at the place where the mules entered upon it. Whether it could lawfully fence at that place depended upon the character and surroundings, and when these are fixed the question whether it could be lawfully fenced becomes one of law for the decision of the court. There are many facts which make it improper for a railroad company to fence, as, for instance, the fact that to fence would interfere with the discharge of the company's duty to the public, or would make the place dangerous to its servants, and it is for the jury to state the facts, leaving the law to be applied by the court to the facts found by the jury.

* * * It would defeat the manifest purpose of the statute to allow conclusions of law, rather than statements of facts, to be made by the jury, for the purpose of the statute is to get upon record the specific and material facts in the form of answers to interrogatories.

Judgment reversed.

1 *82 Circuit*
RUNYAN v. KANAWHA WATER & LIGHT CO.

Supreme Court of Appeals of West Virginia. 1911.

68 West Virginia, 609.

Action by C. D. Runyan, administrator of Walter Runyan, against the Kanawha Water & Light Company. A verdict for plaintiff having been set aside, he brings error.

BRANNON, J. The Kanawha Water & Light Company, a corporation furnishing electricity for public consumption in the city of Charleston, had its wires on a bridge over the Kanawha river for conveyance of electricity. Walter Runyan was an employe of the bridge company engaged in painting the bridge, and while so employed came in contact with an electric wire, and was so badly burned by the electricity that he died. His administrator sued the Kanawha Water & Light Company, and recovered a verdict for \$5000, and the court having set the verdict aside, the plaintiff comes to this Court.

* * * * *

The main defense in the case is contributory negligence. The general verdict finds against that defense; but defendant insists that that verdict is overruled by a finding in answer to an interrogatory. This has given us some perplexity, and is the question of gravity in the case. The interrogatory is this: "If Walter Runyan had been careful, considering the knowledge he had of the wires, would he have been injured?" The answer is, "We think not." Is this inconsistent with the general verdict so as to overrule it? It must be so inconsistent that both cannot stand together. * * *

* * * This finding says that if Runyan had been careful he would not have been injured. Does this come up to the standard of full contributory negligence? No. It does not tell in what he was careless, or to what degree. Runyan having a right to be where he was in work, he could go near or over the wires, unless he knew that there was positive actual danger staring him in the face. If he by accident fell upon or caught his foot in the wires, this would not bar recovery. He might not have used the highest degree of care and yet not be found guilty of contributory negligence defeating the action. We cannot see what was the extent of

his knowledge of danger, whether or not he knew of defects in insulation. He was called on to use only ordinary care required of a prudent man under the circumstances; but this finding does not indicate what care or carelessness he used. We cannot from the finding say, or guess, whether he exercised the only care required by law, ordinary, or was chargeable with gross negligence. In the one case he would not be guilty of contributory negligence defeating the action; in the other he would. We cannot say which from the question and answer. The main verdict finds no negligence, and we are asked to say from the special finding that there was; and thus make the special finding inconsistent with the main verdict, when the special one does not give facts which, in law, impute contributory negligence.

There is another defective feature of this finding to show its inadequacy to overcome the general verdict. It is in the inconclusive language, "We think not." "Answers expressing only the inclination of the minds of the jury, as to say, 'We think not' are insufficient and too uncertain to base a judgment on." *Hopkins v. Stacey*, 43 Ind. 554. Eminent authority there cited says, "An opinion is not a legal verdict, and verdicts must be positive, certain and free from all ambiguity." This position may be assailed as technical; but remember that special finding, to overcome general verdicts must be certain and clearly and plainly inconsistent with it. I grant that there are authorities holding otherwise. 20 Ency. Pl. & Prac. 344. I cannot say that I would for this defect alone reject the answer; still it must be said that the answer is indefinite and leaves the mind in doubt whether the jury intended to find a definite fact. Why did it not say "No," if so intended? The law says that answers to interrogatories should be "direct, definite, certain and complete." 20 Ency. Pl. & Prac. 342.

Again this question 10 called upon the jury to say whether if Runyan had been careful he would have been hurt. "Only such questions as can be fairly and intelligently answered should be submitted. Interrogatories requiring the jury to speculate as to what might have happened in a certain contingency should not be submitted." *Atchison &c. v. Lannigan*, 42 Pac. 343. Therefore, we must regard the answer mere speculation, and not on specific facts, not a flat finding. Findings must be free of obscurity. "They must destroy the

general verdict, if at all, only by their own inherent clearness and strength." Clementson on Special Verdicts, 135. Thompson on Trials, § 2693 says: "The court will not strain the language of the special findings to override the general verdict. If possible they will be interpreted to support the verdict rather than overturn it. No presumption will be made in their favor; nor will they control the general verdict, unless they are invincibly antagonistic to it."

Another objection to this finding, depriving its answer of force, is, that it assumes a very material fact, that is, that Runyan knew the condition of the wires, their danger, etc. This had a tendency to lead the mind of jurors to conclude that Runyan had such knowledge, that even the judge thought so, else he would not have allowed such an interrogatory. An interrogatory must not assume material facts. 20 Ency. Pl. & Prac. 322; *Elliott v. Reynolds*, 16 Pac. 698; *Toledo R. Co. v. Goddard*, 25 Ind. 185.

* * * * *

Therefore, we reverse the order setting aside the verdict, and render judgment upon that verdict for the plaintiff.

*Reversed and rendered.*⁷

⁷ Where the jury evade the issues by answering any question "We don't know," the court should, on motion, order them to retire and return proper answers or report a disagreement.—*Cleveland, C. C. & I. Ry. Co. v. Asbury*, (1889) 120 Ind. 289.

183 *Jake*
EVANSVILLE & SOUTHERN TRACTION CO. v.
SPIEGEL.

Appellate Court of Indiana. 1911.

49 Indiana Appellate, 412.

LAIRY, J. This is an action brought by the appellee, George P. Spiegel, against the appellant for damages occasioned by the death of Carl Spiegel, the minor son of appellee, which death is alleged to have been caused by the negligence of appellant in the operation of one of its cars on Main street in the city of Evansville, Indiana. The direction of Main street is a little east of north, and the appellant company has a

double street car track near the center of said street. Williams street enters Main street from the east, at a point almost opposite to the place where Sycamore street enters it from the west, so that the south line of Williams street, at the point of its connection with Main street, is almost opposite to the point where the north line of Sycamore street connects with it on the west. The accident in which Carl Spiegel lost his life occurred about noon on the 4th day of October, 1907. He came out of Williams street riding a bicycle, and started diagonally across Main street toward Sycamore street, and was struck and killed by a street car going south on the west track.

* * * * *

(3) On behalf of appellant, it is urged that its motion for judgment on the interrogatories notwithstanding the general verdict should have been sustained, for the reason that these answers show that the decedent was guilty of negligence contributing to his death. The general verdict in favor of the plaintiff is a finding of every material fact necessary to a recovery. The special findings of the jury will overthrow the general verdict only when both cannot stand, and this antagonism must be apparent on the face of the record beyond the possibility of being removed by any evidence admissible under the issues made by the pleadings. The evidence actually introduced cannot be considered in passing upon this question. *Cox v. Ratcliffe*, 105 Ind. 374, 5 N. E. 5; *Indiana National, etc., Co. v. Long*, 27 Ind. App. 219, 59 N. E. 410.

(4) Under the issues formed by the pleadings in this case, evidence might have been introduced which would bring the case within the operation of the doctrine known as the "last clear chance." This doctrine is clearly stated by a writer in the *Quarterly Law Review* (vol. 2, p. 507), as follows: "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it." This has been frequently recognized and applied by our courts.


* * * * *

(5) Even though it be conceded that the answers to the interrogatories show that the plaintiff's decedent negligently approached and entered upon the track of the appellant in front of an approaching car, and thus negligently exposed

himself to the danger of a collision, this would not necessarily preclude a recovery from injury resulting from appellant's negligence. Answers to interrogatories showing such facts would not overthrow a general verdict in favor of the plaintiff, for the reason that evidence may have been introduced proving or tending to prove that, after said decedent was in the position of danger in which he had so negligently placed himself, the defendant knew of his perilous position, or might have known it by the exercise of ordinary care, in time to have prevented the injury, and that it negligently failed to take advantage of the last clear chance to prevent the injury. It is the duty of this court to reconcile the interrogatories with the general verdict if they can be so reconciled by any evidence which might have been introduced within the issues; and, to this end, the court, in ruling upon this motion, will treat the case as though this evidence had been introduced and acted upon by the jury. In view of what we have said, we are of the opinion that the answers to the interrogatories are not in irreconcilable conflict with the general verdict, and the motion of appellant for judgment in its favor on such interrogatories notwithstanding the general verdict was properly overruled.

* * * * *

[Reversed on other grounds.]

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 RYAN v. ROCKFORD INSURANCE CO.

Supreme Court of Wisconsin. 1890.

77 Wisconsin, 611.

CASSODAY, J. The learned counsel for the defendant strenuously contends that the evidence is insufficient to support the general verdict or any of the special findings in favor of the plaintiff. The view we have taken of the case renders it unnecessary for us to determine that question.

The statute requires the court to direct the jury to find a special verdict when requested as prescribed. Sec. 2858, R. S. Such verdict must "be prepared by the court in the form of questions in writing, relating only to material issues of

fact and admitting a direct answer, to which the jury shall make answer in writing. The court may also direct the jury, if they render a general verdict, to find in writing upon any particular question of fact *to be stated as aforesaid.*" *Ibid.* This last provision is applicable to the case at bar. The purpose of thus submitting particular controverted questions of fact is to secure a direct answer free from any bias or prejudice in favor of or against either party. It is a wise provision in certain cases when properly administered. It has often been demonstrated in the trial of causes that the non-expert jurymen are more liable than the experienced lawyer or judge to be led away from the material issues of fact involved by some collateral circumstance of little or no significance, or by sympathy, bias, or prejudice; and hence it is common practice for courts, in the submission of such particular questions and special verdicts, to charge the jury, in effect, that they have nothing to do with, and must not consider the effect which their answers may have upon, the controversy, or the parties. The learned trial judge, when in health, has frequently so charged. It is certainly a very proper thing to do when the business or reputation of either party is such as to naturally stimulate a bias in favor of the one party or the other. It is true that juries, under such a charge, sometimes return inconsistent answers; but it is usually because such is the honest result of their unbiased judgment upon different branches of the evidence.

In the case at bar the learned trial judge seems to have been particularly anxious to prevent such inconsistent answers; and hence he explained to the jury what different answers to each particular question so submitted would be consistent, and what inconsistent, with a general verdict in favor of one or the other party. This was peculiarly calculated to secure special answers which would be consistent with a general verdict rather than in accordance with the weight of evidence upon each of such particular questions. The effect of such instructions was very much the same as though the court had charged the jury that after they had determined upon a general verdict then they should answer the particular questions submitted in the way they had thus been informed would be consistent with such general verdict. This was misleading, and well calculated to defeat the very object of the statute in authorizing such submission.

* * * * *

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

185
CHICAGO & ALTON RAILROAD CO. v. GORE.
Smith
Supreme Court of Illinois. 1903.

202 Illinois, 188.

BOGGS, J.—* * *

We do not conceive that it was improper practice to permit counsel for appellee to read the special interrogatories to the jury, and in connection therewith discuss the evidence, for the purpose of convincing the jury that under the evidence the interrogatories should be answered in the affirmative or in the negative, as the case might be. The objection is not that the argument of counsel appealed to the prejudice of the jurors or to their sympathies, or that it transcended legitimate grounds of debate, but simply that it was error to allow counsel to read the interrogatories to the jury and discuss the evidence which bore upon the answers which counsel conceived should be made by the jury thereto. The statute which authorizes the submission of special questions of fact to be answered by a jury requires that such questions shall be stated to the jury in writing, and "shall be submitted by the party requesting the same, to the adverse party before the commencement of the argument to the jury." The end designed to be attained by the argument of counsel is to lead the jury to the proper decision of or answer to the issues made by the pleadings. It was entirely legitimate for counsel to review the evidence and suggest to the jury what, under the proof, their general verdict should be, and none the less to suggest the answers which, in the view of counsel, the evidence demanded should be returned to the special interrogatories. In *Timins v. Chicago, etc., Railroad Co.*, 72 Iowa, 94, it was said: "It is competent for an attorney to read special interrogatories to the jury, and to discuss the evidence applicable thereto, and to suggest the answers which in his judgment ought to be rendered."

* * * * *

The judgment of the Appellate Court must be and is affirmed.

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Am. (f)

Verdicts Contrary to Law or Evidence.

LYNCH v. SNEAD ARCHITECTURAL IRON WORKS.

Court of Appeals of Kentucky. 1909.

132 Kentucky, 241.

Opinion of the court by JUDGE LASSING—Reversing.

* * * * *

Appellant complains that the jury in arriving at their verdict wholly disregarded instruction No. 1, and returned their verdict in favor of plaintiff in spite of it. It is urged by counsel for appellant that, without entering into a consideration as to whether or not this instruction properly presented the law as warranted by the facts proven, nevertheless it was the law of this case, and in disregarding it and returning a verdict in favor of plaintiff as they did the jury found contrary to the law, and that, for this reason, the judgment predicated upon their verdict should be reversed and a new trial awarded. On the other hand, it is claimed by plaintiff's counsel that this instruction did not fairly present the law of the case, as warranted by the facts, but that as the jury, even though not properly instructed, reached a reasonably fair and just conclusion, their verdict and finding should not be disturbed. The greater part of the briefs of opposing counsel is devoted to a consideration of this question. The defendant did not except or object to this instruction, nor is his counsel now objecting to same, but his complaint is that the jury disregarded this instruction. * * *

Section 340, subsec. 6, Civ. Code Prac. makes one of the grounds upon which a new trial may be granted "that the verdict or decision is not sustained by sufficient evidence, or is contrary to law." An examination of the authorities discloses the fact that courts of last resort of the various states are not by any means harmonious in the construction which they

have placed upon similar code provisions, and there is, at least, an apparent lack of uniformity upon this point in the decisions in our own state. The superior court in the cases of *Gausman v. Paff*, 10 Ky. Law Rep. 240; *Palmer v. Johnson*, 13 Ky. Law Rep. 590; *Burns v. McGibben*, 9 Ky. Law Rep. 441; and *Bertman v. Ebert's Adm'r.*, 9 Ky. Law Rep. 198, held that, where a verdict is sought to be avoided on the ground that it is contrary to law, the complaint relates to the law as given by the court in its instructions to the jury, and not as it should have been given, or, in other words these decisions hold that where a new trial is sought on the ground that the verdict is contrary to law, the "law" here referred to means the "law" as declared or given by the court, and not as it should have been given; that, even though the court was in error and failed to give the law correctly, nevertheless the jury was bound by the "law" as given, and, if their verdict was contrary to the "law", this fact would authorize a reversal of the case, and the granting of a new trial.

* * * In the case of *Smith v. Morrison*, 3 A. K. Marsh, 81, in passing upon the ruling of the trial court in stopping Smith's counsel from arguing a proposition of law seemingly contrary to that given by the court, this court said: "In thus restraining counsel we are of opinion the court acted perfectly correct. After having obtained from the court an opinion on the legal import of the settlement, a decent regard for that opinion would seem to forbid the same matter from being again canvassed before the jury." * * * The decisions of other courts of last resort upon this point are not harmonious, but the decided weight of the authorities is to the effect that, where a statute authorizes a reversal upon the ground that the verdict is contrary to the "law," the "law" referred to means the "law" of that case as given by the court, whether right or wrong.

In the case of *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714, the court had under consideration the correctness of the ruling and judgment of the trial court because it was contrary to the "law" as given by the court. Upon appeal it was urged that this was error because the instruction or "law" as given by the trial court was itself erroneous. In disposing of this question the court said: "But counsel for the appellant contend that, the instruction being erroneous, the court erred in setting aside the verdict, because of the

fact that the jury wholly disregarded it. The question presented is: Had the jury the right to disregard the instructions of the court if erroneous? This is a most important question in the administration of the law. It must be conceded that there is a conflict of authority on this question. Counsel for the appellant cite a number of authorities in support of their claim that the jury may disregard the instructions of the court, if erroneous, if the verdict is otherwise in accord with the law, and that it would be error in the court under such circumstances to set aside the verdict. It seems from the authorities cited by appellant that Kentucky, Georgia, Texas, and some other states have so held. A number of the cases cited by counsel for appellant are not exactly in point; that is, they are cases in which the jury did not seemingly disregard the erroneous instructions upon vitally material issues in the case, and where the verdict was in conformity with the charge of the court, taken as a whole. But it must be confessed that some of the authorities cited hold that the jury have a right to disregard erroneous instructions of the court, and that the verdict should not be set aside in such cases if in accord with the correct law. * * * But let it be conceded that there is a conflict of authorities upon the question under discussion, or let us suppose that it is a new question, without any adjudications or authority, in either event; what course should this court pursue? It has always been held in this jurisdiction that it was the sole province of the jury to determine questions of fact. It has been uniformly held that it was error for the court to invade this special province of the jury by even commenting on the evidence. *State v. Sullivan*, 9 Mont. 174, 22 Pac. 1088, and authorities cited. Our system of practice is certainly based upon the theory that it is the province of the jury to determine facts, and that of the court to determine and declare the law in all cases, except in prosecutions for libel. 'The jury, under the direction of the court, shall determine the law and the facts.' State Const. art. 3, section 10. From this constitutional clause it seems plain that the jury have no right to determine the law in any other case. '*Expressio unius est exclusio alterius.*' This is the first time it has been seriously contended in this court that the jury have the right to determine the law in an ordinary suit at law and to absolutely disregard the instructions of the court on the ground that, in

the opinion of the jury, the instructions of the court are erroneous. If the contention of the appellant is to be upheld, what may we not anticipate as the result in the administration of the law in this state? If the jury may rightfully invade the province of the court, why may not the court retaliate by invading the province of the jury in determining questions of fact? As counsel for the respondent suggest, if the contention of appellant is correct, then logically there is an appeal in all cases upon questions of law from the trial court to the jury. And as counsel for respondent further suggest in their argument, if the jury may determine the law, an attorney arguing the case may say to the jury: "The court will charge you that the law is so and so, but I say to you the court is wrong. You, the jury, are the judges of the law, and may determine it for yourselves." Would any court permit such an argument to a jury? Certainly not. But, if the jury are the judges of the law, why should a court prohibit such an argument to them? If a juror should state upon his *voir dire* that he would not be governed by the law as declared by the court, if he thought the instructions erroneous, nobody would doubt that he would not be permitted to sit in the case. Yet, if he has the right as a juror to determine the law, we do not see why he should be challenged for asserting that right. If the contention of appellant is correct, the time of this court in hearing future appeals will be devoted to determining whether the court or the jury were right in their views of the law in the trial of the cause in the lower court. Authority, or no authority, we cannot give our sanction to a practice that would lead to such results. Such a course would ultimately result in overturning our system of keeping separate and distinct the powers and duties of the courts and juries, confining each to its own proper province, in the degradation of the courts, and confusion and chaos in the administration of the law." * * * *Emerson v. County of Santa Clara*, 40 Cal. 543; * * * *Barton v. Shull*, 62 Neb. 570, 87 N. W. 322; * * * *Way v. Chicago & Rock Island Railway Co.*, 73 Iowa, 463, 35 N. W. 525. * * * To the same effect are *Bunten v. Mutual Ins. Co.*, 4 Bosw. (N. Y.) 254; *Flemming v. Marine Ins. Co.*, 4 Whart. (Pa.) 59, 33 Am. Dec. 33; *Dent v. Bryce*, 16 S. C. 1; *Fleming v. L. & N. R. Co.*, 148 Ala. 527, 41 South. 683; *Wood v. Cox*, 84 English Common Law, 280, * * *

After a full consideration, we adhere to the rule inferentially declared in *Smith v. Morrison*, * * * and subsequently followed by the superior court in the several opinions to which we have referred, and by this court in the later case of *Curran v. Stein*, that it is the duty of the trial jury to "conform to the instructions of the court upon matters of law." In other words, that it is the exclusive province of the court to determine questions of law, and that of the jury only to apply the facts proven to the law as given by the court; and, when it is stated that the verdict is contrary to "law," reference is had to the law as given by the court, and not as it might or should have been given.

* * * * *

⁸ In *Schoepbach v. La Clede Gas Light Co.*, (1910) 232 Mo. 603, the court said:—"As an appeal is a mere creature of the statute, the disposition of an appeal in an upper court is subject to statutory regulation. What the statute grants it may regulate, modify or take away. By express mandate of the lawgiver we are forbidden to reverse any judgment, unless we believe error was committed materially affecting the merits of the action. [Sec. 2082, R. S. 1909] * * * Accordingly, if a court below, giving a wrong reason, reaches the right conclusion, its conclusion will not be disturbed above. So, if a jury could find but one verdict on the facts and finds that verdict, a misdirection by the court does not touch the 'merits' of that case. Under the statute in hand, if the court told the jury to go south and they went north and north was the only way the law would allow them to go, we cannot reverse and remand in order that the court might tell them on a new trial to go north. So if the court give too little, too much, or bad law for a party litigant, and yet the jury stumble into a verdict consonant with justice, and the only one the facts allow, under the statute in hand we must let that judgment alone."

18 '1
SERLES v. SERLES.

Supreme Court of Oregon. 1899.

35 Oregon, 289.

This is an action by W. L. Serles against Clara Serles, S. C. Zuber, and John Hough, to recover damages for trespass in detaching and removing a dwelling house from the realty of the plaintiff. The verdict of the jury was for plaintiff in the sum of \$400, and against the defendants Serles and Zuber, and judgment having been entered thereon, they appeal

* * * After the rendition of the verdict, the defendants interposed a motion to set it aside, and for a new trial, based upon several grounds: First, that of newly discovered evidence; Second, excessive damages; and, Third, that the evidence was insufficient to warrant the verdict,—that the verdict is against the evidence, is not justified thereby, and is contrary to law. This motion was overruled, the court saying: “The question of whether the verdict is a proper one upon the evidence is not now involved, only to the extent as to whether there was any evidence to support it, and there is no doubt that there was, and the court cannot review their decision upon the preponderance of the evidence.”

WOLVERTON, C. J., after stating the facts.

* * * * *

2. It is strenuously urged, however, that the court below decided the motion for a new trial upon an erroneous principle of law, in this: That it was governed, as is shown by its written opinion, by the idea that, if there was any evidence in the record to support the verdict, it was without power to disturb the same or set it aside; whereas, it is insisted that it is the duty of the court, in the consideration of the motion for a new trial, based upon the insufficiency of the evidence, to weigh all the evidence submitted to the jury, and if, upon the whole case, the verdict appears to be against the weight of evidence and is manifestly unjust, to allow the motion. The trial judge seems to have assimilated the ground for granting a new trial to that which is proper in support of a motion for a nonsuit, and hence, his conclusion that, if there was any evidence to support the verdict, it was his duty to uphold it. It is a rule of law, well established in this jurisdiction, that a motion for a nonsuit is in the nature of a demurrer to the evidence, and it not only admits all that the evidence proves, but all inferences that might be legitimately drawn therefrom tending to prove a fact under the issues; and, if there is any evidence offered from which such an inference could be drawn, it is the duty of the court to permit it to go to the jury, as the motion is a test of the competency of the evidence to prove the fact to which it is directed. And the question is, upon such motion, whether there is any evidence tending to prove the material allegation upon which the cause of action is based, and this is one of law. But whether a given amount of evidence is sufficient to sustain an allega-

tion is a question of fact for the jury; so that, if there is any evidence tending to prove a given fact, it is the duty of the court, upon the motion for nonsuit to permit it to go to the jury, and to take their verdict touching it: *Vanbebbber v. Plunkett*, 26 Or. 562 (27 L. R. A. 811, 38 Pac. 707), and cases therein cited.

Under the statute (Hill's Ann. Laws, § 235, subd. 6), the court is authorized to set aside a verdict and grant a new trial for "insufficiency of the evidence to justify the verdict or other decision, or that it is against law." This statute does not appear to have received any direct construction by this court; but there are authorities elsewhere pertinent to the inquiry, and they leave no doubt but that, in passing upon the sufficiency of the evidence to support the verdict, the trial court is authorized to weigh and consider all the evidence which has been submitted to the jury, and if it is ascertained that the verdict is against the clear weight thereof, or is one that is manifestly unjust, or that reasonable men would not adopt or return, to set it aside and grant a new trial. A similar statute has received express construction by the Supreme Court of the United States in the case of *Metropolitan R. R. Co. v. Moore*, 121 U. S. 558 (7 Sup. Ct. 1334). It was there held that the language used in the statute, which gave a right to set aside the verdict for insufficient evidence, was not to be limited to its insufficiency in point of law, but that it extended also to its insufficiency in point of fact. Such evidence is said to be insufficient in law only where there is a total absence of proof, either as to the quantity or kind, or from which no inference could be drawn in support of the fact sought to be established. But insufficiency in point of fact may exist where there is no insufficiency in point of law; that is, there may be some evidence to sustain every element of the case, competent both in quantity and quality under the law, and yet it may be met by countervailing proof so potent and convincing as to leave no reasonable doubt of the opposite conclusion. So it is that, upon a review of the whole evidence, the testimony in support of the cause of action or defense may be so slight, although competent in law, or the preponderance against it may be so convincing, that a verdict may seem to be plainly unreasonable and unjust; and in many cases it might be the duty of the court to withdraw the case from the jury, or to direct a verdict in a particular way, yet

in others, where it would be proper to submit the case to the jury, it might become its duty to set aside the verdict and grant a new trial.

* * * * *

It must be understood, of course, that a mere dissatisfaction of the judge with the verdict is not sufficient ground for disturbing it, but the court must exercise its judgment in each particular case, and if, from all the testimony given the jury, it is satisfied that the verdict is against the clear weight or preponderance of evidence, or that the jury has acted unreasonably in returning the verdict, or has been misled or misdirected, or has acted through improper motives, it is the duty of the court to set it aside and grant a new trial. *Wright v. Southern Express Co.*, 80 Fed. 85, 93; *Mt. Adams, etc., Ry. Co. v. Lowery*, 20 C. C. A. 596, 74 Fed. 463, 477. There may be sufficient evidence to go to the jury to make a *prima facie* case, yet there may be opposing evidence so strong, palpable, and overwhelming as to dissipate any reasonable idea that the *prima facie* case should prevail; or the case as first made may be so strong, and the countervailing testimony so weak and unsatisfactory, as to preclude an honest and rational judgment against the case first made. In either case, if the jury should disregard the better showing, it would plainly be the duty of the court to interpose, upon motion for a new trial, and set the verdict aside; and this is the rationale of the statute, in providing that the verdict may be set aside for insufficiency of evidence.

Mr. Justice Brewer has laid down what seems to us to be the proper rule for the guidance of the trial judge, in *Kansas Pac. Ry. Co. v. Kunkel*, 17 Kan. 172. He says: "The one (the trial judge) has the same opportunity as the jury for forming a just estimate of the credence to be placed in the various witnesses, and, if it appears to him that the jury have found against the weight of evidence, it is his imperative duty to set the verdict aside. We do not mean that he is to substitute his own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon, he has no right to disturb the findings of the jury, although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld

by him as against any mere doubts of its correctness. But when his judgment tells him that it is wrong; that, whether from mistake, or prejudice, or other cause, the jury have erred, and found against the fair preponderance of the evidence—then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury.”

We think the court in the case at bar proceeded upon an erroneous principle of law in limiting its inquiry to ascertaining whether there was any evidence from which the jury might infer the facts which were attempted to be proven. It should have gone further, and weighed the evidence in accordance with the principles hereinbefore enunciated: *Larson v. Oregon Ry. & Nav. Co.*, 19 Or. 240, 247 (23 Pac. 974); *State v. Billings*, 81 Iowa, 99 (46 N. W. 862); *City of Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288 (47 Pac. 738); *Hawkins v. Reichert*, 28 Cal. 534; *Dickey v. Davis*, 39 Cal. 565; *Bennett v. Hobro*, 72 Cal. 178 (13 Pac. 473); *Reid v. Young*, 7 App. Div. 400 (39 N. Y. Supp. 899); *First Nat. Bank v. Wood*, 124 Mo. 72 (27 S. W. 554). The defendants were entitled to have their motion for a new trial passed upon in pursuance of correct principles of law, and, the trial court having failed in this, the cause will be remanded, with directions to determine the motion under the rules herein announced. The cumulative character of the newly-discovered evidence renders defendants' position upon the first ground untenable; and, as it pertains to the second, viz., that the damages assessed are excessive, that was a matter within the discretion of the trial court. By anything we have said in this opinion it is not intended to indicate in any manner our impressions touching the weight of the evidence submitted to the jury, and the court below, having seen the witnesses and observed their manner, must act entirely upon its own judgment in passing upon the motion.

*Reversed.*⁹

⁹ Verdicts for amounts which are clearly excessive or clearly too small may be set aside as against the weight of the evidence. For cases of the first description see *Harrison v. Sutter Street Ry. Co.*, (1897) 116 Cal. 685; *Graham v. Consolidated Traction Co.*, (1900) 65 N. J. L. 539; and for a case of the second kind see *Tathwell v. City of Cedar Rapids*, (1903) 122 Ia. 50.

After two verdicts of a jury for substantially the same amount the court will usually acquiesce.—*Bryant v. Ins. Co.*, (1833) 13 Pick. (Mass.)

543; *Monarch Co. v. McLaughlin*, (1877) 1 Ida. 650; *Van Doren v. Wright*, (1896) 65 Minn. 80.

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omit (g) *Impeaching the Verdict.*

PHILLIPS v. RHODE ISLAND COMPANY.

Supreme Court of Rhode Island. 1910.

32 Rhode Island, 16.

JOHNSON, J.—This is an action of the case, brought by Samuel Phillips against The Rhode Island Company, to recover damages for personal injuries alleged to have been sustained through the negligence of the defendant company in the operation of one of its street cars.

* * * The case was tried in the Superior Court with a jury on the 21st, 24th, and 25th days of January, 1910, and a verdict was rendered for the plaintiff in the sum of twenty-five hundred dollars. Thereupon the defendant moved for a new trial, alleging as grounds therefor:

* * * * *

Fourth: That certain members of the jury before whom said cause was tried were guilty of misconduct in this, that during the progress of said trial, and without the consent of the court, without the knowledge and consent of the attorneys for the defendant, did take an unauthorized view of the premises where the accident occurred, concerning which said action was brought and prosecuted.

* * * The defendant's motion for a new trial was denied by the justice who presided at the trial, and the case is now before this court on the defendant's bill of exceptions.

* * * * *

[An affidavit of a jurymen was introduced as to an unauthorized view he himself took of the place of the accident; also, an affidavit of a person not a jurymen who stated therein what another juror had told him about an unauthorized view taken by that juror, together with an affidavit of the latter juror denying the statements in the affidavit concerning what he had said.]

* * * * *

It is well settled in this State that the affidavits of jurymen as to what takes place in the juryroom are inadmissible to impeach their verdict. In *Tucker v. Town Council of South Kingstown*, 5 R. I. 558, 560, the court, speaking by Ames, C. J., said: "The affidavits of the jury-men as to what took place in the jury-room, or as to the grounds upon which they found their verdict, and which were read *de bene* at the hearing, must be rejected; a rule of policy, well settled both in England and in this country, excluding, for the security of verdicts, this mode of impeaching them."

The general rule that the affidavits of jurors as to their own misconduct during the trial are inadmissible to impeach their verdict is, we think, supported by the great weight of authority both in this country and in England. In *Owen v. Warburton*, 4 Bos. & Pull. 326, where the affidavit of a jurymen, that the verdict was decided by lot, was offered, Mansfield, Ch. J. (pp. 329-330), said: "We have conversed with the other judges upon this subject, and we are all of the opinion that the affidavit of a jurymen cannot be received. It is singular that almost the only evidence of which the case admits should be shut out; but, considering the arts which might be used if a contrary rule were to prevail, we think it necessary to exclude such evidence. If it were understood to be the law that a jurymen might set aside a verdict by such evidence, it might sometimes happen that a jurymen, being a friend of one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view afterwards to set aside the verdict by his own affidavit, if the decision should be against him." In *State v. Freeman*, 5 Conn. 348, the court, by Hosmer, C. J. (p. 351), said: "In this state, it has been the practice to admit such testimony; but, said Ch. J. Swift (1 Dig. 775), 'In England, and in the courts of the United States, jurors are not permitted to be witnesses respecting the misconduct of the jury; for it is a great misdemeanor; and this is most unquestionably the correct principle; for otherwise, a juror, who should be disposed to set aside a verdict, would give information to the party for that purpose; if not so disposed, he could suppress the information; and, in that way, any of the jury could command the verdict.'

* * * * *

"The opinion of almost the whole legal world is adverse to

the reception of the testimony in question; and, in my opinion, on invincible foundations."

In the cases cited *supra*, the affidavits of the jurors were offered as to their misconduct in the juryroom. Where the affidavits of jurors have been offered as to their misconduct outside of the juryroom to impeach their verdict, the same rule of public policy has generally been applied by the courts. Thus in *Chadbourn v. Franklin*, 5 Gray 312, where defendant moved for a new trial, and in support of the motion offered one of the jurors as a witness to show that on the Sunday intervening, while the trial was in progress, said juror went to the place where the collision occurred, and examined it for the purpose of informing himself upon the subject-matter of the trial, and the judge below ruled that the juror could not be permitted to testify, in support of this motion, to these acts tending to show his own misconduct, and the defendant excepted, the court, Shaw, C. J. said: "The modern practice has been uniform, not to entertain a motion to set aside a verdict on the ground of error, mistake, irregularity or misconduct of the jury, or of any of them, on the testimony of one or more jurors; and it rests, we think, on sound considerations of public policy." In *Rowe v. Canney*, 139 Mass. 41, 42, the court, by Morton, C. J. said: "The same considerations of public policy protect the communications of jurors with each other, whether in or out of the jury-room, during the pendency of the case on hearing before them." See also *Commonwealth v. White*, 147 Mass. 76, 80.

In *Sanitary District v. Cullerton*, 147 Ill. 385, the affidavits of three of the jurors were offered touching the conduct of others of the jury, and the bailiff in charge, tending to impeach the verdict. It was complained that after they had finished viewing the premises some of the jurors drank intoxicating liquor. The court, p. 390, said: "This court, in an unbroken line of decisions from the case of *Forrester v. Guard*, Breese, 44, is committed to the doctrine that the affidavits of jurors can not be received for the purpose of showing cause for setting aside the verdict. * * *

* * * * *

In *Deacon v. Shreve*, 22 N. J. L. 176, the court said, at page 182: "The principle is now well settled, that generally the affidavits of jurors shall not be received as to what took place in the jury-room, or elsewhere, to show misbehaviour,

- or on the delivery of the verdict to show mistake, for the purpose of correcting or destroying the verdict, though it seems their affidavits are admissible for the purpose of exculpation. The rule stands on the ground of public policy, courts being
- unwilling to permit a dissatisfied juror by such means to destroy a verdict to which he had given a public assent."

In *Downer v. Baxter*, 30 Vt. 467, after the case had been given to the jury, the officer in charge allowed the jury to separate, and they went to their respective boarding-houses for dinner, returning thence to the jury-room and resuming the consideration of the case. The affidavits of all the jurors were read, stating that after they were impanelled to try the cause they had no conversation with any one touching it, except among themselves. The court, p. 475, said: "An objection was taken to the competency of the affidavits of the jurors and their admissibility raises a legal question which we are called upon to decide. We think the true rule is, that the affidavits of jurors may be read to exculpate themselves and sustain their verdict, but not to impeach it. In this case they were offered to show that the jurors had no conversation with others, nor heard any in relation to the cause."

* * * * *

In some States affidavits of jurors as to their own misconduct outside the jury-room during the trial are admitted to impeach their verdict. *Pierce v. Brennan*, 83 Minn. 422; *Peppercorn v. Black River Falls*, 89 Wis. 38; *Roller v. Bachman*, 5 Lea. 153. In Iowa it has been held that affidavits of jurors may be received, for the purpose of avoiding a verdict, to show any matter occurring during the trial, or in the jury-room, which does not essentially inhere in the verdict itself. *Wright v. I. & M. Tel. Co.*, 20 Iowa, 195. This was a case of misconduct in the jury-room. This rule has been followed in Kansas,—*Perry v. Bailey*, 12 Kan. 539. We are not, however, convinced by the reasoning of these cases. We are of the opinion that the affidavits of jurors as to their own misconduct in or out of the jury-room during the trial are inadmissible to impeach their verdict. The objection on the ground of public policy is just as strong in the one case as in the other. The affidavit of the juror in this case was inadmissible as to his own misconduct in taking an unauthorized view, to impeach the verdict, and therefore can not be considered. An affidavit to the declaration of a juror im-

peaching the verdict, besides contravening the same rule of policy, is condemned by the ordinary rule of evidence, excluding hearsay testimony.

The defendant's exceptions are overruled, and the case is remitted to the Superior Court with direction to enter judgment upon the verdict.

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Jabe
MATTOX v. UNITED STATES.

Supreme Court of the United States. 1892.

146 United States, 140.

This was an indictment charging Clyde Mattox with the murder of one John Mullen, about December 12, 1889, in that part of the Indian Territory made part of the United States judicial district of Kansas by section two of the act of Congress of January 6, 1883, (22 Stat. 400, c. 13,) entitled "An act to provide for holding a term of the District Court of the United States at Wichita, Kansas, and for other purposes."

Defendant pleaded not guilty, was put upon his trial, October 5, 1891, and on the eighth of that month was found guilty as charged, the jury having retired on the seventh to consider their verdict. Motions for a new trial and in arrest of judgment were severally made and overruled, and Mattox sentenced to death. This writ of error was thereupon sued out.

* * * * *

In support of his motion for new trial the defendant offered the affidavits of two of the jurors that the bailiff who had charge of the jury in the case after the cause had been heard and submitted, "and while they were deliberating of their verdict," "in the presence and hearing of the jurors or a part of them, speaking of the case, said 'After you fellows get through with this case it will be tried again down there. Thompson has poison in a bottle that them fellows tried to give him.' And at another time, in the presence and hearing of said jury or a part of them, referring to the defendant, Clyde Mattox said: 'This is the

third fellow he has killed.'” The affidavit of another juror to the same effect in respect of the remark of the bailiff as to Thompson was also offered, and in addition the affidavits of eight of the jurors, including the three just mentioned, “that after said cause had been submitted to the jury, and while the jury were deliberating of their verdict, and before they had agreed upon a verdict in the case, a certain newspaper printed and published in the city of Wichita, Kansas, known as The Wichita Daily Eagle, of the date of Thursday morning, October 8, 1891, was introduced into the jury room; that said paper contained a comment upon the case under consideration by said jury, and that said comment upon said case so under consideration by said jury, was read to the jury in their presence and hearing; that the comment so read to said jury is found upon the fifth page of said paper, and in the third column of said page, and is as follows: * * *”

FULLER, C. J., after stating the case. The allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and the result cannot be made the subject of review by writ of error, *Henderson v. Moore*, 5 Cranch, 11; *Newcomb v. Wood*, 97 U. S. 581; but in the case at bar the District Court excluded the affidavits, and, in passing upon the motion, did not exercise any discretion in respect of the matters stated therein. Due exception was taken and the question of admissibility thereby preserved.

It will be perceived that the jurors did not state what influence, if any, the communication of the bailiff and the reading of the newspaper had upon them but confined their statements to what was said by the one and read from the other.

* * * * *

There is, however, a recognized distinction between what may and what may not be established by the testimony of jurors to set aside a verdict.

This distinction is thus put by Mr. Justice Brewer, speaking for the Supreme Court of Kansas in *Perry v. Bailey*, 12 Kans. 539, 545: “Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony; it gives to the se-

cret thought of one the power to disturb the expressed conclusions of twelve; its tendency is to produce bad faith on the part of a minority, to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct, the remaining eleven can deny; one cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard. Under this view of the law the affidavits were properly received. They tended to prove something which did not essentially inhere in the verdict, an overt act, open to the knowledge of all the jury, and not alone within the personal consciousness of one."

The subject was much considered by Mr. Justice Gray, then a member of the Supreme Judicial Court of Massachusetts, in *Woodward v. Leavitt*, 107 Mass. 453, where numerous authorities were referred to and applied, and the conclusions announced, "that on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict. But a jurymen may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. So a jurymen may testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial." See, also, *Ritchie v. Holbrook*, 7 S. & R. 458; *Chews v. Driver*, 1 Cox (N. J.), 166; *Nelms v. Mississippi*, 13 Sm. & Marsh. 500; *Hawkins v. New Orleans Printing Co.*, 29 Ala. Ann. 134, 140; *Whitney v. Whitman*, 5 Mass. 405; *Hix v. Drury*, 5 Pick. 296.

We regard the rule thus laid down as conformable to right reason and sustained by the weight of authority. These affidavits were within the rule, and being material their exclusion constitutes reversible error. A brief examination will demonstrate their materiality.

* * * * *

The judgment is reversed, and the cause remanded to the District Court of the United States for the District of Kan.

*sas, with a direction to grant a new trial.*¹⁰

¹⁰ In *McDonald v. Pless*, (1914) 238 U. S. 264, it was held that it could not be shown by jurors' affidavits that the amount of the verdict was fixed by lot, although the court remarks that in some states by statute and in others by decision of the court, such affidavits are admissible.

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WOLFGRAM v. TOWN OF SCHOEPKE.

Supreme Court of Wisconsin. 1904.

123 Wisconsin, 19.

Action for personal injuries from a hole in a country highway, left by the town authorities in original construction by merely covering the same with poles. Special verdict of twenty questions returned by jury, finding all material facts in favor of the plaintiff except that question No. 16, "Was plaintiff guilty of any want of ordinary care which contributed to injury he received?" was answered "Yes." Plaintiff produced affidavits of all twelve jurors to the effect that all the jurors agreed that plaintiff was not guilty of any want of ordinary care, and that the insertion of the answer "Yes" instead of the word "No" was a mistake. The foreman, agreeing with these facts, states that he intended to write answer to the sixteenth question so as to find that said plaintiff was not guilty of any want of ordinary care which contributed to his injury. Upon these affidavits the plaintiff moved, first, that the answer "Yes" to the sixteenth question be stricken out, and the answer "No" be inserted in lieu thereof, and for judgment upon the verdict as so amended, basing the request also on the contention that there was no evidence to sustain the affirmative answer to that question. That motion was denied, from which denial the plaintiff appeals.

Thereupon plaintiff moved on minutes and said affidavits for a new trial. Defendant moved to strike out jurors' affidavits. The court entered its order reciting that the motion was based on a mistake in the verdict and on the lack of support from evidence, whereby it denied defendant's

motion to strike out said affidavits, "excepting that said affidavits be received and considered only as tending to show that there was a mistrial by reason of a mistake by the jury in writing the answer to question No. 16," but rejecting said affidavits in as far as they "tend, generally, to impeach or contradict said special verdict." The court entered further order granting plaintiff's motion to set aside the verdict and awarding a new trial, no costs being imposed on either party. From that order the defendant appeals.

DODGE, J. * * *

It is, however, probably true that the new trial was granted because the court was convinced by the jurors' affidavits that the written verdict did not express the conclusion of the jury, and that the peril of injustice from entry of judgment for defendant was so great that, in exercise of the discretion vested in him, a new trial ought to be had. This view presents the question whether the affidavits of jurors could be received as evidence of the facts they state. The general rule is very ancient, and often reiterated, that the statements of the jurors will not be received to establish their own misconduct or to impeach their verdict. *Edmister v. Garrison*, 18 Wis. 594, 603. An excellent collection and analysis of decided cases will be found in *Woodward v. Leavitt*, 107 Mass. 453. From this it appears that the early idea was that of secrecy in their deliberations, and, further, the impropriety of receiving jurors' statements as to their mental processes, whether to impeach or support their verdict. This rule, in its application, has been subjected to much of refinement and qualification by different courts, involving conflict of *dicta* and of actual decision which it would not be profitable to review in detail nor possible to harmonize. The necessity of some limitation to the general rule against receiving statements of the jurors is declared in *McBean v. State*, 83 Wis. 206, 209, 53 N. W. 497. In some cases the rule is limited to things which transpire in the jury room or in court, but it will be found in most of those cases also limited to matters involved in reaching the verdict. This limitation was recognized and applied in *Hempton v. State*, 111 Wis. 127, 145, 86 N. W. 596; *Roman v. State*, 41 Wis. 312; *Schissler v. State*, 122 Wis. 365, 99 N. W. 593; *Peppercorn v. Black River Falls*, 89 Wis. 38, 41, 61 N. W. 79; *Mattox v. U. S.*, 146 U. S. 140, 13

Sup. Ct. 50. In line with the same idea are a number of decisions drawing a distinction between the proceedings involved in reaching and agreeing upon the verdict and the mere act of expressing it, either orally or in writing. The following cases recognize such distinction, and hold that the reasons excluding jurors' testimony as to their conduct in the former stage do not exclude their evidence as to what really was the verdict agreed on in order to prove that it has not been correctly expressed, through mistake or otherwise: *Cogan v. Ebdon*, 1 Burrows, 383; *Roberts v. Hughes*, 7 Mees. & W. 399; *Little v. Larrabee*, 2 Greenl. 37; *Weston v. Gilmore*, 63 Me. 493; *Peters v. Fogarty*, 55 N. J. Law, 386, 26 Atl. 855; *Jackson v. Dickenson*, 15 Johns. 309; *Dalrymple v. Williams*, 63 N. Y. 361; *Hodgkins v. Mead*, 119 N. Y. 166, 23 N. E. 559; *Capen v. Stoughton*, 16 Gray, 364; *Pelzer Mfg. Co. v. Hamburg-B. F. Ins. Co.*, 71 Fed. 830. Several of these cases were cited with approval of this very distinction in *McBean v. State*, *supra*. Against their doctrine we find *Polhemus v. Heiman*, 50 Cal. 438; *Murphy v. Murphy*, 1 S. Dak. 316, 47 N. W. 142, and *McKinley v. First Nat. Bank*, 118 Ind. 375, 21 N. E. 36. Of these, the first two seem to be controlled by local statutes, and are therefore not persuasive. The Indiana case, however, squarely denies the admissibility of jurors' testimony to prove that the written answer to a special question was the reverse of the agreement in fact reached. This view is based on the rule that jurors cannot "impeach their own verdict." But is it an attempt to impeach their own verdict? That depends on the sense in which that word is used. Is the written paper filed, or the agreement which the jury reach, the verdict? We think the latter is what is intended when we say the jurors cannot impeach it. The former, like most records or writings, is but the expression or evidence of some mental conception. Hence it may well be said that a showing that such writing is not correct is not impeachment of the verdict itself. The repudiation of written expressions, when, by mistake, they fail to express the intention or mental concept, is familiar in the law. A writing is not a contract when it fails to express that on which the minds of the parties met, and courts freely exercise power to correct mistakes when the proof leaves no doubt that the real contract was something else. That which decides the rights of

parties litigant is the unanimous agreement of the jurors. Each party is entitled to such judgment as results from that agreement. Any other is presumptively unjust, and any rule that necessitates it is unreasonable unless supported by considerations of public policy, or of such danger from opening the door to investigation that wrong is likely to be done oftener than the right promoted. We are persuaded that the reasons which should exclude a juror from showing that he made a mistake in reaching his conclusion (see *Murdock v. Sumner*, 22 Pick. 156) do not extend to a showing that the words used in conveying it to the court, or enrolling it on the records, by mistake of the person uttering or writing them, fail to express the conclusions reached by all the jurymen. Of course, the showing of the latter fact must be clear beyond peradventure; at least to warrant a change in the written verdict and final judgment thereon. If the slightest doubt lurks in the mind of the court, he should confine relief to the granting of a new trial, which, of course, he may always order when there is reasonable cause to believe that the judgment will do injustice. Some courts incline to the view that a new trial is the only relief after the jury have separated. *Little v. Larrabee, supra*; *Weston v. Gilmore*, 63 Me. 493. But the clear weight of authority is that, upon sufficiently clear showing of the mistake, and of what was the verdict agreed on and intended to be expressed, the court may substitute a true expression for the incorrect one, and enter judgment accordingly. See *Cogan v. Ebdon, supra*; *Peters v. Fogarty, supra*; *Dalrymple v. Williams, supra*; *Hodgkins v. Mead, supra*; *Pelzer Mfg. Co. v. Hamburg-B. F. Ins. Co., supra*.

We conclude, therefore, that the trial court properly received and considered the affidavits of the jurors in this case; that they at least sufficed to satisfy the court of great danger of injustice being done by entry of judgment in accordance with the written verdict, and therefore justified him in exercising his discretion to relieve plaintiff from the predicament in which he stood by awarding him another trial. Whether such affidavits made so plain a case as to entitle plaintiff to correction of the verdict and judgment in his favor is a question not open to plaintiff on this appeal. Plaintiff might probably have raised it had he refrained from motion for new trial and appealed from a judgment in

defendant's favor. When, however, he made the latter motion, he appealed to the court's discretion to relieve him from the adverse situation which, while not due to his fault or mistake, was due neither to any misconduct of the jury nor error of the court. He had no absolute right to such relief, but merely to have the court exercise a judicial discretion whether it ought to be accorded him. The situation does not fall within any of those where it is held proper to grant the relief without terms, under the authorities on the subject above cited. We are brought to the conclusion, therefore, that the court committed no error in awarding new trial; but, whether it was granted because the verdict, as filed, was against the weight of evidence or was impugned by the affidavits of the jurors, error was committed in failing to impose reasonable terms as a condition. What those terms should be is a subject for consideration primarily by the trial court.

By the Court.—Plaintiff's appeal is dismissed. Upon defendant's appeal the order is reversed, and cause remanded with directions to embody in the order granting new trial the payment of reasonable terms by plaintiff as a condition.

191 SECTION 9. NEW TRIALS.

GUNN v. UNION RAILROAD CO.

*Appellate Division of the Supreme Court of Rhode Island.
1901.*

23 Rhode Island, 289.

ROGERS, J.—This suit is trespass on the case for negligence brought in the Common Pleas Division, wherein, upon a jury trial, the plaintiff obtained a verdict against the defendant for \$10,000; and thereupon the defendant brought it to this Division on a petition for a new trial on the ground, among others, that the verdict was against the law and the evidence and the weight thereof. On December 28, 1900, this Division filed its opinion granting the petition on the ground that the verdict was against the weight of the evi-

dence. See 22 R. I. 321. On the same day, to wit, December 28, 1900, the plaintiff moved that this Division dismiss the defendant's petition for a new trial and direct the Common Plea Division to enter judgment on the verdict of the jury in said action,—

"First. Because the record in said case shows that to grant a new trial on the grounds therein set forth would be in violation of the constitution of Rhode Island, and also of the constitution of the United States, to wit, of the fourteenth amendment to said constitution of the United States, wherein it is provided that no state shall 'deprive any person of life, liberty or property, without due process of law.'

"Second. Because the court in its opinion has 'granted the defendant's petition for a new trial' on grounds which the record shows deprive the plaintiff of his right to a trial by jury, and of his property, 'without due process of law.'"

At the time our State constitution went into operation section 5 of "An act to establish a Supreme Judicial Court" was in full force, which gave that court the power to grant new trials in cases decided therein or in any Court of Common Pleas for various reasons specified; and said section contained this clause, viz.: "and the said court shall also have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have been usually granted at common law." Digest of 1822, p. 109.

It is clear that our ancestors prior to our present State constitution found trial by jury so fallible that it was necessary to provide for more than one trial. In England as well as in the older States of America, two hundred years ago, trial by jury was in a state of evolution. The old law of attaints against a jury as a means of reversing a verdict against the evidence was apparently obsolete both in England and in this country before the American Revolution. Note to *Erving v. Cradock*, Quincey, 560, by Horace (Mr. Justice) Gray.

Sir William Blackstone, writing in or about 1765 (3 Com. Chitty's ed., 388-392), says: "Formerly the principal remedy, for reversal of a verdict unduly given, was by writ of attaint. * * * But such a remedy as this laid the injured party under an insuperable hardship by making a conviction of the jurors for perjury the condition of his redress. The judges saw this; and therefore very early,

even upon writs of *assise*, they devised a great variety of distinctions, by which an attaint might be avoided, and the verdict set to rights in a more temperate and dispassionate method. * * * When afterwards attaints, by several statutes, were more universally extended the judges frequently, even for the misbehavior of jurymen, instead of prosecuting the writ of attaint, awarded a second trial: and subsequent resolutions, for more than a century past, have so amplified the benefit of this remedy, that the attaint is now as obsolete as the trial by battle which it succeeded; and we shall probably see the revival of the one as soon as the revival of the other. * * * If every verdict was final in the first instance, it would tend to destroy this valuable method of trial, and would drive away all causes of consequence to be decided according to the forms of imperial law, upon depositions in writing, which might be reviewed in a course of appeal. * * * The jury are to give their opinion *instanter*; that is, before they separate, eat, or drink. And under these circumstances the most intelligent and best intentioned men may bring in a verdict, which they themselves upon cool deliberation would wish to reverse.

"Next to doing right, the great object in the administration of public justice, should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of bystanders, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive: he would arraign the determination as manifestly unjust, and abhor a tribunal which he imagined had done him an injury without a possibility of redress.

"Granting a new trial, under proper regulations, cures all these inconveniences, and at the same time preserves entire and renders perfect that most excellent method of decision, which is the glory of the English law. A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party, as if it had never been heard before. * * *

"Nor is it granted where the scales of evidence hang nearly equal; that which leans against the former verdict ought always very strongly to preponderate."

Bright v. Eynon, 1 Burr. 390, decided in the King's bench in 1757, was a motion for a new trial upon which the judges

gave their opinion, granting the new trial, *seriatim*. Lord Mansfield, *inter alia*, said, page 393,—“Trials by jury, in civil cases, could not subsist now without a power somewhere, to grant new trials. If an erroneous judgment be given in point of law, there are many ways to review and set it right. Where a court judges of fact upon depositions in writing, their sentence or decree may, many ways, be reviewed and set right. But a general verdict can only be set right by a new trial; which is no more than having the causes more deliberately considered by another jury, where there is a reasonable doubt, or perhaps a certainty, that justice has not been done.

“The writ of attaint is now a mere sound in every case: in many it does not pretend to be a remedy. There are numerous causes of false verdicts, without corruption or bad intention of the jurors. They may have heard too much of the matter before the trial, and imbibed prejudices without knowing it. The cause may be intricate; the examination may be so long as to distract and confound their attention. * * *

“If unjust verdicts obtained under these and a thousand like circumstances, were to be conclusive forever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely necessary to justice, that there should upon many occasions, be opportunities of reconsidering the cause by a new trial. * * *

“It is not true ‘that no new trials were granted before 1655,’ as has been said from Style, 466.”

After referring to *Slade’s* case, which was in 1648, reported in Style, 138, and to *Wood v. Gunston*, in 1655, Style 466, Lord Mansfield proceeds: “The reason why this matter cannot be traced further back is, ‘that the old report-books do not give any accounts of determinations made by the court upon motions.’

“Indeed, for a good while after this time, the granting of new trials was holden to a degree of strictness, so intolerable, that it drove parties into a court of equity, to have, in effect, a new trial at law, of a mere legal question, because the verdict, in justice, under all the circumstances, ought not to conclude; and many bills have been retained upon this ground, and the question tried over again at law, un-

der the direction of a court of equity. And therefore of late years the courts of law have gone more liberally into the granting of new trials, according to the circumstances of the respective cases. And the rule laid down by Lord Parker, in the case of the *Queen against the corporation of Helston*, H. 12 Ann. B. R. (Lucas, 202) seems to be the best general rule that can be laid down upon this subject; viz. 'Doing justice to the party,' or in other words 'attaining the justice of the case.'

"The reasons for granting a new trial must be collected from the whole evidence, and from the nature of the case considered under all its circumstances."

Mr. Justice Denison concurring, added "that it would be difficult perhaps to fix an absolutely general rule about granting new trials, without making so many exceptions to it as might rather tend to darken the matter than to explain it; but the granting a new trial, or refusing it, must depend upon the legal discretion of the court, guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice."

* * * * *

Other cases in which new trials were granted in England prior to the American Revolution, are *Berks v. Mason*, Sayer, 264, decided in 1756; *Goodtitle v. Clayton*, in 1768, 4 Burr. 2224; and *Norris v. Freeman*, in 1769, 3 Wil. 38. In *Marsh v. Bower*, 2 Black. W. 851, heard in 1773, the action was for words spoken, and the words were fully proven on the trial, but the jury found for the defendant. The court refused a new trial solely on the ground of triviality, declaring "that they would not grant a new trial for the sake of sixpence damages, in mercy to the plaintiff as well as the defendant."

* * * * *

The plaintiff in the case at bar contends that it was an essential provision of the common law that motions for new trials should be addressed to the trial court. One judge, however, as we understand it, went upon circuit, and the judges *in banc* sat upon motions for a new trial, and though the opinion of the judge that sat on the jury trial was listened to with much respect, yet it was not final; otherwise there would have been no reason for the others sitting and going through the idle form of expressing their opinions as they were wont to do. Reference to the old cases hereinbe-

fore cited seems to show that. In *Marsh v. Bower, supra*, the report of the case says: "Lord Mansfield, who tried the cause on the Home Circuit, reported," &c., but "The court unanimously declared," etc.

* * * , * * * * *

In 16 A. & E. Enc. of Law (1st ed.), 618, is the following statement, viz.: "In the absence of statute regulations, the general rule is that an application for a new trial must be addressed to the court in which the cause was tried, and under circumstances rendering it necessary, it may be made to the judge who presided at the trial, during vacation. This rule is particularly applicable, and of nearly universal application in case of motions for new trial for errors of fact. Where a judge dies or goes out of office, however, his successor may entertain the motion, and where a cause has been transferred from one district to another by a change of lines or otherwise, such a motion may be heard by the proper tribunal in the new district, while power to entertain such motions has been conferred by statute in many and perhaps all of the states upon courts other than those in which the trial took place, in cases and under circumstances and conditions differing greatly in the different states."

In 3 Waterman on New Trials, 1214, is this statement, viz.: "Notwithstanding, however, the evident want of qualification of the Appellate Court to form a correct opinion as to the conformity of the evidence with the verdict, in this country it is generally permitted to exercise a discretion in the premises."

Our statute provides that a new trial by jury may be granted "for reasons for which a new trial is usually granted at common law." We have already expressed the opinion that the verdict's being against the weight of the evidence was a common-law reason at the time of the adoption of our State constitution; but while *reasons* are prescribed, methods of procedure are not, and it seems to us utterly unreasonable to try to stretch the application of the word *reasons*, to methods of procedure, so that in the lapse of years, reaching it may be to centuries, no change, or development, or improvement, no adaptation to altered conditions or circumstances, can be made or permitted without making unconstitutional the very same reasons that are still being adhered to.

Granting a new trial is exercising a discretion, and, with us, as in many other States, is a power not confided to a single justice. The exercise of that discretion, when depending upon the weight of the evidence, necessitates some knowledge of the evidence, and in this State that knowledge is furnished by a stenographic report of the evidence—questions, answers, and rulings—typewritten out at length, made by a sworn officer of the court and verified by the allowance of the justice presiding at the jury trial, or, if that be not possible, then verified by affidavit. In this way all the judges have equal opportunities of judging of the evidence, and are not dependent upon the prejudices or peculiarities of any one man; and, as they will not grant a new trial because of the verdict being against the weight of the evidence, unless it is against a clear and decided preponderance thereof, if they have any question in the matter they will invariably sustain the verdict. Though the justice presiding at a jury trial has some opportunity, perhaps, of weighing the evidence, that other justices have not, yet he is also subjected to greater probability of having prejudices awakened, so that in some states the disadvantages are deemed to outweigh the advantages of his sitting on a petition for a new trial, and, in this State, it is provided by statute, that “no justice shall sit in the trial of any cause * * * in which he has presided in any inferior court, or in any case in which the ruling or act of such justice sitting alone or with a jury is the subject of review, except by consent of all the parties.” Gen. Laws R. I. cap. 221, s. 4.

* * * * *

In our opinion it is not necessary in order not to contravene the constitution either of this State or of the United States that the justice presiding at the jury trial should first pass upon the question whether the verdict is against the weight of the evidence, or that he should sit with the court required to pass upon that question in granting a new trial for that reason.

We are of the opinion that this court has the constitutional right to grant a new trial in a civil case when in its opinion the verdict is against the weight of the evidence, and that granting such new trial in the case at bar, would not be a violation of the constitution either of this State or of the United States. The plaintiff's motion, therefore, that

this Division dismiss the defendant's petition for a new trial and direct the Common Pleas Division to enter judgment on the verdict of the jury in this action, is denied.¹¹

¹¹ "A *venire facias de novo* and a new trial, are very different things, though alike in some points. They differ in this: that the *venire facias* is the ancient proceeding of the common law; the new trial is a modern invention to mitigate the severity of the proceeding by attaint. New trials are usually granted where a general verdict is found, a *venire de novo* upon a special verdict. The most material difference between them is, that a *venire de novo* must be granted upon matters appearing upon the record; but a new trial may be granted upon things out of it: as if the verdict be contrary to evidence, or the judge has given wrong instructions."—Chief Justice Willis, in *Witham v. Lewis*, 1 Wils. 48, 55.

"Under a writ of attaint the inquiry was made by a jury, double the number of those who rendered the alleged false verdict, and if they found the verdict a false one, the judgment of the common law was, that the jurors should become infamous; should forfeit their goods and the profits of their lands; should themselves be imprisoned, and their wives and children thrown out of doors; should have their houses razed, their trees extirpated, and their meadows plowed; and that the plaintiff should be restored to all that he lost by reason of the unjust verdict."—3 Blackstone Com. 404.

The best account of the attaint is found in two articles by John M. Zane, *The Attaint*, I, II, 15 Mich. Law Rev. 1, 127.

"The new trial is here, as everywhere, a new trial of the facts, and is in no sense a new trial of the law. The error of law has been tried upon the motion and has been decided by the court in deciding to grant the new trial. The new trial, when granted, is no longer a trial of the law, but solely of the fact."—*Zaleski v. Clark*, 45 Conn. 397.

English Practice. Order 39, rule 1 provides that every motion for a new trial shall be by way of appeal to the Court of Appeal, and rule 2 provides: "No judge shall sit on the hearing of any motion for a new trial in any cause or matter tried with a jury before himself."

192 *False*

CALDWELL v. WELLS.

Supreme Court of Idaho. 1909.

16 Idaho, 459.

STEWART, J. * * * A notice of intention to move for a new trial was served as follows:

"Take notice, that plaintiff, J. W. Caldwell, intends to move the above-named court to vacate and set aside the judgment rendered in the above-entitled cause, and to grant

a new trial of said cause, upon the following grounds, to wit:

* * * * *

"3. Insufficiency of the evidence to justify the judgment.

"4. That the judgment is against the evidence.

"5. That the judgment is against the law.

* * * The motion for a new trial was overruled and the plaintiff appeals from the judgment and from the order overruling the motion for a new trial.

* * * * *

* * * An application for a new trial is directed to the verdict of the jury or the decision of the court. The verdict and the decision are supposed to be based upon the facts. The judgment is based upon the verdict, or the decision or findings of the court. If the verdict or findings of the court do not support the judgment, the remedy is not by moving for a new trial. If, however, the verdict or decision of the court are not supported by the evidence, then the remedy is to move for a new trial and this requires a re-examination of the issue of fact. When a new trial is granted, the finding or verdict is set aside, in which case the judgment must also fall. * * *

In other words, the motion should have been directed to the decision of the court, rather than the judgment. Whether the judgment is correct cannot be determined upon a motion for a new trial; whether the decision of the court as contradistinguished from the judgment, was correct, could have been determined upon motion for a new trial, had such matter been specified as a reason for granting such new trial. * * *

For these reasons the judgment is affirmed. Costs awarded to respondent.

1.9 *John*
SIMMONS v. FISH.

Supreme Judicial Court of Massachusetts. 1912.

210 Massachusetts, 563.

RUGG, C. J. The single question presented by these exceptions is whether the superior court had the power (before the passage of St. 1911, c. 501, expressly conferring it) in setting aside a verdict, returned by a jury for the plaintiff in an action to recover compensation for a personal injury on the ground of inadequacy of damages, to direct that at the new trial damages shall be the only issue, and that the other questions shall be treated as settled in favor of the plaintiff.

There can be no doubt as to the power of the court at common law to set aside a verdict as a whole for insufficient as well as for excessive damages. *Sampson v. Smith*, 15 Mass. 365-367; *Taunton Manufacturing Co. v. Smith*, 9 Pick. 11; *Clark v. Jenkins*, 162 Mass. 397, 38 N. E. 974; *Shanahan v. Boston & Northern St. Ry. Co.*, 193 Mass. 412, 79 N. E. 751; *Phillips v. London & South Western Ry. Co.*, 4 Q. B. D. 406, 5 Q. B. D. 78; *Johnston v. Great Western Ry. Co.*, [1904] 2 K. B. 250-255. It is a constitutional incident of trial by jury, which cannot be taken away by legislative action, that the assistance and protection of the presiding judge shall be available to the litigants in setting aside verdicts not so supported by law and evidence that they ought to stand. *Opinion of Justices*, 207 Mass. 606, 94 N. E. 846; *Capital Traction Co. v. Hof*, 174 U. S. 1-13, 19 Sup. Ct. 580, 43 L. Ed. 873. The ancient common law doctrine that a verdict of a jury was single and indivisible and must stand or fall as a whole was early modified by the custom of this commonwealth, as is pointed out in *Bicknell v. Dorion*, 16 Pick. 478, 483, where a verdict was set aside as to one of several defendants. The practice has prevailed for many years in this court of awarding a new trial upon a single point where the error committed in the trial court was of a kind which could be readily separated from the general issues, and applied without injustice to one matter.

In *Winn v. Columbian Insurance Co.*, 12 Pick. 279, a plaintiff, in an action upon a policy of insurance, dissatisfied with

the amount of the verdict, was restricted upon a new trial, to which he was held to be entitled, to damages alone.

In *Boyd v. Brown*, 17 Pick. 453, 461, which was an action for trespass for carrying away a schooner, the verdict was held to be for an excessive amount, and the new trial was confined to damages alone.

Robbins v. Townsend, 20 Pick. 345, was an action to recover for the support of a pauper by the keeper of a house of correction. During the trial an error was committed in admitting evidence of the official character of the plaintiff. The court, in sustaining the exceptions, said: "There having been a full and legal trial on the merits as to the other parts of the case, and the question of the appointment of the plaintiff as master of the house of correction being entirely disconnected with the other questions raised, and one which in no way could have had any influence upon the finding of the jury upon those questions, the new trial is limited to this particular point. In cases like the present, substantial justice may be done without disturbing the verdict generally, by submitting to a new jury the question, in reference to which, evidence was erroneously admitted." The money element established by the first trial and that as to the settlement of the pauper were left undisturbed. *Sprague v. Bailey*, 19 Pick. 436, was an action against a collector of taxes for taking personal property in levying a tax. Error was committed by the trial court touching proof whether the defendant had been duly sworn as collector, and the new trial was confined to that single issue and those necessarily dependent upon it, while other matters were left as settled by the first verdict. In *Amherst Bank v. Root*, 2 Metc. 522, the only exception which was sustained related to the execution of a bond, and the court confined the new trial to the ascertainment of that fact alone. The only error committed by the trial court in *Hubbell v. Bissell*, 2 Allen, 196, 201, concerned one of several defendants, and bore upon the single ground of defense of mental incompetency, and the court granted a new trial only upon condition that it should be confined to that single issue, the facts found by the first verdict to stand in other respects. In *Seccomb v. Provincial Insurance Co.*, 4 Allen, 152, there were actions upon policies of marine insurance. In the trial court, after verdict for the plaintiffs, a new trial was granted solely for the pur-

pose of submitting to another jury the question whether, according to the usage of commerce, Smyrna was a port in Europe, in all other respects the plaintiffs being held entitled to retain the benefits of the findings of the verdict in their favor. By reason of the conduct of parties, it was held that a new trial upon all issues, was open, but by inference the restriction of the new trial to the single point was approved. *Wayland v. Ware*, 109 Mass, 248, was an action to recover for the support of a pauper. The only error committed by the trial court related to evidence, whether one Davis was credited to the defendant town as a part of its quota of enlistments in the Civil War. In sustaining the exceptions, the court restricted the new trial to that part of the case which had been affected by this error, and outlined alternative forms of judgment to be thereafter entered dependent upon the finding of that fact at the new trial. *Warshauer v. Jones*, 117 Mass. 345, was a writ of entry to recover one tract of land consisting of a passageway and a strip of land. Error was committed during the trial, and the court directed a verdict to stand as to the passageway, which was not affected by the error of the trial court, and that the new trial, be restricted to the rest of the demanded premises. * * *

Dulligan v. Barber Asphalt Co., 201 Mass. 227, 233, 87 N. E. 567, was an action in two counts, the first to recover for the death, and the second for the conscious suffering, of an employè of the defendant under R. L. c. 106. A mistake of the trial court touching the first count was not permitted to disturb the verdict in favor of the plaintiff upon the second count. * * *

This review of our cases demonstrates that this court continuously from early times has exercised the power of narrowing a new trial to specific points in cases where the error committed at the trial was so limited in character as with justice to both parties to be separable from the other issues determined by the first verdict. It has done this as a part of its inherent judicial authority, and not under any statute. It has exercised the power in a great variety of cases touching divers kinds of issues involved in general verdicts. The guiding principle is that, although a verdict ought not to stand which is tainted with illegality, there ought to be but one fair trial upon any issue, and that parties

ought not to be compelled to try anew a question once disposed of by a decision against which no illegality can be shown. Thus the parties and the commonwealth have been saved the expense, annoyance and delay of a retrial of issues once settled by a trial as to which no reversible error appears. * * *

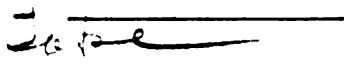
It is a power which ought to be exercised with great caution, with a careful regard to the rights of both parties, and only in those infrequent cases where it is certain and plain that the error which has crept into one element of the verdict by no means can have affected its other elements. But when a proper occasion clearly exists, it is in the interests of justice to exercise the power. There is nothing inconsistent with this view in the decision of *Timpany v. Handrahan*, 198 Mass. 575, 85 N. E. 183. The language of the opinion that there can be "no division of a verdict by a judge in such a way that it shall stand in that part which is satisfactory to him and shall be canceled in that part with which he is dissatisfied" was used in deciding the narrow point of practice then under discussion. A verdict cannot be divided, but it can be set aside as a whole and an order entered that at the new trial where a final verdict shall be rendered the range of inquiry as to facts shall be limited to issues less than those open upon a general trial. No sound distinction in this regard can be made between a verdict in which excessive damages have been returned and one in which inadequate damages have been awarded. Indeed, it is said in the *Opinion of the Justices*, 207 Mass. 606, 609, 94 N. E. 846, 848, referring to a proposed statute in terms limiting a new trial to the question of damages alone, when that is the sole ground for granting a new trial: "In substance the section is in accordance with the general practice to grant a new trial upon the question of damages only, if the verdict is satisfactory in all particulars as a determination of the liability."

It is undoubtedly true that in England there can be no limitation of a new trial to specific issues without consent of both parties. There a new trial means a new trial as to all issues, unless by agreement of parties. *Watt v. Watt*, [1905] A. C. 115, overruling *Belt v. Lawes*, 12 Q. B. D. 356, a contrary decision in the court of appeal. The great weight of authority in this country supports the conclusion we have

reached. *Lisbon v. Lyman*, 49 N. H. 553, 582 to 605; *Lake v. Bender*, 18 Nev. 361, 369-381, 4 Pac. 711, 7 Pac. 74; *Duff v. Duff*, 101 Cal. 1, 5, 35 Pac. 437; *San Diego Land & Town Co. v. Neale*, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; *Woodward v. Horst*, 10 Iowa, 120; *Ramsdell v. Clark*, 20 Mont. 103, 49 Pac. 591; *Schlitz Brewing Co. v. Ester*, 86 Hun. 22, 33 N. Y. Supp. 143; *Lavelle v. Corrignio*, 86 Hun. 135, 33 N. Y. Supp. 376; *Laney v. Bradford*, 4 Rich. (S. C.) 1; *Walker v. Blassingame*, 17 Ala. 810 (see *Edwards v. Lewis*, 18 Ala. 494); *Zaleski v. Clark*, 45 Conn. 397, 404; *McKay v. New England Dredging Co.*, 93 Me. 201, 44 Atl. 614; *Treat v. Hiles*, 75 Wis. 265, 276, 44 N. W. 1088 (see *Hutchinson v. Piper*, 4 Taunt. 555); *Burnett v. Mills Co.*, 152 N. C. 35, 41, 67 S. E. 30; *Goss v. Goss*, 102 Minn. 346, 113 N. W. 690; *Fry v. Stewart*, 98 Va. 417, 36 S. E. 482; *More-Jonas Glass Co. v. West Jersey & Sea Shore R. R.*, 76 N. J. Law, 9, 69 Atl. 491; *Clark v. N. Y., N. H. & H. R. R. (R. I.)* 80 Atl. 406; *Cramer v. Barmon*, 193 Mo. 327, 91 S. W. 1038.

Contra: *State v. Templin*, 122 Ind. 235, 23 N. E. 697; *Johnson v. McCulloch*, 89 Ind. 270; *Edwards v. Lewis*, 18 Ala. 494; *Seaboard Air Line Ry. v. Randolph*, 129 Ga. 796, 59 S. E. 1110; *Central of Georgia Ry. v. Perkerson*, 112 Ga. 923, 38 S. E. 365, 53 L. R. A. 210.

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194 
VALERIUS v. RICHARD.

Supreme Court of Minnesota. 1894.

57 Minnesota, 443.

COLLINS, J. At the trial of this cause, at the request of defendants' counsel, the court plainly charged the jury that, if they found a certain fact from the evidence, the defendants could not be held liable upon the note in suit. To this, counsel for plaintiff took no exception, nor was there even a suggestion that it was erroneous. The verdict being for defendants, a motion to set it aside, and for a new trial, was made by plaintiff's attorneys, on two grounds,—those specified in 1878, G. S. ch. 66, § 253, subd. 5th and 7th. Subsequently, and, as

stated by the court in its order, solely because there was no evidence which warranted that part of the charge referred to above, plaintiff's motion was granted.

* * * * *

The majority are of the opinion that, in civil actions, the power of the court to grant new trials is limited to the grounds prescribed in section 253, and that new trials for errors of law can only be granted when an exception has been taken. The statutory grounds for new trials are exclusive. Practically, this has oftentimes been held in this court, especially when considering motions made upon the ground that errors of law had occurred upon the trial, as witness the Minnesota cases before referred to. To permit a defeated party to have the benefit of an error of law not excepted to would be giving him a great advantage; and here we are asked to go further, and allow to a party who made no objection to the giving of the erroneous instruction, and thereby actually acquiesced in its pertinency and correctness, the benefit of the error. Manifest injustice would be the result, for, had even a suggestion been made that the court was not justified in this part of the charge, we have no doubt prompt correction would have followed. Our construction of the statute has been placed upon others substantially the same. See Hayne, New Trials, ch. 1, § 7; Id. ch. 16.

Order reversed.

BUCK, J., absent, sick, took no part.

CANTY, J. I dissent. Where the trial court has misstated the law in his charge, or charged propositions of law not applicable to the case, and he is of the opinion that in fact the jury was misled thereby, it is in his discretion to grant a new trial though no exception was taken, if, in his opinion, the taking of an exception would not have caused him to change his mind in time to obviate the mistake. In such a case the losing party has no standing at all, as a matter of right. It is merely an application for equitable relief, addressed peculiarly to the discretion of the trial court.

In New York this is carried so far as to hold that, on review at the general term of the rulings of the judge at the trial, the want of an exception is not necessarily fatal, but the general term may, in its discretion, reverse for error not saved by exception, on the ground that it is not, strictly speaking, exercising appellate jurisdiction, but has all the

discretionary powers of the trial court. Baylies, *New Trials & App.* 125; *Standard Oil Co. v. Amazon Ins. Co.*, 79 N. Y. 506; *Mandeville v. Marvin*, 30 Hun, 282; *Maier v. Homen*, 4 Daly, 168; *Lattimer v. Hill*, 8 Hun, 171; *Ackart v. Lansing*, 6 Hun, 476.

It is also in the discretion of the trial court to allow an exception after the jury has retired. *St. John v. Kidd*, 26 Cal. 267. If he has power to allow an exception after the proper time to take it, he has power to consider it taken for the purpose of a new trial.

This ground for new trial does not come under 1878, G. S. ch. 66, § 253, subd. 7, "Error in law occurring at the trial and excepted to by the party making the application," but under the first subdivision of that section, "Irregularity in the proceedings of the court, jury, referee or prevailing party or any order of the court or referee or abuse of discretion by which the moving party was prevented from having a fair trial."

The discretionary power exercised by the court below in this case is one which a trial court, having due regard for the rights of the prevailing party will seldom exercise. It is only when he is satisfied that in fact the particular mistake produced a wrong result and that the failure to except did not prejudice the prevailing party and where he is satisfied that his rulings would have been the same, and that nothing would have been done by him or the prevailing party in time to obviate the mistake even if an exception had been taken. Even viewed by this strict rule I cannot see that the order granting a new trial was an abuse of discretion, and hold that the order appealed from should be affirmed.

Since the above was written the majority opinion has been re-written. It is now admitted that at common law it was in the discretion of the trial court to grant a new trial for errors to which no exception was taken, but it is insisted that by the adoption of the Code this discretionary power has been cut off. It has seldom before been held that the discretionary power of a trial court of general jurisdiction has been cut off by the Code. The Code is a mere skeleton, and much of it merely declaratory of the common law. Especially is this true as to its provisions regulating practice. We do not look to it for the discretionary powers of the District Court, as we

do to the justice of the peace practice act for the discretionary power of that court. On the contrary, it is not unusual to look to the great sources of authority on common law and equity practice to ascertain what the discretionary powers of our District Court are.

The point is also now made for the first time that the motion for a new trial was not made on the grounds stated in the first sub-division of section 253, but on those stated in the fifth and seventh subdivisions. As to this I will say many able judges, in times past, have often set aside verdicts on their own motion, even before the ink was dry on them, and without any motion or grounds of motion being made or stated by the party at all; and the right to do so has hardly been questioned. At common law the trial court had the power to grant a new trial, no matter how informal the application for it might be, or how much the moving party had waived his technical rights by failing to take the proper exception, or to put the proper grounds, or any grounds at all, in his motion. When, as in the present case, a formal motion for a new trial is made, stating the grounds, it will not be presumed that it was granted on any grounds except those stated. It must affirmatively appear that it was granted on some other grounds which it does in this case. It is a new doctrine that a trial court of general jurisdiction has no discretion to brush aside technical informalities, and prevent injustice, by granting a new trial.

* * * * *

But the judge's powers and the applicant's rights are, in this respect, very different questions. The moving party not only fails to save his rights for review in the appellate court, by failing to make them appear of record, and to cover them in his grounds of motion, but he also runs the risk of having his motion denied on technical grounds, merely, by the trial court, which it usually will and ought to do. But notwithstanding this, in furtherance of justice, the trial court may relieve him from his laches, by giving him something which he asked for, but was not in a position to demand as of right. And when it affirmatively appears that the court, in granting him a new trial, has, in furtherance of justice, intentionally relieved him from his technical laches and omissions, it is merely a question whether or not, on common-law principles,

it has abused its discretion. In this case it seems to me that it has not.¹³

¹³ Holding that statutory grounds are not exclusive:—*Corley v. N. Y. & H. RR. Co.*, (1896) 12 App. Div. (N. Y.) 409; *Bottineau Land Co. v. Hintze*, (1911) 150 Ia. 646; *Contra*, *St. Louis & S. F. RR. Co. v. Werner*, (1904) 70 Kan. 190.

The usual grounds for new trial, as presented in *Waterman on New Trials*, are:—Want of Notice of Trial; Error in Summing and Drawing Jurors; Disqualification of Jurors; Tampering with the Jury; Bias or Hostility of Jurors; Misconduct of Jury; Misruling of Judge; Misdirection of Judge; Surprise; Newly Discovered Evidence; Error as to Damages; Verdict against Law; Verdict against Evidence; Improper Rendition of Verdict.

1937 June

LOFTUS v. METROPOLITAN STREET RAILWAY CO.

Supreme Court of Missouri. 1909.

220 Missouri, 470.

GRAVES, J. * * *

* * * After verdict was returned the defendant filed its motions for new trial and in arrest of judgment, which motions were by the court sustained by an order of record in this language: "Now on this day it is ordered by the court that the motion for a new trial and motion in arrest of judgment be and the same are hereby sustained because the court erred in giving instruction 'No. One P.' to which the plaintiff excepts."

* * * * *

II. The further contention is made that this court should not disturb the discretion exercised by the trial court in granting the new trial. In other words, that the granting of a new trial rests within the sound discretion of the trial court. In the broad sense, the granting of a new trial does rest within the sound discretion of the trial judge, and this discretion, like all judicial discretions, should not be disturbed when properly exercised. We are cited to the recent cases of *Rodan v. Railroad*, 207 Mo. l. c. 407, and *Seeger v. Silver Co.*, 193 Mo. l. c. 407, as stating correct rules upon the question.

In the latter case, Judge Marshall said: "The rule is now

well settled in this State that this court will not reverse the action of a trial court in granting one new trial, unless the case is such that no verdict in favor of the party to whom the new trial is thus granted, could, under any circumstances, be permitted to stand."

And in the former, Judge Lamm said: "In the first place, *in limine*, it must be assumed as a commonplace of the law, arising to the level of an axiom, that the granting of a new trial rests within the sound discretion of the trial court; and its action in that behalf will not be disturbed on appeal unless it appears that its discretionary power was abused, i. e., exercised in an arbitrary or improvident manner. (R. S. 1899, sec. 800; and see first note under that section, Ann. Stat. 1906, 761, where the authorities are gathered.)"

These announcements must be taken in the light of the facts of the cases. * * * Both of those cases announce the proper rule in cases where judicial discretion has been exercised as to the facts and the weighing of the evidence as to the facts. In such cases we will not disturb such discretion in a case wherein there is sufficient evidence to sustain a verdict in favor of the party for whom such discretion has been exercised. But these cases are not this case. Upon the facts of the case at bar a verdict for either party could be sustained, but the discretion of the trial judge was not directed to the facts, so far as the question now before us is concerned. He was passing judgment upon a clear question of law, and we have concluded that his judgment on that question was erroneous. When the judicial act is directed solely to a question of law and the act is erroneous, it does not fall within the rule of the exercise of sound judicial discretion. There is no discretion as to the law of a case. Nor can there be an exercise of a sound discretion as to the law of a case. So that when we speak of the granting of a new trial being within the sound discretion of the trial judge, we have no reference to a case where the new trial is granted solely upon the ground that the law has been erroneously given, when in fact it has been properly given.

* * * * *

¹³ The court's discretion will not be exercised in favor of granting a new trial where only nominal or trifling damages are involved.—York v. Stiles, (1899) 21 R. I. 225.

196 STAUFFER v. READING.
John

Supreme Court of Pennsylvania. 1903.

206 Pennsylvania State, 479.

Appeal from jury of view. Before Endlich, J.

From the record it appeared that the city of Reading appropriated one and one-half acres of plaintiff's land for the purpose of a boulevard. The boulevard was so located as to cut off three acres of plaintiff's land to the north, leaving about seven acres to the south of the boulevard.

Verdict for plaintiff for \$3,295.83.

On a rule for a new trial the court made the following order:

November 10, 1902. The rule to show cause is discharged, on condition that the plaintiff within thirty days from the date of entry of this order convey to the defendant, for park purposes, the tract lying north of the boulevard; otherwise, upon the expiration of said period, the rule to become absolute.

Plaintiff appealed.

* * * * *

MITCHELL, J.—The granting or refusing of a new trial except for causes like errors of law by the judge or misconduct of the jury, where it may be matter of right, is an exercise of judicial discretion by the court in furtherance of right and justice according to the circumstances of the case. Hence it is well settled that the court may impose terms upon either or both of the parties as conditions of the grant or refusal, and the latitude allowed to the discretion of the court to this end is very great. As each case must be determined on its own circumstances the causes cannot all be specified or enumerated beforehand, but in general as is said by the most prominent writer on the subject, "it may be safely asserted that no case can occur presenting circumstances timely addressed to the discretion of the court, in which the rights of the parties may not be fully protected by the imposition of conditions meeting the exigency." Graham on New Trials, 610.

Large as the discretion is, however, it is a judicial discretion and must be used with reference to the rights involved in the controversy. The conditions imposed therefore must

have some direct relation to the issue between the parties in the case.

The condition complained of in the present proceeding transgresses this limit. The conveyance of the three acres was not asked for by the city nor offered by the appellant. Whatever its merits as a just or wise settlement between the parties, it was not apparently desired by either, and was certainly no part of the issue which they brought into court to have decided. In imposing it as a condition of the refusal of a new trial therefore, the court exceeded its discretionary authority.

Judgment reversed, and record remitted with directions to reinstate the rule for new trial and proceed to dispose of it according to law.¹⁴

¹⁴ Conditions of various kinds may be imposed for granting or refusing a new trial, the most common being payment of costs or expenses.—North Center Creek M. & S. Co. v. Eakins, (1880) 23 Kan. 317; Brooks v. San Francisco & N. P. Ry. Co., (1895) 110 Cal. 173; Cohen v. Krulewitch, (1902) 77 App. Div. (N. Y.) 126.

1972
GILA VALLEY, GLOBE & NORTHERN RAILWAY CO. v.
HALL.

Supreme Court of the Territory of Arizona. 1911.

13 Arizona, 270.

CAMPBELL, J. Appellee was in the employ of appellant as chainman. On April 23, 1907, he was engaged with another employee, named Ryan, in measuring distances, locating mile-posts on appellant's line of railway. For that purpose they used a three-wheeled velocipede furnished by appellant. This velocipede was of the kind ordinarily used in work of this character, with a gasoline engine for motive power. It had two wheels on the right-hand side, over which was the engine, and a seat for the use of the operator, and a seat in front for another person. The third wheel was a small wheel on the left-hand side, nearly opposite the front wheel on the right-hand side, and fastened to the machine by a bar extending across the track. On the day mentioned, Hall and Ryan were

upon this velocipede on plaintiff's line of railway, Ryan operating the machine and Hall sitting in front. While the velocipede was going at a speed of from eight to twelve miles an hour, it suddenly left the track, going to the left, the side on which was situated the one small wheel. Hall was thrown in front of it and run over, sustaining severe injuries. This action was brought against the railroad company to recover damages for the injuries so received, it being alleged that the flange on the third or small wheel was worn and cracked, and that by reason of such condition the machine left the track, and that the company was negligent in furnishing such velocipede. Appellant answered, denying the negligence alleged, pleading contributory negligence, and that Hall knew or might have known the condition of the velocipede and assumed the risk of the injuries resulting from the alleged defect. The jury returned a verdict for \$10,000. A motion for a new trial was made, and prior to its determination Hall voluntarily remitted \$5,000 from the amount of the verdict. Thereafter, the court denied the motion for a new trial and entered judgment in favor of the plaintiff for \$5,000 and costs. From this judgment and from the order denying the motion for new trial, the railway company appeals.

* * * * *

The remaining important question in the case is whether the court erred in rendering judgment for the amount of the verdict less the sum remitted by the appellee. It is insisted by appellant that the court should have granted a new trial for the reason that it is beyond the power of a court to permit a *remittitur* where the damages are unliquidated and the verdict excessive. The question has heretofore been before this court * * * *Southern Pacific Co. v. Tomlinson*, 4 Ariz. 126, 33 Pac. 710, was an action to recover damages for death by wrongful act, under a statute permitting the jury "to give such damages as they may think proportioned to the injuries resulting from said death." A verdict for \$50,000 was returned, from the which the plaintiff remitted \$31,998, and judgment was entered for the remainder. The power of the trial court to permit the *remittitur* was questioned, but it was held: "A trial court has the power, where excessive damages have been allowed by the jury, and where the motion to set aside the verdict is based upon this ground, to make a remission a condition precedent to overruling the motion.

The exercise of this power rests in the sound discretion of the court. This doctrine is affirmed in the case of *Cattle Co. v. Mann*, 130 U. S. 74, 9 Sup. Ct. 458, 32 L. Ed. 854; also in *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755. Of course, if it is apparent to the trial court that the verdict was the result of passion or prejudice, a *remittitur* should not be allowed, but the verdict should be set aside. In passing upon this question, the court should not look alone to the amount of damages awarded, but to the whole case, to determine the existence of passion or prejudice, and to determine how far such passion or prejudice may have operated in influencing the finding of any verdict against the defendant. When the circumstances, as they may appear to the trial court, indicate that the jury deliberately disregarded the instructions of the court, or the facts of the case, a *remittitur* should not be allowed, but a new trial should be granted. If they do not so indicate, and the plaintiff voluntarily remits so much of the damages as may appear to be excessive, the court, in its discretion, may allow the remission and enter judgment accordingly."

It is argued that to permit a *remittitur*, or to require it as a condition of refusing a new trial, is to substitute the court's judgment for that of a jury, to the latter of which the defendant is entitled. But it is to the jury's judgment that defendants object when they appeal to the court for new trials on the ground of excessive verdicts. The trial court has undoubted power to determine whether the verdict is or is not excessive, and in considering the question usually determines in its own mind the maximum amount for which a verdict could with propriety be permitted to stand. Where there has been no error of law committed which would require a retrial, and it appears that the excessive verdict has resulted from too liberal views as to the damages sustained, rather than from prejudice or passion, to permit a remission of the excess, instead of putting the parties to the expense of a new trial, promotes justice and puts an end to the litigation. Of course, if it appears that the verdict is tainted by prejudice or passion, and does not represent the dispassionate judgment of the jury upon the question of the right of the plaintiff to recover, a new trial should be granted. But we think that the trial court is in a better position to determine whether the verdict is so tainted than is this court, and that unless it

clearly appears from the record that the excessive verdict resulted from prejudice or passion, rather than from that liberality which jurors sometimes exercise in cases which appeal to men's sympathies, we should accept the trial court's determination. The trial court in this case has determined that the jury was not influenced by passion or prejudice, and we see no reason for not accepting its conclusion.

Other rulings of the court are assigned as error and have received our consideration, but they are not of sufficient importance to warrant discussion here. We find no reversible error in the record, and affirm the judgment of the district court.¹⁵

¹⁵ This decision was sustained and the views here stated were approved, on appeal to the United States Supreme Court, (1913) 232 U. S. 94.

198 Circuit
FORT WAYNE & BELLE ISLE RAILWAY CO. v. WAYNE
CIRCUIT JUDGE.

Supreme Court of Michigan. 1896.

110 Michigan, 173.

MONTGOMERY, J. One Emma L. Long brought an action against the relator for personal injury, and, on a trial before a jury, recovered a verdict of \$800. The respondent, deeming this award insufficient, set aside the verdict, and ordered a new trial. The relator asks for a writ of *mandamus* directing that this order be set aside.

The counsel for relator concede that the court might, for an error of its own commission on the trial, order a new trial on its own motion, but contend that the court has no such control over verdicts of juries, and can only vacate such verdicts on application of one of the parties. We think the practice in this State has been otherwise, from its earliest history, and although the exercise of this power has been very rare, there have been instances of it. That these instances must, of necessity, be infrequent, naturally results from the recognized impropriety of a trial judge interposing his own judgment, as against that of a jury, except in a clear case. But

in such case the court possesses the power, at common law, to grant a new trial on its own motion; and in our opinion the power is not limited to cases where the error is that of the court, or where there is misconduct of the jury, as contended by relator's counsel, and as appears to have been held by the supreme court of Texas in *Lloyd v. Brinck*, 35 Tex. 1. As sustaining the broader power, as a common-law power, see 2 Thomp. Trials, § 2711, and cases cited,—particularly, *State v. Adams*, 84 Mo. 313.

Having determined that Judge Donovan had the power to set aside this verdict, it follows that his discretion must control his action, except in a case of clear abuse of such discretion, which we do not find in this case.

The writ will be denied.

HOOKE and MOORE, JJ., concurred. LONG, C. J., did not sit. GRANT, J., took no part.¹⁶

¹⁶ *Hensley v. Davidson Bros. Co.*, (1907) 135 Ia. 106, demonstrates the same doctrine with citation of many cases.

MEHNERT v. THIEME.

Supreme Court of Kansas. 1875.

15 Kansas, 368.

BREWER, J.: The plaintiffs in error were sued upon a promissory note. Mehnert filed an answer in person, alleging part payment to the amount of \$166.10, and that after the maturity of the note he and his co-defendant had given a mortgage due in twelve months as security, and that this time had not passed. They made no appearance at the trial, and judgment was rendered for the face of the note and interest. On the same day they, by an attorney, filed a motion to vacate the judgment, and grant them a new trial, on the ground that they were prevented from making their defense by "accident, which ordinary prudence could not have guarded against, and unavoidable misfortune." This motion was overruled, and this is the error complained of. Mehnert's affidavit was the only testimony offered upon said motion.

He testified that he filed the answer, and that it was true; that he lived twelve miles from Fort Scott, where the court was in session; that he had a large amount of stock, and no male help on his place, and was consequently obliged to be home every night; that in order to be present in court in time on that morning he rose between three and four o'clock, attended to his home duties, and started with his team for Fort Scott between five and six o'clock, drove with all possible dispatch, and made no stoppages on the road; that he reached the court-house about ten o'clock and found that the case had been called and disposed of a few minutes prior thereto; that the delay in driving in was caused by the bad almost impassable condition of the roads. Was this accident which ordinary prudence could not have guarded against, or unavoidable misfortune? It does not appear that the roads were for that season of the year, December, exceptionally bad, or that by an unexpected change in the weather they had become suddenly bad, or that Mehnert did not by frequent travel have full knowledge of their actual condition. At that time, it is no uncommon thing for country roads to be very rough, and in very bad condition. Common prudence would dictate that one who was acting as an attorney, and attending to business in court then in session, should not run the risk of getting into court in the morning over such roads from a remote part of the county. The real difficulty was, that Mehnert was attempting to perform the double part of suitor and attorney. While this is perfectly proper, yet whoever attempts it subjects himself to the obligations and liabilities of both. It is the duty of an attorney having business in court to be present during its sessions. There is his business; there is his work. Oftentimes that which will excuse the absence of a suitor, will come far short of excusing the absence of his attorney. Now, Mehnert, was acting as an attorney, intrusted with business in the court then in session. Instead of employing some one to take care of his stock on his farm, and being himself in readiness to attend to his case, he is with full knowledge of his great distance from the court-house, and the almost impassable condition of the roads, attempting to take care of both stock and lawsuit. He succeeded in the former, but failed in the latter, and failed simply from omitting the ordinary precautions which men take under similar circumstances. *Hill v. Williams*, 6 Kas. 17.

The judgment will be affirmed.

200 UNITED STATES v. CHRISTENSEN.

Supreme Court of the Territory of Utah. 1890.

7 Utah, 26.

ANDERSON, J. The defendant was indicted for unlawful cohabitation, and was tried and convicted. He moved for a new trial upon the ground, among others, of misconduct of the jury tending to prevent a fair and due consideration of the case, based upon affidavits showing that one John Harris, who was one of the petit jury which convicted him, was on the grand jury which found the indictment, and that the fact was not known to him or his counsel until after the verdict, and that the juror stated falsely on his *voir dire* that he had not formed or expressed an unqualified opinion as to the guilt or innocence of the accused of the offense charged. The motion was sustained, and a new trial granted, and the United States excepted to the ruling of the court, and now prosecutes this appeal from the order of the court granting a new trial. When the juror Harris was called, he was sworn on his *voir dire*, and interrogated by defendant's counsel as follows: "Do you know the defendant? Do you know any of the witnesses named on the back of the indictment? Have you talked with any person regarding this case? Have you ever formed or expressed an opinion as to the guilt or innocence of the defendant?" To each of these questions he answered in the negative, and was accepted as a juror in the case.

The only question to be determined is whether the court erred in sustaining the motion for a new trial. In the case of *People v. Reece*, 3 Utah, 72, 2 Pac. Rep. 61, it was held that where a juror falsely stated, upon examination under oath as to his qualifications as a juror, that he was a citizen of the United States, and neither of the defendants knew or had reason to believe until after verdict that he was not a citizen, the defendants could not be deemed to have waived their right to a jury of twelve men possessing the qualification of citizenship, and, being guilty of no negligence or want of watchfulness, were entitled to have the verdict set aside, and a new trial granted. In *People v. Lewis*, 4 Utah, 42, 5 Pac. Rep. 543, the defendant was convicted of grand larceny. One of

the trial jury which convicted him was a member of the grand jury which found the indictment against him. Neither the defendant nor his counsel knew this until after the verdict. The defendant moved for a new trial, which was overruled, and the ruling was affirmed in this court upon the ground of the defendant's negligence in not making sufficient inquiries as to the qualifications of the jurors. The jurors were sworn on their *voir dire*, and interrogated as to their statutory qualifications, to which no answer was given. Counsel for defendant then examined the jurors as follows:

"Are you acquainted with the defendant, Walter Lewis here? Have any of you heard so much about his case as to form or express an opinion, an unqualified opinion, concerning his guilt or innocence? If any of you have, make it known. I will not put questions directly to each of you." The jurors were then asked if any of them were related to the prosecuting witness, and if they had formed or expressed an opinion from anything they had heard him say, and he added: "You don't seem to answer, and I will not put the question to any of you particularly." No statement of the facts constituting the alleged offense was made to the jurors, and hence, the court say, the jurors could not well have known whether they had an opinion as to the guilt or innocence of the defendant or not, and that, taking into consideration the timidity and apparent unwillingness of many jurors to answer questions unless they are individually interrogated, it is not surprising that there was no response to the questions of defendant's counsel. The court was of the opinion that interrogating the jurors in such a general way was such negligence that the defendant could not, after an unfavorable verdict, successfully move for a new trial, when, with the proper diligence, good ground for a challenge of the juror would have been discovered. The court said, however, that "an express unqualified answer that the juror is a citizen, or that he has not formed or expressed an opinion as to the guilt or innocence of the accused, is sufficient to relieve the defense from further investigation unless there is something to put the party upon further inquiry." In the present case the defendant's counsel asked the juror whether he had formed or expressed an opinion as to the guilt or innocence of the defendant, and he answered that he had not, and under the ruling in *People v. Lewis, supra*, the defendant was not bound

to pursue the investigation further. It is not shown that the juror Harris had formed or expressed an unqualified opinion as to the guilt or innocence of the defendant further than the fact that he was one of the grand jury that found the indictment against him, and as to this fact he was not interrogated. The case of *Rice v. State*, 16 Ind. 298, was precisely like the one at bar in its facts. One of the trial jurors had been one of the grand jury which found the indictment. The juror was not asked as to whether he had been on the grand jury that found the indictment, but was asked whether he had formed or expressed an opinion as to the guilt or innocence of the accused, and answered that he had not. The fact that he had been on the grand jury was not discovered until after verdict, and, on a motion for a new trial, the affidavit of the juror was filed in support of the verdict to the effect that at the time of being examined he had no opinion as to the defendant's guilt, and had forgotten the circumstance of his having been on the grand jury. The court held that the defendant was entitled to a new trial, and was guilty of no negligence in not sooner discovering the fact of the juror's incompetency, but that, if the fact had been known to the accused at the time the jury was accepted and sworn, he could not afterwards have been heard to make the objection.

An objection to a juror such as is raised in this case is not like merely technical disqualifications, such as alienage, non-residence, and the like, which do not tend to impeach the fairness and impartiality of the jury. It is possibly true that the juror in this case had no opinion at the time of his examination as to the guilt or innocence of the accused. He may have forgotten that he was on the grand jury that found the indictment. He may have voted against finding the indictment, or may have been absent when it was found, as twelve of the fifteen jurors constitute a quorum, and may transact business; but the presumptions of the law are all to the contrary, and, in the absence of any showing to that effect, he must be presumed to have participated in the finding of the indictment, and to have formed an opinion as to the guilt or innocence of the defendant. * * * If he [defendant] had searched the records of the court he would have ascertained that fact, and it would have been commendable prudence and diligence to have done so; but we do not think his failure to do so is such negligence as should deprive him

of the right to be tried by an impartial jury, especially in view of the false answer given by the juror. The motion for a new trial was properly granted. In support of the views above expressed, see *Com. v. Hussey*, 13 Mass. 221; *Dilworth v. Com.*, 65 Amer. Dec. 264; *Bennett v. State*, 24 Wis. 57; Hayne, New Trials, § 45, and cases cited. See, also, section 64. Our attention has been called to a number of cases where, upon the same state of facts as are presented here, a different conclusion has been reached, but we think the weight of authority as well as of reason is in accordance with this opinion. The ruling of the district court is affirmed.

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HOSKINS v. HIGHT.

Supreme Court of Alabama. 1891.

95 Alabama, 284.

STONE, C. J. * * *

The power to set aside verdicts and grant new trials is inherent in our courts of common-law jurisdiction; and in the exercise of this power the court is called upon to use its equitable discretion to prevent a palpable and material wrong. As said by Clopton, J., in *Cobb v. Malone*, 92 Ala. 630, "The power is essential to prevent irreparable injustice, in cases where a verdict wholly wrong is the result of inadvertence, forgetfulness, or intentional or capricious disregard of the testimony, or of bias or prejudice, on the part of juries, which sometimes occurs."

When, in the exercise of this inherent power, the trial court grants a new trial, the presumption is that it has rightfully used its discretion; but, if the contrary appears, and it is plainly shown that the trial court has abused its power, this discretion, being judicial in its character, should be revised on appeal.—*Edsall v. Ayres*, 15 Ind. 286; *Lloyd v. McClure*, 2 Greene (Iowa), 139; *Frieley v. David*, 7 Iowa, 3.

The grounds upon which a new trial may be granted are as varied as the circumstances of each individual case. In the exercise of a sound discretion, the court must consider the particular surroundings, and have special regard to the

equitable demands of each separate case. But text-writers and different courts recognize many different grounds for the granting of new trials. Surprise and mistake are placed in this category; and there are many instances where new trials have been granted, because one party to a suit has been taken by surprise, or has been prejudiced, on account of a mistake or inadvertence for which he was not responsible, and which was not occasioned in any way by his negligence. No doubt it was intended that the ground upon which the new trial in this case was asked and granted should receive its force and efficacy from this division of the causes that justify such equitable interposition by the court. We shall so consider it; for the ground as stated in the motion is, that the defendant "was prevented from making his defense thereto by accident or mistake, and without fault on his part."

In order to obtain a new trial on the ground of mistake and surprise, there are certain requirements which must be fulfilled as conditions precedent to the exercise by the trial court of this discretion. It must be shown that the surprise or mistake occurred in reference to some matter material to the issue involved; that injury resulted therefrom and that the party asking for a new trial has not been guilty of negligence or fault in the premises.—*Beadle v. Graham*, 66 Ala. 102; *Brooks v. Douglass*, 32 Cal. 208; *Jackson v. Worford*, 7 Wend. 62; *Huber v. Lane*, 45 Miss. 608; *Walker v. Kretsinger*, 48 Ill. 502; *Fretwell v. Laffoon*, 77 Mo. 26; 16 Amer. & Eng. Encyc. Law, p. 532.

The first duty of a party surprised at the trial, or upon the discovery of a mistake that will prejudice his interest, is to take proper legal steps to continue or delay the cause; for "he can not neglect this in the hope of securing a verdict in spite of the surprise (or mistake), and then obtain a new trial." In the case of *Shipp v. Suggett*, 9 B. Monroe (Ky.) 5, the court observed; "The correct practice in such case is for the party at once, upon the discovery of the cause, during the progress of the trial, which operates as a surprise on him, to move a continuance or postponement of the trial, and not attempt to avail himself of the chance of obtaining a verdict on the evidence he has been able to introduce, and if he should fail, then to apply for a new trial on the ground of surprise. To tolerate such a practice would have the effect of giving to the party surprised an unreasonable and unfair advantage,

and tend to an unnecessary and improper consumption of the time of the court." We approve this language, and announce the rule, that before a party can be granted a new trial on the ground of surprise and mistake, which was known or discovered before or during the trial, he must first move for a continuance, or take such legal steps to postpone the trial of the cause as the circumstances of the particular case may require. *Washer v. White*, 16 Ind. 136; *Young v. Com.*, 4 Gratt. 550; *Gee v. Moss*, 69 Iowa, 709; *Wells v. Sanger*, 21 Mo. 354; *Rogers v. Hine*, 1 Cal. 429; *Bell v. Gardner*, 71 Ill. 319; *Doyle v. Sterga*, 38 Cal. 459; *Dewey v. Frank*, 62 Cal. 343; 16 Am. & Eng. Encyc. of Law, p. 533. This motion for a continuance, or effort to postpone the trial, is affirmative matter, and should therefore, appear of record. In its absence, this court can not presume such motion or effort was made; and the cause must be considered in the light of such facts and matters of record as appear in the transcript. This conclusion is decisive of the only question presented by this appeal, for no motion for a continuance, nor any effort to postpone the trial, was made when the absence of the important witnesses was discovered. The trial court should not have granted the motion for a new trial, under the circumstances shown in the record.

We could rest our opinion here; but, considering that this phase of the question has never before been presented to us for review, we deem it best to decide the correctness of the lower court's ruling in granting a new trial upon the ground stated in the opinion, and the evidence produced to substantiate such ground.

The accident or mistake that prevented the defendant from making his defense, was the absence of certain witnesses, whose names he had given to his counsel to have summoned. These witnesses were never subpœnæd, and this is, no doubt, at least one of the reasons they were absent. These witnesses were not subpœnæd by reason of the mistake or negligence of the defendant or his counsel, whose recollection was that counsel directed his clerk to have the clerk of the court subpœna the witnesses. The clerk had no recollection of any such direction, and never instructed the clerk of the court to subpœna the said witnesses.

While it is true that a new trial may be granted to a party who was deprived of the benefit of the evidence of a witness

who was excusably absent, and whose testimony would have probably affected the result, yet, in order to claim the benefit of a new trial on this ground, it must, as a general rule, be shown that the witnesses had been regularly summoned and that their absence was not caused through the negligence of the party asking for a new trial. As said in 16 Amer. & Eng. Encyc. of Law, 541, "It is a general rule, that a new trial should not be granted on account of the absence of witnesses, when a continuance has not been asked for, or the absence of the witnesses is caused by any form of neglect by the party applying for a new trial."—*Huhland v. Sedgwick*, 17 Cal. 123; *Tilden v. Gardiner*, 25 Wend. (N. Y.) 663; *Love v. Breedlove*, 75 Tex. 649; *Gee v. Moss*, 68 Iowa, 318; *Young v. Com.*, 4 Gratt. (Va.) 550; *Wells v. Sanger*, 21 Mo. 354; *Rogers v. Hine*, 1 Cal. 429.

The result is the same, whether the absence of the witnesses was caused by the mistake or negligence of the party or of his attorney. "The mistake or negligence of the attorney appearing for the party to a suit is the mistake or negligence of the party; and no new trial will be allowed where such mistake arises from negligence or lack of skill."—*Handy v. Davis*, 38 N. H. 411; *Heath v. Marshall*, 46 N. H. 40. The failure to make defense to a suit, by reason of a mistake of the defendant or his counsel, caused by negligence, can not justify the granting of a new trial, it matters not how effective or just the defense may be.—16 Amer. & Eng. Encyc. of Law, 549, n. 4.

Under the principle above announced, the judgment of the City Court granting a new trial is reversed, and a judgment is here rendered overruling the defendant's motion for a new trial.

*Reversed and rendered.*¹⁷

¹⁷One cannot claim surprise over the introduction of relevant testimony, such as evidence of an affirmative defense properly admissible under the general issue.—*Nellums v. Nashville*, (1901) 106 Tenn. 222.

So, in general, mistake of law will not authorize a new trial,—14 Encyc. Pl. & Pr. 743; but exceptions are often made in order to prevent serious injustice.—*Chinn v. Taylor*, (1885) 64 Tex. 385; *Douglass v. Todd*, (1892) 96 Cal. 655; *Whereatt v. Ellis*, (1887) 70 Wis. 207; *Baxter v. Chute*, (1892) 50 Minn. 164.

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~~Take~~ NICHOLSON v. METCALF.
Supreme Court of Montana. 1904.

31 Montana, 276.

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

This is an appeal by Metcalf from an order granting a new trial. The only ground of the motion for a new trial was newly discovered evidence. The only affidavit filed showing that evidence was newly discovered is that of plaintiffs. This affidavit, in so far as the discovery of the evidence and the showing of diligence in that regard is concerned, is as follows: "That subsequent to the trial of said cause, to-wit, on the 12th day of December, A. D. 1902, I have discovered evidence which will establish the fact that myself and my co-plaintiff in said action," etc. Then follows a statement of the evidence which has been discovered. The affidavit then continues: "I did not know of the existence of said evidence at the time of the trial, and could not, by the use of reasonable diligence, have discovered or produced the same upon the former trial. The name of the witness by which I can establish the facts herein set forth is E. A. Briggs, now residing at Centerville, in Silver Bow county, Montana; that I did not for eighteen years prior to the 12th day of December, A. D. 1902, know the whereabouts of said Briggs." The affidavit of Briggs also appears in the record, supporting the affidavit of plaintiffs as to the facts to which he would testify, and stating that he was present and heard the conversation upon which plaintiffs' cause of action was based.

The statute concerning new trials provides as follows: "The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved for any of the following causes materially affecting the substantial rights of such party * * * (4) Newly discovered evidence material for the party making the application which he could not with reasonable diligence have discovered and produced at the trial." (Section 1171, Code of Civil Procedure.)

We are of the opinion that the affidavit does not contain a sufficient showing of diligence, as contemplated by the statute,

to warrant the order appealed from. (*Rand v. Kipp*, 27 Mont. 138, 69 Pac. 714; *Gregg v. Kommers*, 22 Mont. 511, 57 Pac. 92; *Caruthers v. Pemberton*, 1 Mont. 111; *Butler v. Vassault*, 40 Cal. 74; *Hendy v. Desmond*, 62 Cal. 260; *Bagnall v. Roach*, 76 Cal. 106, 18 Pac. 137; *Barton v. Laws*, 4 Colo. App. 212, 35 Pac. 284; *State v. Power*, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902; *Bradley v. Norris*, 67 Minn. 48, 69 N. W. 624; 1 Spelling on New Trial and Appeal, Secs. 209-218.)

Under these authorities it was incumbent upon plaintiffs to show that they had been guilty of no laches, and that failure to produce the evidence on the trial could not be imputable to lack of diligence on their part. They must make strict proof of diligence, and a general averment of its existence is insufficient. Whether reasonable diligence has been used is a question to be determined by the court upon the affidavits presented, and therefore these affidavits should state with particularity what acts were performed. They should show what diligence was used, how the new evidence was discovered, why it was not discovered before the trial, and such other facts as make it clear that the failure to produce the evidence was not their own fault, or because of want of diligence on their part. So far as the evidence presented in this case is concerned, the first search for evidence may have been made after the cause had been tried. If Briggs was present at the conversation, plaintiffs must have known it. Perhaps this fact escaped their memory at the time of the trial, but mere forgetfulness is no excuse. (*Hendy v. Desmond*, 62 Cal. 260.)

The mere allegation that for eighteen years plaintiffs did not know the whereabouts of Briggs is insufficient. If plaintiffs knew that Briggs could testify in their behalf, they should have shown that they had exhausted the methods provided by law for obtaining the attendance of witnesses. If they did not know that Briggs could so testify, it is immaterial that they did not know his whereabouts.

While it is true that the granting or refusing of a motion for a new trial is largely in the discretion of the trial court, and its action will not be interfered with on appeal unless there is abuse of such discretion, the affidavits being defective in the showing of diligence, we are satisfied that the court below had no authority to grant the order, and therefore abused its discretion.

We therefore advise that the order appealed from be reversed, and the cause remanded.

PER CURIAM.—For the reasons stated in the foregoing opinion, the order is reversed and the cause remanded.¹⁸

¹⁸ Where a non-resident attorney arranges with a local agent to notify him when his case is called for trial, the failure of the agent constitutes negligence of the attorney, and precludes a new trial.—Griffin v. O'Neill, (1891) 47 Kan. 116. This is true even when the attorney arranges with the clerk of the court to notify him, in the absence of a statute placing this duty upon the clerk.—Colley v. Sapp, (1923) — Okla. —, 216 Pac. 454; First Nat. Bank v. Wentworth, (1882) 28 Kan. 183.

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PARSONS v. LEWISTON, BRUNSWICK AND BATH
STREET RAILWAY.

Supreme Judicial Court of Maine. 1902.

96 Maine, 503.

WISWELL, C. J. While the plaintiff was driving a horse attached to a long covered vehicle on runners across the bridge between the cities of Lewiston and Auburn, in the direction of Auburn, he met the defendant's rotary snow-plow coming towards him from Auburn; his horse became frightened at the appearance of the snow-plow and the noise caused by it to such an extent as to become unmanageable; finally, the horse bolted towards one side of the bridge, and, after striking that side, started diagonally across the bridge to the other side, the plaintiff in the meantime was thrown out, dragged some distance and sustained severe injuries.

The plaintiff, claiming that the accident was attributable to the negligence of the defendant's employees in the management of the snow-plow, brought this suit to recover the damages sustained by him. The trial resulted in a verdict for the defendant and the plaintiff brings the case here upon two motions for a new trial, one, because the verdict was against the weight of the evidence, the other upon the ground of newly-discovered evidence. The plaintiff's counsel admits in argument that the jury was authorized in finding a verdict for the defendant upon the evidence introduced at the trial, so that it only becomes necessary to consider the second mo-

tion and the newly-discovered testimony presented under it, in connection with the case as submitted to the jury.

The contention of the plaintiff at the trial was that his horse showed signs of fright when about one hundred feet distant from the snow-plow as the two were slowly approaching each other; that the fact that his horse was greatly frightened and was becoming unmanageable was so apparent that it should have been seen, and in fact was seen, by the motorman a sufficient length of time before the horse bolted, for him to have stopped his plow, and allow the plaintiff to drive past; that by doing so the accident would have been avoided, but that he failed to stop the snow-plow and that this failure was the proximate cause of the accident resulting in the injury to the plaintiff. The defendant's answer to this proposition is, and was at the trial, that the motorman did stop his plow as soon as the horse showed any signs of fright. Defendant's counsel in their brief say, "coincident in point of time with the first appearance of real fright on the part of the horse, the motorman shut off the current, applied the brake, and stopped the plow."

Upon this issue, the plaintiff testified that the snow-plow did not stop until after the accident, and one witness called by him, whose means of observation on account of his distance from the scene of the accident were not particularly good, to some extent substantiated the plaintiff, stating it as his impression that the snow-plow did not stop. Upon the other hand, four witnesses called by the defense, all of whom were on the snow-plow at the time, and in the employ of the defendant corporation, and three of whom were still in its employ at the time of the trial, all testified in substance that the motorman stopped his plow as soon as the horse appeared to be frightened. A jury certainly would be authorized to find that it was negligence upon the part of those managing the rotary snow-plow, such as this one was described and shown by the photographs to be, to continue its movement along the track, in such a situation as this, when an approaching horse displayed signs of great fright and of becoming unmanageable. But, upon the other hand, the jury was authorized to find from the testimony in the case that the motorman seasonably stopped his plow, and did all that he could do to prevent the accident. So that the important issue of fact

at the trial was, as to whether or not the plow was seasonably stopped, in view of the situation.

Since the trial the plaintiff has discovered three additional witnesses who saw the accident and who will testify, with varying degrees of positiveness, that the snow-plow did not stop until after the accident. These witnesses are entirely disinterested, they had no acquaintance with the plaintiff, their opportunities for seeing what happened were good. The testimony of these three witnesses is newly-discovered within the well-established rule in this state, its discovery subsequent to the trial was accidental; and the failure of the plaintiff or his counsel to be earlier aware of its existence cannot be attributed to any negligence upon their part, because diligence upon their part would not have been likely to have put them in possession of it.

The question then is, whether the court, in the exercise of its sound discretion, but within the rules which have been adopted relative to granting new trials upon this ground, should grant a new trial in this case. But first, inasmuch as there may be some confusion as to what the true doctrine is governing the court in the exercise of its discretion in cases of this kind, growing out of the language used in two decisions of this court, it may be well to carefully state it.

The true doctrine is, that before the court will grant a new trial upon this ground, the newly-discovered testimony must be of such character, weight and value, considered in connection with the evidence already in the case, that it seems to the court probable that on a new trial, with the additional evidence, the result would be changed; or it must be made to appear to the court that injustice is likely to be done if the new trial is refused. It is not sufficient that there may be a possibility or chance of a different result, or that a jury might be induced to give a different verdict; there must be a probability that the verdict would be different upon a new trial. But it is not necessary that the additional testimony should be such as to *require* a different verdict.

* * * * *

In this case we can not say that the new evidence, in connection with the former evidence, would require a different verdict. After this evidence is submitted it then becomes a question for the jury to pass upon. But it does seem probable

to the court that the verdict will be different when the case is submitted anew with the additional evidence.

It is true that this evidence is cumulative, but it is not an absolute and unqualified rule that a new trial will not be granted under any circumstances upon newly-discovered cumulative testimony. *Snowman v. Wardwell*, 32 Maine, 275. When the newly-discovered evidence is additional to some already in the case in support of the same proposition, the probability that such new evidence would change the result is generally very much lessened, so that much more evidence, or evidence of much more value, will generally be required when such evidence is cumulative; but if the newly-discovered testimony, although merely cumulative, is of such a character as to make it seem probable to the court that, notwithstanding the same question has already been passed upon by the jury, a different result would be reached upon another trial with the new evidence, then such new trial should be granted.

And after all, while it is important to have general rules in regard to the granting of new trials upon this ground, which may be known to the profession, and by which the court will be governed so far as practicable, each case differs so materially from every other, that the decision of the question as to whether or not a new trial should be granted in any particular case must necessarily depend, to a very large extent, but of course within the limits of such general rules, upon the sound discretion of the court, which will always be actuated by a desire, upon the one hand, to put an end to litigation when the parties have fairly had their day in court, and, upon the other, to prevent the likelihood of any injustice being done.

In the exercise of this discretion, and within the rules as above laid down, the court is of the opinion that this plaintiff should have the opportunity to again submit his case, with the additional testimony, to the determination of a jury.

*New trial granted.*¹⁹

¹⁹ In *Oberlander v. Fixen & Co.*, (1900) 129 Cal. 690, the court said:—"The rule, so often reiterated by the courts, that a new trial should not be granted where the evidence is merely cumulative, must be regarded (in this state) not as an independent rule, * * * but as 'a corollary of the requirement that the newly discovered evidence must be such as to render a different result probable on a retrial of the case.'"

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GERMAN v. MAQUOKETA SAVINGS BANK.

Supreme Court of Iowa. 1874.

38 Iowa, 368.

Plaintiff claims \$1,000, alleged to be due on account of business transacted with defendant in the years 1872 and 1873. The defendant denies that any balance is due plaintiff. Trial to the court.

Plaintiff testified in substance that on or about Nov. 25th, 1872, he gave defendant two drafts, each for \$1,000, on Vaughn Bros., Chicago.

That one of these drafts was forwarded to Chicago and paid. That the other, under his direction, was retained; that he gave checks against this draft to the amount of \$980.93, which was charged to his account; and that afterward he settled the account by turning out notes which the bank discounted, and this draft was delivered up to him and destroyed.

The defendant's cashier and vice-president both testified that the draft sent to Chicago was drawn on the 23d of November, and that the bank paid over the counter therefor \$1,000 less exchange.

The plaintiff, in rebuttal, testified that it was possible the draft paid by Vaughn Bros. was drawn on the 23d, but that he did not, on that day or any other day, receive from any officer of the bank \$1,000 in cash over the counter of the defendant on that draft, or upon any draft in controversy in this suit; and that no officer of the bank ever claimed to him before the day of trial that they had paid cash over the counter of the bank on any draft in controversy.

Upon the testimony introduced, the court rendered judgment for the defendant.

Plaintiff thereupon moved for a new trial on the ground of surprise and of newly discovered evidence.

The court overruled the motion on the ground that the newly discovered evidence was cumulative. Plaintiff appeals.

The further material facts are stated in the opinion.

DAY, J.—That a new trial will not be granted because of

the discovery of evidence, which is merely cumulative, is a general doctrine of the courts, and has been frequently recognized in this state. See 1 Graham and Waterman on New Trials, 486-495, and cases cited; *Alger v. Merritt*, 16 Iowa, 121; *Sturgeon v. Ferron*, 14 Iowa, 160; *Manix v. Malony*, 7 Iowa, 81.

It is exceedingly difficult, if not impossible, to furnish a general definition of cumulative evidence, which in a given case will materially aid in determining whether particular testimony offered falls within or without that class.

In 1 Greenleaf on Evidence, § 2, it is said: "Cumulative evidence is evidence of the same kind, to the same point. Thus, if a fact is attempted to be proved by the verbal admission of the party, evidence of another admission of the same fact is cumulative." And in *Alger v. Merritt*, 16 Iowa, 121, (127), it is said: "If the new evidence be specifically distinct and bear upon the issue, though it may be intimately connected with some parts of the testimony at the trial, it is not cumulative." Citing 1 G. & W. on New Trials. Many of the cases seem to hold that evidence is cumulative if it goes to establish the issue which was principally controverted upon the former trial. These cases, we think, lay down too broad a rule. The evidence may tend to establish the same issue, and yet be so unlike and distinct from any testimony before produced, as to furnish no pretext for declaring it cumulative. The case of *Gardner v. Mitchell*, 6 Pick. 114, furnishes an apt illustration.

In that case the plaintiff recovered a verdict for \$5,337 on a breach of warranty as to the quality of 51,000 gallons of oil sold him by defendant. The defendant moved for a new trial on the ground of newly discovered evidence by which he could prove declarations of the plaintiff that the oil was as good as expected. It was held that this was a new fact not before in the case, and a new trial was granted. The same principle was recognized in *Guyot v. Butts*, 4 Wendell, 579.

In this case plaintiff states in his motion for new trial, "that he can fully prove by the testimony of William Phillips of Clayton county, Iowa, that on the 23d day of November, A. D. 1872, this plaintiff drew a draft on Vaughn Bros. of Chicago, for \$1,000, at the bank of defendant; that said witness was with plaintiff at the time, and that he,

plaintiff did not receive cash for the same, but did check against said draft to the amount of \$500, and plaintiff says he can show he drew no other draft that day.

Plaintiff also states he can prove substantially the same by Abram Gish.

Now, whilst this testimony tends to the establishment of the same fact as that testified to on the former trial by plaintiff, to-wit: that \$1,000 was not paid when the draft was drawn, it tends to establish it in part, as an inference from a new fact, not introduced upon the former trial, viz: that a check was drawn against the draft to the amount of \$500.

It seems to us, therefore, that the case falls within the principal of *Gardner v. Mitchell*, 6 Pick. 114, and *Guyot v. Butts*, 4 Wendell, 579, and that the evidence newly discovered was something more than merely cumulative. See 1 G. & W. on New Trials, 490-493, and cases cited; 3 Id. 1048, and cases cited.

* * * * *

We think the motion for a new trial should have been sustained.

*Reversed.*²⁰

²⁰ A written admission is cumulative evidence of the same fact already shown by an oral admission.—*Brown v. Wheeler*, (1901) 62 Kan. 676.

205 *Take*

CHICAGO AND EASTERN ILLINOIS RAILROAD CO. v.
STEWART.

Supreme Court of Illinois. 1903.

203 Illinois, 223.

WILKIN, J.—This is an action of trespass on the case, brought by Robert Stewart against appellant, to recover damages on account of a personal injury sustained by him on the 30th day of December, 1899, occasioned by a collision between appellant's locomotive engine and the street car upon which appellee was a passenger, in the city of Chicago. The jury returned a verdict for \$1,358.40. Appellant made a motion for a new trial, which was overruled, and judgment was rendered upon the verdict. The railroad

company now prosecutes a further appeal from a judgment of affirmance in the Appellate Court for the First District.

The only ground for reversal urged in this court is that the court below erred in overruling the defendant's motion for a new trial on the ground of newly discovered evidence. The claim for damages was for injuries to the plaintiff's spine, shoulder and arm. During the progress of the trial plaintiff testified that he had never received an injury before this accident. On cross-examination he was asked if he had not been injured some years ago in an accident on the Santa Fe Railroad, to which he replied that he did not get hurt in that accident. He was then asked to hold up his left hand, which showed three fingers missing, and when asked as to the time of losing those fingers he replied that he did not remember when it was. After the verdict was returned the claim agent of the appellant company made an investigation on the Santa Fe accident, and ascertained from the county hospital that on April 25, 1899, one "R. Stuart" had been taken to that hospital because of an injury to his hand. The agent then made an affidavit to the facts ascertained by him in his investigation, and counsel for appellant presented it to the court in support of the motion for a new trial. Counsel insisted that new evidence had been discovered which would tend to impeach the plaintiff and show that he had sworn falsely when he stated that he did not know when he received the injury to his hand. No claim is made in this cause for any injury to the hand, therefore the loss of the fingers was wholly immaterial to the issue of the case. It was, perhaps, proper, in the discretion of the court, to permit the cross-examination of the witness upon that subject for the purpose of discrediting him, but for no other purpose. The newly discovered evidence, therefore, even if it would have been competent upon the trial, tended only to impeach or discredit the plaintiff, and that upon a matter not material to the issue. It has been often decided by this court that a new trial will never be granted on the ground of newly discovered evidence merely for the purpose of impeaching a witness who testified upon the trial. (*Friedberg v. People*, 102 Ill. 160; *Grady v. People*, 125 id. 122; *Monroe v. Snow*, 131 id. 126; *Bemis v. Horner*, 165 id. 347; *Chicago and Northern Railway Co. v. Calumet Stock Farm*, 194 id. 9.)

The motion for a new trial was therefore properly overruled.

The judgment of the Appellate Court will be *affirmed*.²¹

²¹ See also, on the subject of impeaching evidence, *Moore v. Chicago, St. L. & N. O. RR. Co.*, (1881) 59 Miss. 243; *Blake v. Rhode Island Co.*, (1911) 32 R. I. 213.

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HEISKELL v. ROLLINS.

Court of Appeals of Maryland. 1895.

81 *Maryland*, 397.

ROBINSON, C. J. The motion to dismiss the appeal in this case is made on the ground that the appeal was not taken within two months after final judgment was entered, as required by Code, art. 5, § 6. The docket entries show that the judgment was entered 6th October, 1894, and that the appeal was taken on 2d January, 1895. If the matter rested here, we should be obliged to dismiss the appeal, for the reason that it was not taken within two months after judgment was rendered. But the docket entries also show that the verdict was rendered on the 6th October, 1894, and that judgment on verdict was entered on the same day, and that on the same day a motion for new trial was made, and reasons in support of the motion were filed; and they further show that the motion for new trial was not disposed of until 2d January, 1895. The court could not, of course, have entered final judgment on the verdict until the motion for new trial was overruled or otherwise disposed of.

At common law, it was incumbent on the plaintiff, after verdict, to enter a rule for judgment *nisi causa*, and this rule expired in four days. Within the four days the defendant had the right to move for *new trial* or arrest of judgment, and, unless the motion was made within that time, the right was gone. In *Clerk v. Rowland*, 1 Salk. 399, it is said: "So, where there is a verdict, there must be four days between the verdict and the judgment. Therefore, after verdict or writ of inquiry, the course is for the plaintiff to give a rule to enable him to enter his judgment *nisi causa*."

In the court of king's bench, the day on which the verdict was entered was not reckoned one of the four days, and the four days were computed exclusive of the day on which the rule was made. In the court of common pleas, however, the practice was to include the day on which the rule was made. And in *Standfast v. Chamberlaine*, 3 Salk. 215, the judgment was set aside because it had been entered before the expiration of the four days, as required by law. Now, in this case, the judgment was entered on the day the verdict was rendered, although the plaintiff had on that day filed a motion for a new trial, with reasons in support of such motion; and it further appears by the docket entries that this motion was not disposed of until 2d January, 1895. We must assume, therefore that there was some mistake on the part of the clerk in entering final judgment on the day the verdict was rendered, and while the motion for a new trial was pending, and, if so, no final judgment has been entered on the verdict, because the record shows that the motion for a new trial was overruled 2d January, 1895; but it does not show that judgment was entered on that day, or on any day subsequent thereto, and if this be so, the appeal must be dismissed, on the ground that no final judgment has been entered. We shall therefore dismiss the appeal, without prejudice, in order that the appellant may take such steps as he may deem necessary to have the entry of judgment which was improvidently entered stricken out, and final judgment entered, and which could not be entered until the motion for new trial was disposed of. Appeal dismissed, without prejudice.²²

²²In *Hogan v. State*, (1874) 36 Wis. 32, the court said:—"It is certain that at common law, motions for a new trial must be made after verdict and before judgment. It would be no greater absurdity to move for a new trial at common law before verdict than after judgment."

In *Romine v. Haag*, (Mo. 1915) 178 S. W. 147, the court said: "Although in theory this motion suspends the entry of the judgment, the practice has grown up of entering it upon the bringing in of the verdict. The effect of the filing of the motion for a new trial is then to suspend its effect as a final judgment until the court shall determine whether the verdict may stand. It is upon this theory that, although the statute (R. S. 1909, Sec. 2040) provides that no appeal shall be allowed unless it be made during the term at which the judgment appealed from is rendered, the appeal may be taken at a subsequent term to that upon which it is formally entered, upon the overruling of a motion for a new trial. * * * Until the motion is determined the judgment is provisional, and the sustaining of the motion vacates

it entirely." To the same effect see *Woodward Iron Co. v. Brown*, (1910) 167 Ala. 316.

Sometimes the right to move for a new trial on grounds arising out of the conduct of the trial, as well as for newly discovered evidence, after the entry of judgment, is given by statute.—*Tracey v. Altmyer*, (1871) 46 N. Y. 598.

Sometimes the statute makes the entry of a judgment a necessary condition precedent to a motion for a new trial.—*McIntyre v. MacGinniss*, (1910) 41 Mont. 87.

2072abc
CHAMBLISS v. HASS.

Supreme Court of Iowa. 1904.

125 Iowa, 484.

WEAVER, J. Benjamin Chambliss died intestate in the year 1899, and the appellee herein, J. H. Hass, was duly appointed administrator of his estate. Thereafter Jefferson Chambliss, a son of the intestate, brought suit, against the administrator, claiming the ownership of certain promissory notes held by said administrator, and listed as a part of the assets of the estate of Benjamin Chambliss. Upon trial, judgment was rendered in favor of the claimant. Within less than one year from the date of said judgment the administrator filed a petition for new trial under the provisions of Code, tit. 20, c. 1, alleging the discovery to show that the testimony offered upon the trial by said Jefferson Chambliss concerning his alleged possession of the notes during the lifetime of his father was untrue, and that the gift or transfer to his son was never in fact consummated by delivery. The plaintiff's demurrer to this petition having been overruled, he filed an answer in the nature of a denial. In February, 1903, Jefferson Chambliss died, and his administrator was substituted as plaintiff. In April, 1903, plaintiff amended his answer to petition for new trial, alleging that, before said petition was filed, the defendant had appealed from the judgment of the district court to this court, where on May 21, 1902, said judgment was duly affirmed, and that thereafter execution had been issued upon said judgment, and was returned by the sheriff on June 10, 1902, fully satisfied, for which reasons the trial court was without juris-

diction to entertain the petition for a new trial. To this amendment a demurrer was sustained, and trial was held to the court upon the issues presented by the petition and answer. The court found for the petitioner, and ordered a new trial, and plaintiff's appeal from this order now before us.

* * * * *

2. The one serious question presented by this appeal is upon the ruling of the trial court sustaining defendant's demurrer to the plea setting up the appeal from the judgment in the main case, the affirmance of such judgment, and its subsequent payment, as a bar to the demand for a new trial. The contention of the appellant, that the appeal from the judgment in the principal case had the effect to deprive the trial court of jurisdiction to entertain the application for new trial, cannot be sustained. The right to petition for new trial within one year upon the grounds named in the statute is absolute and unqualified, and is wholly independent of the right of appeal. The proceeding involves no attempt to review the judgment which has been appealed from, nor to pass upon or take advantage of any alleged error in the record. It is in effect an independent proceeding, in which a new and different issue is joined and tried as an ordinary action. Code, §§ 4094, 4095. *Bank v. Murdough*, 40 Iowa, 26; *Cook v. Smith*, 58 Iowa, 607, 12 N. W. 617. In the last-cited case, after judgment rendered against them in the circuit court, the defendants filed a petition for a new trial, and, without waiting for a disposition of the petition, they also prosecuted an appeal to this court, where the judgment was affirmed. Pending the appeal, the plaintiff filed an answer setting up the pendency of the case in this court as a bar to the proceeding for a new trial, and a demurrer thereto was sustained. After the affirmance of the judgment on appeal the proceeding for a new trial was brought on for hearing, and a new trial granted, and, this order being appealed from, was by us affirmed, saying that "during the time limited by statute the power of the court and the right of the party are unconditional." The case at bar is parallel with *Cook v. Smith* in every essential particular, except as relates to the payment and satisfaction of the judgment, the effect of which we shall hereinafter consider. The view we have indicated has the very general support of the au-

thorities. *Henry v. Allen* (N. H.) 41 N. E. 894; *Hellman v. David Alder & Sons Clothing Co.* (Neb.) 83 N. W. 846; *Brooks v. Syndicate* (Nev.) 53 Pac. 59G; *Naglee v. Spencer*, 69 Cal. 10; *Fuller v. United States*, 182 U. S. 563, 21 Sup. Ct. 871, 45 L. Ed. 1230; *State v. Cir. Court*, 71 Wis. 595, 38 N. W. 192. In *Fuller's Case* a judgment in his favor was affirmed by the Circuit Court of Appeals (72 Fed. 467, 18 C. C. A. 641) and by the Supreme Court of the United States (18 Sup. Ct. 944, 168 U. S. 707, 42 L. Ed. 1215), and mandate returned to the trial court. A petition for new trial had been filed while the appeal was pending, and, after final order of affirmance had been entered, the trial court granted a new trial as prayed. Upon appeal from this order, the court, by Harlan, J., goes into an elaborate discussion of the statute providing for new trials, and of the precedents, including *Cook v. Smith*, and decides that the trial court acted within its jurisdiction. It says of the proceeding that it "is in form a new and independent suit, although the statute requires it to be heard summarily by the court," and quotes approvingly from *Ex parte Russell*, 13 Wall. 664, 20 L. Ed. 632, the following pertinent language: "It has been objected that the granting of a new trial after a decision by this court is, in effect, an appeal from the decision of this court. This would be so if it were granted upon the same case presented to us. But it is not. A new case must be made; a case involving fraud or other wrong upon the government [the new trial in that case having been granted upon the application of the United States]. It is analogous to the case of a bill of review in chancery to set aside a former decree or a bill impeaching a decree for fraud." In *Henry v. Allen*, *supra*, an appeal having been taken from the judgment of the trial court, and a proceeding having also been begun in that court for a new trial, the appellant moved the Court of Appeals to suspend further proceedings for the time being without prejudice to his rights in the premises, and to remand the case to the trial court in order that the application for a new trial might be disposed of. This motion was denied on the ground that the pendency of the appeal in no manner affected the right or jurisdiction of the lower court to proceed to hear and dispose of the application. In *Brooks v. Syndicate*, *supra*, a motion by appellee in the Supreme Court to dismiss the appeal because

the appellant had applied for and obtained an order for a new trial in the court below was overruled, the court holding there was no such interference of jurisdiction, and no such inconsistency between the right to appeal and the right to apply for a new trial, that both might not be prosecuted to a termination. A like principle was applied by the West Virginia court in *Gillespie v. Allen*, 37 W. Va. 675, 17 S. E. 184. It is there held that where, pending an appeal, a bill of review has been filed in the lower court, based solely on the ground of newly discovered evidence, the questions presented to the two tribunals are entirely distinct, and no confusion can arise from their separate determination. The question presented by the appeal from the judgment is simply whether the record of the proceedings before the trial court is sufficient to sustain it. The appellate tribunal cannot hear or consider any attack upon such judgment for fraud or undue advantage in its procurement, except as the same is disclosed by the record. Of after-discovered fraud, perjury, or other wrong it can take no original cognizance. That is left to the trial court alone. The affirmance of the judgment on appeal makes it immune against all attack based upon or inhering in the record of the proceedings up to and including its rendition by the trial court, but it cannot estop the party aggrieved who, within the time prescribed by statute, makes a sufficient showing that but for the fraud or wrong, since discovered, of the prevailing party, such judgment would probably not have been obtained. To so hold would be to nullify to a great extent the statute providing for new trials.

We come, then, to inquire whether the collection of the judgment upon execution after its affirmance by this court operates to defeat the right to a new trial. It is a well-settled proposition that one who obtains and enforces a judgment which is afterwards reversed on appeal, or is annulled or set aside by the trial court for fraud or mistake, may be required to make restitution to the party so injured. *Pittsfield v. Barnstead*, 38 N. H. 115; *Heath v. Halfhill*, 106 Iowa, 131, 76 N. W. 522; *Zimmerman v. Bank*, 56 Iowa, 133, 8 N. W. 807; *Hanschied v. Stafford*, 27 Iowa, 301; *Kidd v. Curry*, 29 Hun, 215; *Clark v. Pinney*, 6 Cow. 299; *Haebler v. Myers*, 132 N. Y. 363, 30 N. E. 963, 15 L. R. A. 588, 28 Am. St. Rep. 589; *Bank U. S. v. Bank*, 31 U. S. 8, 8 L. Ed. 299; *Heyden-*

feldt v. Sup. Ct., 117 Cal. 348, 49 Pac. 210; *Flemings v. Riddick's Ex'r*, 5 Grat. 272, 50 Am. Dec. 119; *Peyser v. Mayor*, 70 N. Y. 500, 26 Am. Rep. 624; *Hiler v. Hiler*, 35 Ohio St. 647; *Cleveland v. Tuffts*, 69 Tex. 584, 7 S. W. 72. Independent of statutory provisions for restitution upon motion, the right thereto has long been recognized as a rule of the common law, and may be enforced in an independent action. It is said that, where payment of money has thus been enforced upon a judgment or order of the court which is afterward reversed or set aside, the law implies a promise to restore it to the party from whom it was exacted. *Bank U. S. v. Bank*, 31 U. S. 17, 8 L. Ed. 299; *Haebler v. Myers*, *supra*. Had no appeal been taken, and plaintiff had enforced collection of his judgment soon after its rendition, and thereafter, and within the year allowed by the statute, the defendant had obtained a vacation of such judgment and an order for new trial, no one, we think, would contend that such payment would deprive the defendant of the right to be heard, or of the right to restitution should the retrial result in his favor. Nor do we see how the fact that an appeal has been taken and judgment affirmed before the order for new trial is entered can introduce any change in the relative rights or positions of the parties. As already suggested, the affirmance simply decides that the judgment was regularly and properly entered upon the case which the trial court then had before it, but leaves it exposed to the liability of a new trial, on proper showing therefor, precisely as if no appeal had been taken. Let us suppose, for instance, that an appeal had been promptly perfected, an affirmance ordered, and the judgment collected by execution, all within six months from the date of its rendition in the trial court, and thereafter and within one year the defendant had discovered indubitable proof that the recovery against him had been secured by gross fraud and perjury; could it be said that the affirmance and satisfaction of the judgment had made the statutory provision for new trial of no avail to him? If so, why? The law gave him the entire year in which to act, and an application made upon evidence discovered during the eleventh month is as timely as if it had been made during the first month. This issue which he now seeks to try has never been adjudicated by any court, and was in no manner considered or passed upon by the appel-

late tribunal, and the satisfaction of the judgment by execution cannot be considered an acknowledgment of its finality or a waiver of the right to attack it for fraud. It is suggested, also, that the payment was voluntary, and operates as a waiver of any right to restitution. Even if the payment had been made without actual coercion, it does not follow that no right to demand repayment exists. Whatever may be the doctrine of some of the older cases, it is now the recognized general rule that a party under such circumstances is not required to submit to seizure or distress of his property to preserve his right to compel restitution. *Scholey v. Halsey*, 72 N. Y. 578; *Hiler v. Hiler*, 35 Ohio St. 645; *Brown v. Richardson*, 30 N. Y. Super. Ct. 57. See, also, *Manning v. Poling*, 114 Iowa, 20, 83 N. W. 895, 86 N. W. 30, and cases there cited. In the present case the only showing as to the manner of payment is contained in the pleading to which the demurrer was sustained. The allegation there made is that after the judgment was affirmed, execution was issued thereon, and "returned on the 10th day of June, A. D. 1902, fully satisfied." Accepting the correctness of this statement, it must be conceded that the payment was involuntary, within the rule applied by us in the *Manning* Case. A payment made upon execution is not voluntary. *Nichols v. Knowles* (C. C.) 5 McCrary, 478, 17 Fed. 494.

* * * * *

In our judgment, the conclusion reached by the trial court is correct, and the order appealed from is *affirmed*.²³

²³ When the statute allows a motion for a new trial to be filed within a designated period after final judgment, this refers to the entry of judgment in the trial court and not to the affirmance on appeal.—*Hellman v. Adler & Sons Clothing Co.*, (1900) 60 Neb. 580.

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Seward v. CEASE.
Supreme Court of Illinois. 1869.

50 Illinois, 228.

LAWRENCE, J.—It is very seldom that a court of chancery will interfere to grant a new trial at law, though its jurisdiction to do so is undoubted. In this case, a bill was filed for that purpose, and the case having been heard on a motion to dismiss the bill, the relief prayed was refused. We are of opinion, however, that the motion should have been overruled, and if, after the cause is at issue and proofs taken, the case made by the bill is sustained, a new trial should be awarded. For the present, we must take the allegations of the bill as true, and they show, not merely that the only evidence upon which the judgment at law was obtained was false, but that the witness who gave it has voluntarily made an affidavit of its falsity before a magistrate, stating his desire to retract the same, and this affidavit is made an exhibit with the bill. This, then, is not a case of conflicting evidence. An unrighteous judgment has been obtained upon perjured testimony, and the perjury is shown, not by uncertain admissions of the perjurer, but by his own oath voluntarily made for the purpose of repairing his wrong. A stronger case could hardly arise. The motion to dismiss should have been overruled, and the defendant required to answer. After the answer is filed and the cause is at issue, it will be incumbent on the complainant to take the testimony of the witness, when the defendant will have an opportunity of cross-examining, and if the witness adheres to the statements of his affidavit, and there is no evidence he has been subjected to corrupt influences, the court will award a new trial.

The decree is reversed and the cause remanded.²⁴

²⁴ "Applications to courts of chancery, for the purpose of granting new trials at law, and the interposition of the Chancellor, whenever a proper case is made out, may be warranted as well upon the score of principle as of precedent.

"An injunction to stay proceedings upon an unjust judgment, and for a new trial, is a remedy recognized and approved by courts of equity. These remedies are to be enforced under the operation of established forms and rules of proceeding, instituted as they are for the development of truth and justice.

"Anciently, courts of equity exercised a familiar jurisdiction over trials at law, and compelled the successful party to submit to a new trial, or to be perpetually enjoined from proceeding on his verdict. (Floyd v. Jayne, 6 John. Ch. Rep. 479.)

"But this practice, except in cases the most extraordinary, has long since gone out of use; because courts of law are now competent to grant new trials, and are in the constant exercise of that right to a most liberal extent. Anciently, courts of law did not grant new trials; and in those days, courts of equity exercised that jurisdiction over trials at law, and compelled the successful party to submit to a new trial when justice required it. But, even in that age, the Court of Chancery proceeded with great caution. A new trial was never granted, unless the application was founded upon some clear case of fraud or injustice, or upon some newly discovered evidence, which the party could not possibly, by any vigilance or industry of his, have had the benefit of, on the first trial.

* * * * *

"In general, where it would have been proper for a court of law to have granted a new trial, if the application had been made while that court had power to do so, it is equally proper for a court of equity to grant a new trial, if the application be made on grounds arising after the court of law ceased to have power to act.

"The general rule is, that courts of chancery will not interfere after verdict and judgment at law, except in cases of fraud, or in extraordinary cases where manifest injustice would be done; nor where the party might have defended himself fully at law and neglected it. Great abuse would be made of a contrary doctrine, by drawing within the jurisdiction of equity, as by a side wind, almost all causes decided at law. The high powers intrusted to Chancery, to promote the purposes of justice, should not be abused to the vexation of citizens, and the unsettling solemn decisions of other courts, where it is always to be presumed that full justice has been done." 3 Graham & Waterman on New Trials, 1455 *et seq.*

For a further discussion of this subject see: Black on Judgments, § 357; Freeman on Judgments, § 485; 3 Pomeroy's Equity Jurisprudence, § 1365; Yancy v. Downer, (1824) 5 Littell (Ky.) 8, 15 Am. Dec. 35; Wynne v. Newman's Adm'r, (1881) 75 Va. 811; Kansas & Arkansas Valley R. R. Co. v. Fitzhugh, (1895) 61 Ark. 341, 33 S. W. 960.

MEMPHIS STREET RAILWAY CO. v. JOHNSON.

Supreme Court of Tennessee. 1905.

114 Tennessee, 632.

SHIELDS, J.—This action is brought by W. B. Johnson against the Memphis Street Railway Company to recover damages for personal injuries sustained by him, through the negligence of the defendant, while plaintiff was a passenger on one of its cars.

The case was submitted to a jury, and a verdict found

for the plaintiff. The motion of the defendant for a new trial was overruled, and judgment entered. The defendant tendered a bill of exceptions to this action of the court, which was signed and filed, and the case is now before us upon appeal in the nature of a writ of error.

The errors assigned are predicated upon the refusal of the trial judge to set aside the verdict of the jury and grant the defendant a new trial because of the admission of certain evidence offered by the plaintiff over the objection of the defendant, and his refusal to give in charge to the jury certain written instructions submitted by counsel for the railway company at the conclusion of the charge in chief.

For the defendant in error it is insisted that these assignments of error cannot be considered by this court because the errors complained of were not properly set out and relied upon as grounds for a new trial in the motion made by the plaintiff in error in the trial court for that purpose, as required by a rule of that court, and passed upon by the presiding judge.

The rule of the circuit court of Shelby county in relation to motions for new trials, which is in the record, requires all grounds upon which a new trial is asked to be stated and set out separately in a written motion and entered upon the minutes of the court; and all errors not so set out are presumed to be waived, and will not be considered on the hearing of the motion.

The plaintiff in error attempted to comply with this rule, and the grounds for a new trial upon which these assignments are based are stated in its motion in these words:

"(1) For error in the admission and exclusion of evidence.

"(2) The court erred in refusing the special instructions asked by the defendant."

* * * * *

We are now to determine whether or not the grounds upon which these assignments of error are predicated are sufficiently set out in the motion for a new trial. It seems to be well settled that the statement of the grounds in the motion must be sufficient to direct the attention of the court and opposing counsel to the error or irregularity relied upon to vitiate the verdict.

In the work on Pleading & Practice last quoted from, it

is further said: "The general rule is that the grounds (for a new trial) must be stated so specifically as to direct the attention of the court and opposing counsel to the precise error complained of. A mere statement of the grounds, without further specifications, will therefore be insufficient. The purpose of the rule is to direct the attention of the trial judge to the alleged erroneous rulings, and present to the appellate court the precise question involved. The safest course is to assign each error with the same particularity of an assignment of error in appeal. * * * But this is not the practice in most of the States; the courts holding that it is sufficient merely to assign error in giving a certain instruction or admitting certain evidence, without stating why such ruling was erroneous. If the grounds for a new trial are not stated in the motion, it may be overruled by the court, and disregarded on appeal. All errors known at the time of filing the motion must be included therein, or the errors omitted will be deemed to have been waived." Ency. of Plead. & Prac., vol. 14, pp. 882, 883.

We are of the opinion that the grounds set out in the motion should be as specific and certain as the nature of the error complained of will permit. Thus, if the error consists in the admission or rejection of evidence, the evidence admitted or rejected should be stated. If it be for affirmative error in the charge, or for failure to give an instruction properly and reasonably presented, it should set out the portion of the charge complained of, or the instruction refused, or otherwise definitely identify the instruction. If it be for misconduct of the opposite party or that of the jury, the facts constituting it should be stated. This was not done in this case. The testimony admitted and that excluded is not stated—not even the name of the witness given—and the instructions requested are not set out or sufficiently identified.

We do not think that it is necessary to state why the ruling complained of is erroneous as fully and with all the strictness required in assignments of error in this court, but a fair statement of the error complained of, sufficient to direct the attention of the court and the prevailing party to it, is all that is required.

Nor was it necessary for the successful party in the court below to there object to the form of the motion, because

rules of this character are made in the interest of the public, and for the purpose of enabling the courts to speedily and correctly dispose of the cases pending in them, and they cannot be waived by litigants.

We are of the opinion that no sufficient grounds for a new trial because of the admission of incompetent or rejection of competent testimony, or a failure to give in charge to the jury instructions submitted by the defendant, were stated in the motion made by it in the circuit court, and that there is therefore nothing upon which these assignments of error on the action of the trial judge in refusing to set aside the verdict and grant a new trial can be predicated; and, under the practice of his court, in cases coming from those courts having rules like that in this record, not to consider the assignments of error upon any ground not appearing in the motion for a new trial, these assignments of error are insufficient, and must be overruled.

The other assignments of error filed by the plaintiff in error were disposed of in an oral opinion.

210 *trial*
KING v. GILSON.

Supreme Court of Missouri. 1907.

206 Missouri, 264.

WOODSON, J. * * *
* * * * *

The motion for a new trial was filed on March 27, 1906, and one of the grounds assigned therefor is in words as follows:

"11. Because, since the trial of this cause, the defendants have discovered new and important evidence material to the issues submitted to the jury, which evidence is not cumulative in character and which evidence was unknown to defendants at the time of the trial."

On the same day the court granted defendants ten days in which to file affidavits in support of motion for new trial; and within that time they filed the affidavits of Dr. Waterhouse, Arthur Marshall, Edward Unwin and J. H. Orr, one

of the attorneys for the defendants, the three latter stating what diligence they had used in trying to discover all the witnesses and evidence in the case.

The plaintiffs contend that the action of the court in granting a new trial on the ground of newly-discovered evidence was erroneous.

The motion for new trial does not disclose or set out the newly-discovered evidence or its nature, nor does it give the names or addresses of the witnesses by whom the newly-discovered evidence was to be given, nor was there any affidavit filed with the motion.

The motion simply states that, "since the trial of this cause, the defendants have discovered new and important evidence material to the issues submitted to the jury, which evidence is not cumulative in character, and which evidence was unknown to the defendants at the time of the trial."

This question has been before this court repeatedly, and there is nothing new to be said upon it.

In the case of *State v. David*, 159 Mo. l. c. 535, this court said: "A new trial was also asked upon the ground of newly-discovered evidence, but the evidence was not set out in the motion. The mere fact, asserted in the motion, that the newly-discovered evidence was material, did not prove it to be so. It should have been set out in order that the court might pass upon its materiality. For these reasons, besides others unnecessary to mention, this question cannot be considered by this court."

* * * * *

In the case at bar, the affidavits were not filed in support of and in proof of the newly-discovered evidence stated in the motion for a new trial, because, for the very obvious reason, there was no such evidence stated therein; but the object and purpose in filing them was to bring the evidence itself and not the proof thereof to the attention of the court. The law requires such evidence to be set out in the motion; and the mere fact that it is so stated does not prove it to be true, and for that reason its truthfulness is required to be established by affidavits. But here the defendants are trying to make the affidavits serve a two-fold purpose; first, a ground for a new trial, and, second, proof of the statements constituting that ground. This cannot be done. The motion for a new trial must be filed within four

days after the trial, and the court has no power to extend the time for filing it. If the evidence is set out in the motion, then this court has repeatedly held that the trial court may give the parties time in which to file affidavits in support thereof.

The defendants state in their motion that they have discovered new evidence; that it was material to the issues; that it was not cumulative, and that if admitted in evidence probably a different result would be reached if a new trial was granted. If they knew such evidence existed at the time the motion was written, why did they not incorporate it into the motion and later file the affidavits in support thereof?

If such a practice as is contended for in this case was permissible, it would enable the parties to supplement and add to their motion for a new trial after the expiration of the four days allowed for filing it, and thereby open the door to temptation and fraudulent conduct in bolstering up motions for new trials.

* * * * *

[*Affirmed on other grounds.*]

210 ^{11/8} ~~11/8~~
VOSE v. MAYO.

United States Circuit Court for the District of Maine. 1871.

3 Clifford, 484.

CLIFFORD, Circuit Justice. Power to set aside a verdict before judgment and grant a new trial is vested in the circuit courts "in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law," and the correct mode of applying to the court for the exercise of that power is by motion for new trial, which, under the rules of the circuit court in this circuit, must be made in writing, and must, unless the time is enlarged by leave of the court, be filed within two days after the verdict. Such a motion must assign the reasons for the application, and when the motion is grounded on facts not within the knowledge of the presiding justice, and

not appearing in his minutes, it must be verified by affidavit, unless the requirement is waived by the opposite party. No affidavit of merits, however, is required when the motion is properly addressed to the minutes of the presiding justice, as where the motion is to set aside the verdict for error of ruling in admitting or rejecting evidence, or for refusing to instruct the jury as requested, or for misdirection, or because the verdict is against the law, or against the evidence or the weight of the evidence, as the theory of the motion in all such cases is, that all the matters of fact alleged in the motion are within the knowledge of the presiding justice, or that they may be verified by reference to his minutes taken at the trial. Where the motion is for new trial on account of newly discovered evidence, or where the motion is grounded on the charge that the opposite party or the jury were guilty of misconduct in respect to the trial, the rule is different, as the motion in such cases presents a preliminary question whether the facts and circumstances disclosed are such as to make it the duty of the court to order notice to the opposite party, and to direct the mode in which the proofs shall be taken, and in all such cases the motion must be in writing, and must, unless the requirement is waived, be supported by affidavit. *Johnson v. Root* (Case No. 7, 409;) Hill, New Trials, 393, sec. 35; *Macy v. DeWolf* (Case No. 8, 933).

* * * * *

25 Various methods have been devised by which the data necessary for the determination of a motion for a new trial may be presented to the court.

1. *The minutes of the court may be used.* These being deemed already in existence and before the court, a party moving upon them is required to prepare no abstract or statement of the proceedings in the case, upon which to base his claim for relief.

"The term 'minutes of the court,' as used in subdivision 4, § 5090, Comp. Laws, seems to have no well-defined legal meaning, but is evidently used in that section as referring to such minutes as the judge may make of the evidence, and to his recollection of the same, and is evidently intended to relieve a party from the expense and labor of preparing a statement or bill of exceptions. To require the party moving for a new trial upon the minutes of the court to procure a transcript of the stenographer's notes, and cause the same to be filed, would, in effect, impose upon him a greater burden than preparing a bill of exceptions or statement." *Distad v. Shanklin*, 11 S. D. 1.

2. *It may be made upon a bill of exceptions or statement of the case.* By this means a statement of the evidence and other proceedings had upon the trial, so far as material to the questions raised by the motion,

is written out at large, and settled as correct by the attorneys or the court, and thereupon such statement becomes the exclusive source of information as to what took place upon the trial, and the sole foundation for the motion so far as it relates to the trial itself.

3. *It may be made upon affidavits.* This method is to be employed when matters outside the proceedings at the trial are to be brought to the attention of the court as a basis for the relief asked. It is commonly used in connection with, and supplementary to, the other two methods.

212 *Court*
SECTION 10. TRIAL BY COURT WITHOUT A JURY.

FOWLER v. TOWLE.

Supreme Judicial Court of New Hampshire. 1870.

49 New Hampshire, 507.

This was a writ of error, brought by Cyrus Fowler and others against Elias Towle. The writ of error is dated October 1, 1869.

The original action was replevin, for a meeting-house bell, in favor of Towle, against Fowler and others. The plea was *non cepit*, with a brief statement, giving notice of title to the bell in the defendants and others. By consent of the parties, the action was tried by the court at Freedom, after the adjournment of the May term, 1868. Neither party requested the court to report the facts found, nor the conclusions of law upon them. At the close of the trial, the cause was reserved for consideration upon written arguments, and the finding of the court was subsequently filed in the clerk's office. The finding, after giving a description of the action, concludes as follows:

"The case was well tried, and the evidence and law were well argued by the respective counsel engaged, in writing. The court, after a mature examination and consideration of the facts and evidence, and the law applicable thereto, has come to the conclusion, that the said Elias Towle recover of said defendants one dollar, for his alleged damages for the alleged caption and detention of said bell mentioned in his declaration; and also that plaintiff be restricted to the recovery of one dollar in full of all costs whatsoever in this suit.

G. W. N., Jus. &c.

"The finding of the court is also upon the further limitation and condition, that if the defendants shall undertake either by transfer of the action to the full court or otherwise, to delay immediate judgment according to the aforesaid finding of the court, then the plaintiff by way of penalty, shall be allowed to recover the whole amount of his legal costs from the beginning, and also if the plaintiff shall attempt to transfer this action as aforesaid or otherwise disturb the aforesaid finding of the court, then, in such case, the court orders that, by way of penalty, the aforesaid finding shall be wholly reversed and annulled, and that the said defendants recover as damages against said plaintiff the value of the bell, being three hundred dollars, with interest from the 5th day of July, A. D. 1867, and full costs of court.

G. W. N., Jus. &c.

"The action on the docket having been continued *nisi* judgment is therefore ordered as of the last term for plaintiff for one dollar debt, and one dollar costs, and the clerk will enter it up accordingly.

G. W. N., Jus. &c."

* * * * *

In the assignment of errors in this case the plaintiffs in error pray that "the judgments aforesaid may be reversed and held for nothing, and that they may be restored to all things they have lost by reason thereof."

* * * * *

The defendant in error moved to quash the writ of error upon its return into court, and the parties agreed that "pleas may be filed and argued without prejudice to defendant's motion to quash in the same brief in which said motion is argued." No plea has been furnished, and the defendant in error relies solely upon his motion to quash.

* * * * *

SARGENT, J. The first ground taken by defendant in error, on his motion to quash is, that in this class of cases, error does not lie. That the proceeding being entirely by force of special statute, is not a proceeding according to the course of the common law, and therefore that *certiorari* should have been the form of proceeding instead of error.

What are the statute provisions applicable to this case? Secs. 1 and 2 of chap. 189, Genl. Stats., prescribe the juris-

diction of this court at the law terms, while sec. 3 does the same at the trial terms, as follows: "At the trial terms they shall take cognizance of civil actions and pleas, real, personal and mixed, according to the course of the common law," etc. Sec. 4 then provides that "in civil actions the court shall try the facts in controversy and assess the damages, if the parties so elect, and judgment rendered on such trial shall be conclusive as if rendered on the verdict of a jury;" and sec. 5 provides that "the decision of the court in such case, shall be in writing, if either party so requests, stating the facts found and the conclusions of law upon them, which shall be filed and recorded, and either party may except to any ruling or decision of the court in matters of law in the same manner and with like effect, as upon a trial by jury."

Now the question is, whether the substitution of the court for the jury, to settle the questions of facts, by agreement of parties, so far changes the nature of the whole proceeding, that it is no longer "a civil action or plea" prosecuted "according to the course of the common law?" The writ is the same; the service the same; the entry in the court the same; the defendant's appearance the same; the pleadings the same; the issue joined is the same; and, after verdict, the judgment must be the same; and shall have the same effect, as though rendered upon a verdict of the jury; and provision is made, that either party requesting it, shall have the decision in writing, and may except to any ruling or decision of the court in matters of law, in the same manner, and with the same effect, as upon a trial by jury.

When all these facts are considered, and also the fact that it is only by agreement of the parties, that this change can be made, and that all the proceedings, both before and after trial, are to be the same in both cases, we are satisfied that this arrangement of the parties as to the trier of the facts, does not change the nature of the proceeding any more than it does the form, and was not designed to change either.

It is sufficient answer to this suggestion, that if by this agreement of the parties, and this trial of the facts by the court instead of a jury, the proceeding is changed so as to be no longer a "civil action or plea according to the

course of the common law," then the court at the trial term would no longer have jurisdiction of the case, because it clearly does not come under any of the other heads enumerated in sec. 3, and unless it continues to be what it was when it was commenced, viz., a civil action or plea according to the course of the common law, the court would cease to have jurisdiction of the same at the trial term, because it is only as such an action or plea, that the court at that term has any jurisdiction of the case. This position of the defendant in error is not well taken.

A writ of error would be the proper remedy in a case tried by the court, under secs. 4 and 5 in all cases, where it would be the remedy if the same case had been tried by the jury, instead of the court. The court was substituted for the jury in this case, to try the facts, by express agreement of the parties; but while the court thus settles the questions of fact, in the capacity of a jury, still the judge retains all his powers as judge in questions of law, and may exercise the same discretion in allowing or limiting costs, that he might before, so that while acting as a jury, to try the facts, he has no power over the costs, either to allow or disallow, or limit, yet as judge, he may pass upon the question of costs.

And while the judge who thus acts in the double capacity of judge and jury has, and may exercise all the powers both of the judge and jury, still he has no powers in addition to those which the court and jury have in any ordinary case. Having premised thus much, in relation to the powers and duties of the judge, who acts as judge and jury both, in the trial of a cause, let us look at the verdict in this case, and see how much of it is a finding upon questions of fact, and what part of it is simply a ruling upon questions of law, or the exercise of the discretion vested in the court.

So far, as the limiting of the original plaintiff's costs is concerned, that was a matter within the discretion of the court, as a court, and had nothing to do with the finding of the facts, and no exception would lie to the ruling of the court, upon a matter like this, which is placed by law in the discretion of the court, and it seems equally well settled, that a writ of error will not lie in such a case. *Rochester v. Roberts*, 29 N. H. 360, 368.

To this part of the verdict, then, there could be no ex-

ception, and there was no error. And if there had been error in this, the plaintiffs in review being the original defendants, would hardly insist upon having that corrected, and being compelled to pay full costs, instead of the limited amount fixed by the judge who tried this cause. That is not one of the errors assigned in this case.

The other part of the verdict (omitting now the conditional portions of it) is "that said Towle recover of said Fowler & als. one dollar as damages for the caption and detention of said bell mentioned in his declaration." As there was no request to state in writing either the facts found, or the conclusions of law upon the facts in the case, by either side, we think this finding is plain, intelligible and explicit enough, to answer the requirements of the law.

In order to reach that conclusion, the facts found must have been, that the bell in question belonged to Towle, and as he had taken the bell into his possession upon the replevin writ, all he could recover would be the damages for the wrongful taking and detention of it, and that is, what he does recover by this verdict and judgment. This is such a finding that judgment may be properly rendered upon it.

* * * * *

Let us next consider the remaining or conditional portion of the verdict in this case. It will be observed, that the finding of the court is in three separate and distinct parts; the first and third relate to the same subject-matter; the first, the finding of one dollar damages and the limiting the costs to one dollar; the third, ordering a judgment on that finding, according to its terms. These, too, are consistent with each other, and are perfect in themselves, and each is signed separately, and neither of them contains anything, as matter of fact, which the presiding judge might not properly find, acting in place of a jury, or as matter of law, which the same judge acting as court, might not properly do and order.

But the second or conditional part of the verdict is all inconsistent with the other findings, it is all conditional, not upon the law or facts of the case, but upon the future conduct of the parties, and was intended to be held over both parties, as it would seem, *in terrorem*, in order to induce them to abide by the first award, and submit to the judgment, which was ordered thereon. This portion of the

verdict is entirely separate from all the rest, and is signed separately.

Whence did the presiding judge, who tried this cause, derive his power to make orders as to the future conduct of these parties? The power to deprive them of rights which the law had given them, the power to punish them for resorting to those remedies which the law has provided for all good citizens? He could not derive this power from the agreement of the parties, because this agreement was simply, that the court should act in the place of the jury in finding the facts in the case, and gave the court no additional powers as a court. After that agreement, the presiding judge, had just the powers he had before as presiding judge, and in addition, the power and authority to find the facts in the case, upon legal testimony, and that was all.

A jury may mistake their province, and undertake to find something, that was not in issue, but such part or parts of their verdict would be rejected as surplusage, and only such part as was confined to the issue raised by the pleadings, could stand as a verdict. *Tucker v. Cochran*, 47 N. H. 54. So far, then, as he acted as a jury, the presiding judge, had no authority or power to undertake to regulate the future conduct of these parties, and so far the verdict can have no force or effect. While acting as judge, he had the power to limit costs, in his discretion, and to order judgment upon the verdict he had rendered, still he had no more power than he would have had if the jury had found the verdict upon the evidence. In such case, he would have the power to set aside the verdict if a proper case was made, or to order judgment upon it, or to continue the cause, but he had no power or jurisdiction to put the parties under bonds for good behavior, without the proper complaint on oath, nor had he the power to say that they should not avail themselves of all their legal rights and remedies, after the judgment which he might properly render, was entered up.

As a part of the verdict, upon the facts, this portion would be merely surplusage, and would all be rejected, and as an order of the court, or a part of the judgment, it was extra-judicial, was without authority, and without legal effect, a mere nullity, not *voidable* merely but absolutely void.

There is no doubt, therefore, that the second judgment

would be reversed, if the question were brought before the court at the proper time and in the proper way. But the question here is, whether a writ of error is the proper way to bring the matter before the court at this time. When this case was brought forward, and the new judgment was rendered, it was at a regular term of the court, when counsel were present, as it was their duty to be, and had every opportunity to take exceptions. All the objections existed then that exist now, and if the proper exceptions had been taken to the rulings and orders of the court at that time, the judgment must inevitably have been reversed. No reason or excuse is given or offered, or pretended to exist, why objection was not then made, and exception taken. * * *

Under these circumstances, the plaintiffs in error, having had ample opportunity to take any and all exceptions, seasonably, and have them considered just the same as upon a writ of error, and having neglected to take any such exceptions at the proper time, they cannot now * * * be heard to raise exception. * * *

We find no ground, therefore, upon which this writ of error can be sustained, and are of opinion that the motion to quash the writ should be granted.

Writ quashed.

213 Quashed

UTAH NATIONAL BANK v. NELSON.

Supreme Court of Utah. 1910.

38 Utah, 169.

Action by the Utah National Bank of Salt Lake City, Utah, against Joseph Nelson. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Plaintiff, a corporation organized and existing under the laws of Congress, brought this action to recover from defendant upon a promissory note. The complainant alleges, in substance: That the defendant, on January 22, 1908, at Salt Lake City, Utah, for value received, executed and delivered to plaintiff his certain promissory note, and thereby promised, on 30 days' demand after date, to pay to the order of plain-

tiff \$13,250, with interest at 6 per cent. per annum from date until paid, and to pay 10 per cent. additional as attorney's fee if the note should be placed in the hands of an attorney for collection; that payment of the note was demanded September 11, 1908, but the defendant refused to pay the same, or any part thereof; that the note was placed in the hands of attorneys for collection. The answer admitted each allegation in the complaint, with the exception that it denied that the note was given "for value received." The answer also contained the following affirmative allegation, namely; "That the promissory note signed by the defendant and delivered by him to the plaintiff, as alleged in said complaint, was without consideration, and that no consideration whatever passed or was given for the said promissory note; * * * that neither the plaintiff nor any other person ever paid any sum of money or any other thing, or ever suffered or received any detriment as a consideration for the signing and delivery of the said promissory note; and that said note was wholly without consideration." The case was tried to the court without a jury. * * *

The court, among other things, found, so far as material here: "That, for a valuable consideration received by defendant, he executed and delivered his promissory note (the note in question) to plaintiff; * * * that all of the allegations contained in plaintiff's complaint filed herein are true, and all the denials and allegations of said defendant in his answer are untrue, except as to the admissions therein contained." As a conclusion of law the court found that plaintiff was entitled to judgment against defendant for the principal of the note, \$13,250, and interest thereon amounting to \$1,104.16, and for attorney's fee amounting to \$1,325, and rendered judgment in favor of plaintiff for the sum of \$15,679.16 and costs of suit. To reverse the judgment defendant has brought the case to this court on appeal.

MCCARTY, J. (after stating the facts as above). Appellant, in his assignment of errors, alleges "that the court erred in that it failed to find the facts, if any there were, constituting, or which could constitute, any consideration for the contract or promissory note," and insists that the finding made by the court, namely, "that for a valuable consideration received by said defendant he (the defendant) executed the promissory note mentioned," was a mere conclusion of law and not a finding of fact at all * * *

In Spelling, New Tr. & App. Pro. § 593, the author says; "If an issue be tendered in general terms and met by a denial in the same form, a finding in the same general form will be sufficient; but, where the pleadings are so framed that the controversy turns upon a particular fact, the finding should conform to the issue thus presented and be specific. Accordingly, when only general facts are averred, and the controversy related to the settlement of a long standing account consisting of numerous items, it was held that a general finding of a balance in favor of plaintiff was sufficient"—citing with approval the case of *Pratalongo v. Larco*, 47 Cal. 378. The action in that case was, as stated in the opinion, "for money lent and advanced and paid, laid out, and expended by the plaintiff to and for the use of the defendant and for money had and received by the defendant for the use of the plaintiff. The answer is a general denial and a counterclaim in which the defendant avers that the plaintiff is indebted to him for money had and received, lent and advanced, and paid, laid out, and expended." So in this case it is alleged in the answer, in general terms, that the note in question "was without consideration, and that no consideration whatever passed or was given for the promissory note." The general finding that the note was executed "for a valuable consideration received by said defendant" negatives the affirmative allegation of the answer and is therefore sufficient. Moreover, the authorities seem to hold that findings are sufficient when the facts found are stated in the same way as they are alleged in the pleadings.

In Hayne on New Trial, sec. 243, the rule is stated as follows: "Facts may be stated in the findings in the same way they are stated in the pleadings. It is not necessary that the findings should follow the precise language of the pleadings; but the only purpose of findings is to answer the questions put by the pleadings, and it seems to be the received idea that it is sufficient if the answers are given in the same language as the question, and that the two modes of statement are governed by the same general rules."

In 8 Ency. Pl. & Pr. 939, it is said: "It is not necessary that the findings should be in the exact language of the pleadings or in any particular form." The finding complained of in this case, while of course not in the exact language of that part of the answer in which want of consideration is alleged,

nevertheless is directly responsive thereto. And, furthermore, the doctrine is elementary that the findings should be a statement of the ultimate facts in controversy and not of the evidentiary matters from which the ultimate facts are to be deduced or found. In 8 Ency. Pl. & Pr. 941, it is said: "The findings of the court should be statements of the ultimate facts only, and not probative facts * * * The findings should contain a concise statement of the several facts found by the court from the evidence and not the evidence from which they are found."

Murphy v. Bennett, 68 Cal. 528, 9 Pac. 738, was an action to recover damages for the tearing down of a barn and converting the materials thereof. It was alleged in the complaint that the plaintiff was the owner of the barn at the time of the alleged conversion. The answer denied the ownership of the plaintiff and set up two affirmative defenses in justification of the taking. The court found that the plaintiff was not, and that the defendant was, the owner of the building, but omitted to find on the affirmative defenses. It was contended that the finding was a conclusion of law. On appeal the Supreme Court held that the finding on the issue of ownership was sufficient, and that the failure to find on the affirmative defenses did not prejudice the plaintiff. In the course of the opinion the court said: "Here the allegation in the complaint is that the plaintiff 'was the owner of a certain frame building, situate,' etc. The answer denied that plaintiff was the owner of the building. Whether plaintiff did own the building or not was then the ultimate fact to be determined, and upon the issue thus raised the court found against the plaintiff. We think it clear that the findings referred to are findings of fact, and not conclusions of law."

In the case of *Kahn v. Central Smelting Co.*, 2 Utah, 371, it is said in the syllabus: "A finding 'that there was no partnership between the plaintiff and the defendant, is not a conclusion of law, but is a finding of fact.'" And in the course of the opinion Mr. Justice Emerson, speaking for the court, says: "The fact that there was a partnership is the ultimate fact alleged in the complaint. There are certain facts and conditions and circumstances set out in the complaint from which this ultimate fact is deduced; that is, there is in the complaint much detail of mere evidentiary facts. The material issue of fact is, however: Was there a partnership?"

And the finding responds to this issue. This was the ultimate fact to be ascertained, and it is none the less a finding of fact because drawn as a conclusion from other facts." This case is cited with approval and the doctrine therein announced re-affirmed by this court in the case of *Snyder v. Emerson, Auditor*, 19 Utah, 319, 57 Pac. 300, wherein it is held that "the finding that W. F. Critchlow was duly appointed as night jailer is not a conclusion of law, but a finding of an ultimate fact which was an issue."

As a test for determining whether the finding in question is a conclusion of law or a finding of an ultimate fact, let us suppose, for example, that the court had, in the language of the defendant's answer, found "that the promissory note signed by defendant and delivered by him to the plaintiff, as alleged in said complaint, was without consideration, and that no consideration whatever ever passed or was given for the said promissory note." Could such a finding be successfully assailed on the ground that it is a conclusion of law and not a statement of an ultimate fact? Certainly not, because it is the only finding that the court could have made had it found on this issue in favor of the defendant, and that, too, notwithstanding this issue was presented by the affirmative allegations of defendant's answer and the burden was upon him to prove that the note was executed without consideration. Now, if a finding that the note was executed without consideration would be a sufficient finding to support a judgment in favor of defendant, it necessarily follows that a finding that the note was made and delivered "for a valuable consideration" is a sufficient finding to support a judgment for plaintiff. We are clearly of the opinion that the finding made by the court is a finding of an ultimate fact, and, as we have stated, it is directly responsive to the affirmative allegations contained in the defendant's answer.

* * * * *

Judgment affirmed, with costs to respondent.

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DARLING v. MILES.

~~False~~*Supreme Court of Oregon. 1911.**57 Oregon, 593.*

This is an action by Thomas Darling against S. A. Miles to recover damages suffered by reason of the fraudulent representation made by defendant in the sale of certain lots.

The complaint alleges that on "the 20th day of July, 1906, the defendant herein did, with intent to cheat and defraud the plaintiff, falsely and fraudulently represent to the plaintiff that he was the absolute owner in fee, free from incumbrance, of lots six (6) and seven (7) in block five (5), in Pleasant View addition, * * * in the city of Portland, and that lot six (6) was 46.9 feet by 100 feet, * * * when in truth and in fact the defendant at that time was not, and well knew that he was not, the owner of the south fifteen (15) feet of said lot six (6) free from incumbrance, and plaintiff alleges that the public then had a right to use the said 15 feet as a highway, and the defendant then knew it; that plaintiff herein relied upon the truth of the statement of the defendant and believed the same, and on July 20, 1906, he did, by reason of such reliance and belief, purchase * * * and received from the defendant his warranty deed, wherein and whereby the grantors certified that the said premises were free from all encumbrances * * *."

All these allegations are denied by the answer, except that defendant admits the execution and delivery of the deed, with covenants and warranty, as alleged in the complaint.

The action was tried by the court without a jury. At the close of the testimony the court made the following finding of facts:

"The court finds that on or about the 20th day of July, 1906, the plaintiff purchased from the defendant lots 6 and 7 in block 5, Pleasant View addition, Multnomah County, Oregon, for a valuable consideration, and received from the defendant a general warranty deed therefor. That the south 15 feet of said lot 6 is subject to a right of way of the public to use the same for a highway, and said sale was made without any fraud on the part of the defendant, and without any fraudulent representations in regard thereto."

Judgment was rendered thereon in defendant's favor, from which plaintiff appeals.

EAKIN, J. 1. Plaintiff contends that the findings of fact do not support the judgment, and to this we agree. Section 158, B. & C. Comp., provides that when an action is tried by the court, without the intervention of a jury, the decision shall state the facts found, and such decision shall be entered in the journal, and judgment entered thereon accordingly. The finding that "the sale was made without * * * any fraudulent representations" only states a conclusion of law. To justify a conclusion to that effect it was necessary for the court to find whether or not defendant represented that he was the owner of the lot, free from incumbrance, and that its dimensions were as stated, with knowledge on defendant's part that the representations were false or were made recklessly as of his own knowledge, without any knowledge of their truth; and if the court finds that the representations were so made it must also find whether plaintiff relied thereon to his injury: *Cawston v. Sturgis*, 29 Or. 331 (43 Pac. 656). Finding adverse to plaintiff on at least one of these matters is necessary to support the conclusion that there were no fraudulent representation, or to support a judgment to that effect.

2. This court has held in many cases that findings of fact must be made on all material issues necessary to support the judgment. See *Wright v. Ramp*, 41 Or. 285 (68 Pac. 731); *Henderson v. Reynolds*, 57 Or. 186 (110 Pac. 979), and cases therein cited.

3. Counsel for defendant urges that the proof fails to establish the elements of fraudulent representations alleged, but the case is not before us upon the evidence. The only means we have of knowing what was proved is from the findings of fact which are silent as to the elements urged here.

4. It is said in *Drainage Dist. No. 4 v. Crow*, 20 Or. 536 (26 Pac. 846), after quoting from said Section 158, B. & C. Comp.:

"The object of this statute was to enable the parties to have placed upon the record the facts upon which the right litigated depends as well as the conclusions of law. * * * The facts found are conclusive upon the appellate court, but the conclusions of law are reviewable here on appeal."

The facts found must justify the conclusions of law.

Otherwise, they are abstract statements and not conclusions.

* * * * *

The judgment is reversed and remanded for a new trial.

MOORE, C. J., did not sit in this case.

Quoted 15 SLAYTON v. FELT.

Supreme Court of Washington. 1905.

40 Washington, 1.

CROW, J.—This action was commenced by appellant, Charles J. Slayton, against respondent, D. W. Felt, to recover a broker's commission on the sale of real estate in the city of Seattle. Upon the trial before the court without a jury, appellant presented findings of fact in his favor, which the court declined to make. Judgment was entered dismissing the action. * * *

* * * * *

(2) Appellant also contends that the trial court erred in failing to make findings of fact and conclusions of law, separately stated, or at all, and asks that the judgment be reversed by reason thereof. Appellant urges that under Bal. Code, Sec. 5029, it was the duty of the trial court to make findings of fact and conclusions of law, separately stated. Respondent contends that, as the final judgment was one of dismissal, findings of fact were unnecessary, citing, *Thorne v. Joy*, 15 Wash. 83, 45 Pac. 642, and *Noyes v. King County*, 18 Wash. 417, 51 Pac. 1052. Both of said cases were actions in equity. This court has heretofore announced the rule that findings of fact and conclusions of law are not necessary in equitable actions, but we are not aware of any such announcement being made as to actions at law. We see no reason why findings of fact and conclusions of law are not just as essential, if properly requested, in an action at law when the same is dismissed, as where an affirmative judgment is entered. This being an action at law, the cases cited by respondent do not sustain his contention. The question then arises whether the action of the trial court in failing to make findings of fact and conclusions of law amounted to such prejudicial error as

would entitle appellant to a reversal. In *Wilson v. Aberdeen*, 25 Wash. 614, 66 Pac. 95, this court said:

"We come now to the consideration of the appellants' contention that the judgment must be reversed because of the failure of the trial court to make findings of fact and conclusions of law. Our statute provides that 'upon the trial of an issue of fact by the court, its decisions shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly.' Bal. Code § 5029; 2 Hill's Code, § 379. This provision of the code is in form mandatory, and this court has several times held, in effect, that in actions at law tried by the court without a jury, findings of fact and conclusions of law are necessary to support the judgment. See *Bard v. Kleeb*, 1 Wash. 370, 25 Pac. 467; *Kilroy v. Mitchell*, 2 Wash. 407, 26 Pac. 865; *King County v. Hill*, 1 Wash. 404, 25 Pac. 451; *Sadler v. Niesz*, 5 Wash. 182, 31 Pac. 630, 1030; *Potwin v. Blasher*, 9 Wash. 460, 37 Pac. 712. But in more recent cases it has been decided that a judgment will not be reversed on appeal for want of findings of fact and conclusions of law, where it is not made to appear by the record that there was any request for such findings and conclusions, or any objection raised upon that account. *Washington Rock Plaster Co. v. Johnson*, 10 Wash. 445, 39 Pac. 115; *Remington v. Price*, 13 Wash. 76, 42 Pac. 527."

It is true that appellant did request the trial court to make findings of fact in favor of himself, upon the issues raised by the pleadings, the same being claimed by him to be warranted by the evidence admitted. The court, not thinking the evidence warranted such findings, refused to sign the same. It does not appear, however, that appellant at any time requested the court to make such findings of fact and conclusions of law as it might determine to be proper or warranted by the evidence. We think this request should have been made, before appellant would be entitled to base a successful assignment of error upon the refusal of the court to make any findings whatever. The findings requested by appellant are shown in the record, and afford him an opportunity, of which he has availed himself, to assign error upon the refusal of the trial court to make the same. He has been deprived of no legal or valuable right in that direction. This court in *Bard*

v. Kleebe, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273, construing said Bal. Code, § 5029, there mentioned as § 246, said:

"As we regard it, § 246 is for the protection of court and parties. To the court it gives an opportunity to place upon record its view of the facts and the law in definite written form, sufficiently at large that there may be no mistake. To parties it furnishes the means of having their causes reviewed, in many instances, without great expense."

The only privilege of which the appellant has been deprived, if any, has been to bring an appeal to this court without a statement of facts based upon such findings as the court would have signed if requested, but which, necessarily, would have been against appellant upon the issues joined. Such an appeal could not have benefited appellant in any manner whatever. In view of this fact, and, also, the further fact that appellant failed to require the court to make findings in accordance with its view of the evidence, we think no error prejudicial to appellant has been committed. In an action at law, either party has the right to request a trial court to make such findings of fact as it may deem proper, upon all the issues involved, or upon any particular issue, which such party may deem material or important, and such findings should then be made. A mere request, however, to make certain findings in favor of such party only, is not in itself sufficient. Of course, it is the proper and correct practice for a party to request findings in his own favor, to which he may think himself entitled, so that he may make proper exceptions to their refusal. But such findings in his favor having been refused and excepted to, he must, if he desires to assign error on a failure to make any findings or conclusions whatever, also request the court to make such findings as it thinks the evidence warrants. This was not done by appellant in this action.

We find no prejudicial error in the record. The judgment is affirmed.

MOUNT, C. J., ROOT and HADLEY, JJ., concur.

FULLERTON and DUNBAR, JJ., concur in the result.

GRAHAM v. STATE, EX REL. BOARD OF COMMISSIONERS.

216
J. H. E.

Supreme Court of Indiana. 1879.

66 Indiana, 386.

WORDEN, C. J.—This was an action by the appellee, against the appellant, which resulted in a trial by the court, and a finding and judgment for the plaintiff, for the sum of two thousand dollars.

The action was brought against Graham, as a surety on the official bond of Rufus Gale, as the auditor of Jefferson county. The bond was in the usual form of such bonds, but was in the penalty of five thousand dollars. Breaches of the bond were assigned, alleging, among other things, that Gale, during his term of office, had, as such auditor, drawn numerous warrants or orders upon the county treasury, payable to himself, for large amounts, and had presented them to the treasurer for redemption, who had paid the amount thereof to said Gale in redemption thereof; that the orders were drawn without any order of the board of commissioners of the county, or authority of law.

* * * * *

The defendant filed a motion for a *venire de novo*, because the facts were not sufficiently found. And it is said in the brief of counsel for the appellant, that "The failure of the court to find one way or the other, upon the facts, as to two of the breaches alleged in the complaint, leaves the issues as to those breaches untried, just as the verdict of a jury on one paragraph of a complaint consisting of several paragraphs leaves the issues on the other paragraphs untried, and in such a case a *venire de novo* is awarded."

This makes it necessary to consider to some extent the nature and office of a special verdict or finding.

The statute provides that "A special verdict is that by which the jury find the facts only, leaving the judgment thereon to the court." 2 R. S. 1876, p. 171, sec. 335. The next following section provides that "the court shall, at the request of either party, direct them" (the jury) "to give a special verdict in writing upon all or any of the issues."

By section 341, 2 R. S. 1876, p. 174, it is provided that upon

trials of questions of fact by the court, if one of the parties request it, "the court shall first state the facts in writing, and then the conclusions of the law upon them."

There is no difference between a special verdict and a special finding by the court, except that the special verdict finds the facts only, and the court afterward pronounces, or rather applies the law to the facts found, and renders judgment accordingly; while, in a special finding, the court states the conclusions of law upon the facts found, so that the parties can except to the conclusions. Neither a special verdict nor a special finding can do more in relation to facts than to find or state them. But what facts are to be thus found or stated? Clearly those that are proved upon the trial, and none other. When the special verdict has found the facts proved on the trial, it has performed its entire office; and when the special finding has stated the facts proved on the trial, it has performed its entire office, so far as the facts are concerned. Of course the facts may be proved by circumstances or otherwise, as in any other mode of trial.

But suppose there are issues in the cause concerning which no evidence is given. There is nothing in such case in relation to those issues for the court or jury, in finding specially, to pass upon. No fact in relation to them has been proved, and, hence, no fact in relation to them is to be found or stated, because, as we have seen, the special verdict or finding is confined to the facts proved.

In the case supposed, it would seem that, in rendering judgment, the issues concerning which no facts are found should be regarded as not proved by the party on whom the burden of the issue or issues lies.

* * * * *

The judgment below is affirmed, with costs.

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gale CITY OF OWENSBORO v. WEIR.
Court of Appeals of Kentucky. 1893.

95 Kentucky, 158.

HAZELRIGG, J. The question involved in this appeal is the liability of the appellant, City of Owensboro, for the fee of the appellees—attorneys at law—for services rendered by them at the employment of the mayor of the appellant acting without the authority of the city council.

The circumstances of the employment are set forth in an “agreed case” and in the record in which the services were rendered.

* * * * *

But, say the appellees with earnestness, there was no statement by the court of its conclusions of fact found, separately from its conclusions of law.

Section 332 of the Civil Code provides that “upon trials of questions of fact by the court, it shall not be necessary for the court to state its findings, except generally for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case, the court shall state in writing the conclusions of fact found, separately from the conclusions of law.”

Now upon an agreed state of fact, what could the court do in the way of stating “in writing the conclusions of fact found separately from the conclusions of law?” Simply copy or restate the agreed state of fact! Clearly the court’s judgment on the law only was asked. There was no *trial* of questions of fact. The case of *Harris v. Ray*, 15 B. M. 629, cited by counsel, simply determined that the provisions of the Code regulating applications for a new trial applied to judgments by default. It has no bearing on the section quoted.

* * * * *

218 **GAINES & CO. v. WHYTE GROCERY CO.***Kansas City Court of Appeals. 1904.**107 Missouri Appeal, 507.*

SMITH, P. J.—The plaintiff and defendant are both business corporations, the former organized under the statute of this State and the latter under that of the State of Kentucky. The plaintiff in its petition alleged, (1), that it was and is the owner of a special trade-mark for “Old Crow” whiskey, which defendant had infringed and was infringing; and (2), that by the use of the words “Old Crow” upon bottles containing whiskey other than the genuine “Old Crow” whiskey produced by plaintiff which it offered to the trade, defendant thereby carried on such unfair trade and competition as entitled plaintiff to the injunctive process of the court. The defendant’s answer, in addition to a general denial, interposed the defenses of laches and the statute of limitation. There was a trial and decree for plaintiff and defendant appealed.

* * * * *

The defendant’s final contention is, that the trial court erred in its refusal to make special finding of the facts and conclusions of law thereon. The statute (section 695) doubtless applies to both legal and equitable actions, but while this is so, we do not think the failure to make a special finding in an action of the latter kind constitutes a reversible error, because the supervisory courts are authorized on appeal to try and determine such actions upon the pleadings and evidence *de novo*. The findings of the trial court, if any, may be entirely disregarded by the former tribunal and such findings and decree entered therein as seems to it to be meet and proper. The Legislature did not, by the enactment of the statute already referred to, intend to abrogate the well and long-established practice of the appellate courts in supervising the findings of trial courts in equity cases, or to deprive the former of the jurisdiction to determine for themselves the correctness of the findings of the latter. *Blount v. Spratt*, 113 Mo. 48; *McElroy v. Maxwell*, 101 Mo. 294; *Benne v. Schnecko*, 100 Mo. 250. If the supervisory courts are not bound by the findings of the trial courts, or their conclusions of law in equity cases, but may review the whole evidence and

determine for themselves what the findings of fact and conclusions of law should be, it is difficult to see how a party could be prejudiced by the failure of the trial court to make special findings of fact, in such cases.

The failure, therefore, of the court in the present case to make special finding of facts was not such an error as requires a reversal of the decree; and especially so since it was, as we think, clearly for the right party and the only one that could have been given in the cause.

Accordingly, our conclusion is that the decree should be affirmed. All concur.

CITY OF BUFFALO v. DELAWARE, LACKAWANNA &
WESTERN RAILROAD CO.

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Court of Appeals of New York. 1907.

190 New York, 84.

The object of this action was to secure a judicial determination that a portion of the river front in the city of Buffalo is a public street and to compel the defendant to remove certain obstructions therefrom. The main issue raised by the answer was whether the *locus in quo*, called Front street, was a public street when the action was commenced. * * *

The trial justice found the following facts, among others:
* * *

"*Eighteenth.* That said dock and wharf from the time of its erection down to the commencement of this action, and since, has been open to travel by vehicles and pedestrians, except when such travel was temporarily obstructed by freight stored upon said dock or wharf, and the said dock or wharf has been used during the said times by vehicles and pedestrians, more largely by the latter than the former; that the greater number of persons using said dock or wharf for foot or vehicle traffic did so for the purpose of reaching the stores and warehouses abutting on said wharf, and for the purpose of delivering supplies to the vessels lying thereat, or receiving passengers from such vessels, or transacting other business with said vessels. But it is equally true that many of

the people using said dock and wharf, both for foot and vehicle traffic, used the same as a way of communication between Main street and points east of Washington street, and that many pedestrians constantly used said dock and wharf who had no business with the abutting stores and warehouses, or the vessels lying at said dock."

After finding the facts as thus stated the trial court found the following, which were designated as "conclusions of law:"

* * * * *

"*Third:* That for a period of six years and more prior to the commencement of this action the said premises herein designated as 'Front street,' ceased to be traveled or used as a public highway, and ceased to be a highway for any purpose.

* * * * *

VANN, J. The trial court rendered judgment against the plaintiff on the theory that, although Front street became a public highway as early as 1826 through tender of dedication by the owners and acceptance by the municipal authorities, still it had ceased to be a public highway because it had not been traveled or used as such for a period of more than six years prior to the commencement of the action. While facts were found which sustain the conclusion of law that Front street became a public highway through offer and acceptance, no finding of fact, classified as such, was made that the street had not been traveled or used as a public highway for the statutory period required to effect an abandonment. (*City of Cohoes v. Delaware & Hudson Canal Co.*, 134 N. Y. 397; *Matter of Hunter*, 163 N. Y. 542, 548; L. 1861, ch. 311; L. 1890, ch. 568, § 99.)

It is claimed that the third conclusion of law contains the finding of fact needed to support the judgment and that, although it is classified as a conclusion of law, since it is really a finding of fact the same effect should be given to it as if it had been so designated in the decision.

The finding in question is one of fact or law. If it is the latter, the facts found do not support the judgment, because a street once in existence is presumed to continue until it ceases to be such owing to abandonment or some other lawful cause. (*Cohoes Case, supra.*) We think, however, that the finding, except the last clause thereof, is not one of law but of fact. The cessation of user and travel upon a street for the period prescribed involves a question of fact. Traveling

upon a street is an act or a series of acts which can be seen and described. The use of a street for traveling purposes requires that something should be done thereon which is apparent to ordinary observation. One may travel on a street by walking, riding or driving. Each method involves action and an act is a fact, as that word is known to jurisprudence.

An error in the classification of findings by the trial court does not prevent an appellate court from classifying them for itself in accordance with their actual character. Giving a wrong name to a finding does not change its nature and if it is placed under the head of "conclusions of law," when it is a finding of fact, it will be treated on appeal as what it really is, at least for the purpose of upholding a judgment. (*Berger v. Varrelmann*, 127 N. Y. 281, 288; *Christopher & Tenth Street R. R. Co. v. Twenty-third Street R. R. Co.*, 149 N. Y. 51, 57.) As we have already seen, the judgment appealed from cannot stand unless the finding under consideration is a finding of fact, and it now remains to be seen whether it can stand even on that theory, since it is claimed that such finding of fact is inconsistent with other findings of fact, and hence must yield thereto at the election of the appellant in aid of his exceptions. It was upon this ground that one of the learned justices below based his dissent.

What is the situation according to the findings when properly classified? About 1826 a public highway existed on the river front between Washington and Main streets. It still existed in 1838, when a dock was built by the abutting owners over and upon the land owned by them constituting said highway, covering it for its entire width and length. From that time to this the abutting owners have used the dock for dock purposes and the general public have used it for highway purposes, neither use excluding the other altogether, although doubtless interfering with it to some extent. Under these circumstances what became of the street when the dock was built? Can abutting owners destroy a street in this way? Did the construction of the dock annihilate the highway? There is no statute which gives it that effect, and according to the common law the street leaped from the ground to the dock and stayed there. It is there now unless it has been abandoned by nonuser as we read the authorities. * * *

* * * * *

When a private dock is built over a public street upon the

shore of navigable waters, the dock becomes part of the street and the public has a right to travel over it. Ownership of the dock is not inconsistent with the existence of the street any more than ownership of the land over which the street extended. Assuming that the defendant or its predecessors could lawfully build a dock over their own land in order to reach the river, still, as their land was subject to the right of the public to travel upon it, they could not unreasonably interfere with that right nor with the existence of the street which was the foundation thereof. Two rights co-existed. The defendant, as owner of the river front, had the right to reach the water. As there was a street along the river front over the defendant's land the public had the right to use the street. The building of the dock changed neither right. Both continued to exist, although under changed conditions. They met but did not merge, nor did either destroy the other. The defendant had the right to use its dock, as a private dock, subject to the right of the public to travel over it, as they had previously traveled upon the land over which it was built. The city had no right to use the dock for dock purposes, but its citizens had the right to use it for street purposes. While the street followed the dock, and covered the whole of it, that did not authorize the city to collect wharfage; and although the dock was private property the same as the land beneath it, that did not authorize the defendant to prevent the public from using it for the same purpose that they had previously used the land. The easement for travel still existed, but it was over the dock which took the place of the land constituting the street. The public had the right to travel in the same place and in the same direction that they had before, but instead of traveling upon the surface of the land, they were obliged to travel and had the right to travel upon the structure that the defendant had placed on the land. That structure became a street for the purpose of travel and a private dock for use as such, with a superior right in the public in case of conflict through reasonable use of the respective rights.

* * * * *

We have thus laid down the law applicable to the facts as found independent of the fact appearing in the third conclusion of law. It is clear that the latter, treated as a finding of fact that Front street had not been traveled or used as a pub-

lic highway for more than six years, is inconsistent with the eighteenth finding of fact that the public used the dock continuously from the time it was built, both for foot and vehicle traffic, as a way of communication between Main street and points east of Washington street. The learned trial justice evidently regarded the street as no longer in existence after the dock was built, and hence found that travel had ceased upon the street, although he found that it continued upon the dock which took the place of the street. He may thus have been misled into making the inconsistent findings.

“While an appellate court should harmonize inconsistent findings when it is possible to do so, if they prove irreconcilable it is the duty of the court to accept those most favorable to the appellant, and he is entitled to rely upon them in aid of his exceptions.” (*Israel v. Manhattan Ry. Co.*, 158 N. Y. 624, 631; *Nickell v. Tracy*, 184 N. Y. 386, 390.) The finding that the street has been abandoned cannot be reconciled, according to our view of the law, with the finding that the dock has been used and traveled upon continuously as a street. We are, therefore, compelled to reject the former and to accept the latter, with the same force and effect as if it was the only finding upon the subject appearing in the decision. This leaves the conclusion of law that the defendant is entitled to the exclusive use, possession and occupancy of Front street, and that the plaintiff is not possessed of any right, title or interest therein, without any finding to support it. The exception to this conclusion of law, as well as to the direction for judgment against the plaintiff, raised reversible error and requires us to reverse the judgment appealed from and to order a new trial, with costs to abide the event.

Judgment reversed, etc.

SECTION 11. THE JUDGMENT.

(a) *Nature.*

MONTGOMERY v. VIERS.

*Court of Appeals of Kentucky. 1908.**130 Kentucky, 694.*

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Jahse

O'REAR, C. J. Plaintiff avers that in 1900 a judgment by default was rendered in his behalf by the Hardin county quarterly court against Euclid Walker and Mary F. Walker, for \$49.50, with interest and costs, but that the then judge of said court, who was also its clerk, failed to sign the judgment upon the judgment book. Application was made recently by plaintiff to the respondent, who is now judge of the Hardin county quarterly court, to sign that judgment, or, in lieu of doing so, to enter now for then a judgment identical in terms. The respondent refused to entertain the motion unless notice was given to the Walkers; the case having years ago gone off the docket. Thereupon the plaintiff exhibits his petition in this court, praying that the writ of mandamus issue against the respondent compelling him to enter the judgment now for then.

Common-law courts have from earliest times exercised the prerogative of correcting their own judgments by their own records so as to make them conform to the original fact. In this they have exercised the inherent power of supplying their lost or defaced records. It must be manifest that the record is not the judicial act. It is only historical. Its principal practical use is evidential. The judge hears the case. So may the jury. The judgment of the court is the pronouncement of the judge upon the issue submitted to him. When spoken, it is the court's judgment. Necessarily, the giving of the judgment must precede its historical engrossment. The clerk of the court executes the mechanical act of recording in some manner so as to give permanence to the evidence of the judgment that the court has delivered. * * * But some officer whose responsibility may be regarded as higher ought to authenticate what the clerk has recorded as the action of the court. None other is so well qualified, or so

much interested, as the judge of the court whose acts are involved. Hence for all time the presiding judge or justice has usually signed the records of his court, perhaps not for the purpose of making of them records, but to identify them as such, and to authenticate them in the most irrefragable manner, for future use; but his signature is not always deemed essential to the completeness of the record, or to its validity as such.

* * * In *Raymond v. Smith*, 1 Metc. 65, 71 Am. Dec. 458, it was held that a loose paper among the files of a suit, purporting to be the judgment of the court in that case, but not recorded, nor signed by the judge, nor indorsed in any manner to show that it had been filed, nor in the handwriting of the judge, was not a judgment of the court. * * *

As regards the sufficiency of the entry of a judgment, Freeman (Freeman, Judgments, 550) says: "I think however, that from the cases this general statement may be safely made: That whatever appears upon its face to be intended as the entry of a judgment will be regarded as sufficiently formal, if it shows: (1) The relief granted; and (2) that the grant was made by the court in whose record the entry is written. In specifying the relief granted, the parties of and for whom it is given must, of course, be sufficiently identified." In inferior courts the same strictness in this, as in other particulars, has not been exacted, though none the less desirable. A few instances cited by Freeman may be referred to as relevant. In New York, justices of the peace were required to enter their judgments in their dockets within four days after the rendition of the judgments; but, under the general rule that the entry of a judgment is a ministerial act, the failure of a justice to comply with that part of the law as to time of recording the judgment was held to leave the judgment in force. *Hall v. Tuttle*, 6 Hill, 38, 40 Am. Dec. 382; *Walrod v. Shuler*, 2 N. Y. 134; *Fish v. Emerson*, 44 N. Y. 377. In the last-named case, while censuring such loose practice on the part of the magistrate, the judge writing the opinion for the Court of Appeals said: "I am unable to find any principle of law requiring us to hold that the omission to docket must inflict a penalty upon the plaintiff more justly due to the magistrate." In Maine, a justice of the peace, after having been out of office for over three years, completed the record of a case which he had tried by writing up and

entering a judgment upon his judgment book. *Matthews v. Houghton*, 11 Me. 377. * * *

Under the maxim that "An act of the court shall prejudice no one" (Broom's Legal Maxims, p. 115), made to also read by its frequent application to this class of cases as "A delay of the court shall prejudice no one," the practice of entering judgments *nunc pro tunc* exists, and has from very early times. *Doune v. Lewis*, 11 Ves. 601. Nor is there a limitation upon the time when it may be done, unless such be found in the modern statutes of limitation; one instance being recorded where such an entry was made 23 years after the judgment was rendered. Danl. Ch. Pr. 1219. The entry of such judgments are always to protect some right that has arisen since the judgment was delivered, as otherwise a judgment now would be as efficacious as if entered then. For that reason, and to that end, in pursuance of the maxims just quoted, the courts will enter a judgment which was in fact rendered, but which through the omission of the clerk, or other casualty, has not been recorded; but, before proceeding to order such judgment entered as of the date of its rendition, strict evidence is required that it was then so rendered. Therefore the rule is that such judgment can be entered only upon evidence of the fact of its rendition contained in the record itself. * * *

* * * The present official can examine the record. He can see whether it imports a regular entry, and whether it is written by the clerk who recorded the other entries of the time. He can see whether the summons had been served in due season, or whether the record shows that the defendants had appeared. He may examine the minute book and docket of the court. And from all these sources of record evidence can determine whether the judgment is correctly entered, and thereupon sign it, or, though not entered, to enter it now for then, thereby securing the plaintiff in such rights as legally accrued to him by its virtue but for the omission complained of by which the record was not formally completed.

Even if the former judge were living, he might have wholly forgotten the circumstances of the transaction, or, after these years, misremembered them. Hence the rule of resorting to the record alone, and not to the judge's memory, to see what judgment ought to be entered now for then. In Tidd's Practice, 965-972, it was stated upon authorities cited that the

practice of allowing such entries is attended with great caution, lest the rights of innocent strangers may be affected. Hence notice of the application should be given. In the case at bar, not only the Walkers, whose rights are necessarily involved, but we think any other person who may have become interested in the title to the property which had become affected by the proceedings under the regular entry, should have notice of the motion. The respondent was right in requiring it. * * *

The motion for mandamus is denied.²⁶

²⁶ "Save for some statute, entry of record is not indispensable to a judgment; but it is just as clear that a judgment is essential to the validity of an entry. See Freeman on Judgments, Sec. 38, and cases cited." * * * "A judgment rendered and entered in vacation, without consent of the parties or any order of court entered during term time, is void. See Code Sec. 247, and authorities cited thereunder. But judgments and decrees ordered and rendered during term time may be entered in vacation."—Burke v. Burke, (1909) 142 Ia. 206, 210.

There can be normally only one judgment or decree in an action. Hence where part only of the relief demanded is obtained, another judgment for the balance cannot be had,—Overland Washington Motor Co. v. Alexander, (1915) 43 App. D. C. 282. So, too, a second judgment entered in a cause will not affect the validity of a prior judgment, but the second will be inoperative,—Wagner v. Noe Life Ins. Co., (1912) 70 Wash. 210.

Parol evidence to fix terms of judgment. The doctrine stated in the principal case is criticized by Freeman in 1 Judgments, §§ 62, 63. In the latter section he says: "Whether the 'old notion' has yielded so far as to authorize the entry of a judgment as of some prior date, when there is no record evidence of its rendition at such date, is doubtful; but the fact of the rendition of a judgment being made evident by the record, a decided preponderance of authority authorizes the court to proceed in its subsequent investigations with the aid of oral as well as of written evidence. Were the rule otherwise, the power of courts to furnish relief, made necessary by the negligence or inadvertence of their clerks, would be so restricted in its operation as to be of little or no utility. * * * Should the record in any case be lost or destroyed, the court whose record it was possesses the undoubted power, at any time afterward, to make a new record. * * * There is no reason why the same rule should not apply, when, instead of being lost, the record was never made up, or was so made up as to express a different judgment than the one pronounced by the court. Hence the general rule that a record may be amended, not only by the judge's notes, but also by any other satisfactory evidence," even "the testimony of the witnesses who heard the decision announced in open court."

3301 GOLDREYER v. CRONAN.

Supreme Court of Errors of Connecticut. 1903.

76 Connecticut, 113.

TORRANCE, C. J. The complaint in this case alleged that the defendant owed the plaintiff divers sums of money, one of the items being in amount \$300. The trial court allowed this item and disallowed the others. The case was tried at the November term of the court in 1902, and decided at the January term, 1903; the precise date of judgment being the 26th day of February, 1903. On that day the judge filed in court a paper called "Memorandum on Which Judgment is Based," which, after reciting the substance of the evidence in the case, stated that the court allowed the \$300 item and disallowed the others, and ended with these words: "Judgment for the plaintiff to recover \$300 and costs. J. Bishop, Judge."
* * *

It does not appear that any formal judgment in accordance with said memoranda was ever entered up, but on the 11th of March, 1903, the court ordered judgment for \$400.50 in favor of the plaintiff to be formally entered up; and this was done under the following circumstances, as stated in the finding: "On March 2, 1903, the plaintiff and defendant appeared in court, and Judge Julius C. Cable, one of the judges of the court, directed the clerk to call in Judge Bishop to hold said court. Said court was duly opened by the sheriff, and thereupon the plaintiff orally moved that the judgment be corrected by adding interest. The defendant objected to such correction on the ground that the January term of said court had ended, and the March term begun; and further that if the court had jurisdiction the plaintiff was not, in law, entitled to such interest; and further that the plaintiff, by his failure to prosecute his suit with diligence, waived whatever right, if any, he had to interest on the judgment. On March 11, 1903, the court granted said motion of the plaintiff, and corrected said judgment, and added the interest, amounting to \$400.50."

It will thus be seen that the judge, through said signed memoranda, announced, in effect, that he found the damages to be \$300, and that he rendered judgment for the plaintiff

for that amount only, and costs of suit. After this the case was not continued to the next term, nor was it held for further consideration or advisement, nor was any further action of the court necessary to entitle the plaintiff to the entry of a formal judgment in his favor for \$300 damages and costs.

* * * * *

The plaintiff claims that on the 26th of February, 1903, the court did in fact render judgment for \$400.50, but that by a clerical mistake a different and a smaller amount was entered up. If the record sustains this claim, it may be conceded, for the purposes of this case, that the court had the power to correct the mistake at the succeeding term, or at least that a new trial would not be granted on account of its action in so doing. Mistakes merely clerical, by which the judgment as recorded fails to agree with the judgment in fact rendered, may be corrected at a term subsequent to that in which the judgment was rendered, upon proper notice to all concerned. Over its recorded judgments the court may exercise two powers: (1) The power to correct and amend the record so that it shall truly show what the judicial action in fact was; (2) the power to set aside, annul, and vacate such judgments. It is well settled that these powers may be exercised during the term in which the judgment is rendered, and, speaking generally, that the first can be exercised at any subsequent term, while, as a rule, the second cannot be so exercised, save under exceptional circumstances. *Tyler v. Aspinwall*, 73 Conn. 493, 47 Atl. 755, 54 L. R. A. 758; *Wilkie v. Hall*, 15 Conn. 32, 37; *Weed v. Weed*, 25 Conn. 337; *Hall v. Paine*, 47 Conn. 429; *Sturdevant v. Stanton*, 47 Conn. 579; *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 997; *Foster v. Redfield*, 50 Vt. 285; *Maryland Steel Co. v. Marney* (Md.) 46 Atl. 1077; Black on Judgments, c. 9, §§ 153-158, and cases there cited. The case thus turns upon the question whether the claimed mistake was a judicial one, in failing to include interest in the judgment as rendered, or a clerical one, in failing to include interest in the judgment as recorded. If the mistake was of the former kind, the court, upon the facts found, had no power to correct the mistake at the March term. * * *

A judgment, speaking generally, is the determination or sentence of the law, speaking through the court; and it does not exist, as a legal entity, until pronounced, expressed, or made known in some appropriate way. It may be expressed

orally or in writing, or in both of these ways, in accordance with the customs and usages of the court in which the judgment is rendered.

In the case at bar the February judgment was pronounced in writing only, in and by the signed memorandum of the judge. There is no finding that it was ever otherwise pronounced or made known. Before that entry was made, the judgment had no existence. When it was made, the judgment first came into being. The entry of it was thus the only expression of it, the only declaration of it, ever made by the judge. It was both pronounced and entered up, so to speak, in the same words and at the same moment. Of necessity, then, the judgment "entered up" was the same as the judgment actually pronounced. It thus clearly appears from the record, outside of the finding now under consideration, that the entry of the judgment made by the judge is a true record of the judgment actually rendered, and cannot, in the nature of things, be other than a true record; and we think there is nothing in that finding absolutely inconsistent with this conclusion. When read in the light of the other facts found, all that the finding can fairly be said to mean is that the court by mistake accidentally failed to include interest in its signed memoranda, and that is equivalent to saying that the court failed to include interest in its judgment, and also in its record of it. We think any other view of the finding is untenable, in view of the other facts set forth in the record. It follows that the court in March had no power to correct, amend, or change the February judgment.

There is error. The March judgment is set aside, and the cause is remanded, with directions that judgment be entered up as of February 26, 1903, for \$300 and costs. The other Judges concurred.

2324 (b) As a Bar and an Estoppel.

AETNA LIFE INSURANCE CO. v. BOARD OF COM'RS
OF HAMILTON COUNTY.

*United States Circuit Court of Appeals, Eighth Circuit.
1902.*

117 Federal Reporter, 82; 54 Circuit Court of Appeals, 468.

In Error to the Circuit Court of the United States for the District of Kansas.

On July 20, 1897, the Aetna Life Insurance Company, a corporation, brought this action upon coupons, some of which were cut from 20 bonds dated May 7, 1877, and others from 40 bonds dated May 16, 1888. The plaintiff alleged in its petition that these bonds and coupons had been issued by the defendant, the board of county commissioners of the county of Hamilton, state of Kansas; that the plaintiff had purchased them for value, before maturity; that the coupons in suit were overdue; that demand of payment had been made, and that they had not been paid. The answer of the defendant consisted of a denial that the bonds and coupons were ever issued by it; a denial that the plaintiff ever bought them; an assertion that these bonds and coupons were executed and issued by parties who were not officers of the county of Hamilton, and who had no authority to issue them on its behalf; that the county never received any consideration therefor; and that the plaintiff was estopped from maintaining this action, because in a prior suit between the same parties upon other coupons cut from the same bonds the same defenses had been interposed and the same issues had been presented which were interposed and presented in this case, and those defenses and issues had been tried, and a judgment had been rendered therein for the defendant, and had been subsequently affirmed by this court. *Aetna Life Ins. Co. v. Hamilton Co.*, 25 C. C. A. 94, 79 Fed. 575. To this answer the plaintiff replied that it was true that in an action between these parties on other coupons cut from the same bonds from which those involved in this action were taken the same defenses were interposed and the same issues were made which were interposed and made in this suit; that evidence was introduced in support of

all the allegations of the petition; that a trial was had; that the court found for the defendant, and rendered a judgment in its favor, which was affirmed in this court. But it denied that all the issues and defenses in the former action were litigated and determined, and alleged that the court made no specific finding of facts, but that the judgment in favor of the defendant was rendered upon a general finding in its favor; so that it is impossible to determine which of the various defenses pleaded by the county in that action were sustained. The reply also contains an allegation that the county clerk of Hamilton county made a written certificate to the effect that the actual indebtedness of the county, including that evidenced by the bonds in question, did not exceed \$80,000; that he did this for the purpose of persuading the plaintiff to buy the bonds; that the plaintiff was thereby induced to purchase them; and that these facts estop the county from denying their validity. In this state of the case the court below granted a motion for judgment on the pleadings in favor of the defendant upon the ground that the right of the insurance company to recover upon the bonds or the coupons was rendered *res adjudicata* by the former judgment to the effect that they were void. The writ of error challenges this decision.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The defenses interposed and the issues raised in this case are identical with those presented in the former action, in which judgment was rendered for the defendant upon coupons cut from the same bonds as were those in this suit. The only new allegation in this action is that the plaintiff was induced to buy the bonds and coupons by the certificate of the county clerk that the indebtedness of the county, including that evidenced by the bonds in question, did not exceed \$80,000; and this averment is immaterial, because the county clerk had no statutory or other authority to make such a certificate for the county. *City of Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 282, 30 C. C. A. 38, 48, 49 L. R. A. 534. The fact that the issues of demand and refusal of payment in the two actions differ because they must have been made at different times, since the coupons in this action were not due until after the former action was commenced, is of no consequence,

because a demand and refusal were not essential to the maintenance of either action, and the legal presumption is that the former judgment was based on a sufficient defense, and not upon an immaterial issue. *Speer v. Board*, 88 Fed. 749, 753, 754, 32 C. C. A. 101, 105; *Hughes Co. v. Livingston*, 43 C. C. A. 541, 556, 104 Fed. 306, 321. The only real question in the case, therefore, is this: Is a former judgment upon a general finding in favor of the defendant which does not disclose which one of several defenses was sustained, an estoppel of the plaintiff therein from maintaining a second action upon different causes of action against the same defendant in which the same defenses are interposed and the same issues are presented that were made in the earlier action? Counsel for the plaintiff argue with great force and persuasiveness that this question must be answered in the negative. They plant themselves upon the declaration of the supreme court in *Russell v. Place*, 94 U. S. 606, 608, 24 L. Ed. 214, that "it is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible." They cite in support of their contention *Cromwell v. Sac Co.*, 94 U. S. 351, 24 L. Ed. 195; *Board v. Sutliff*, 38 C. C. A. 167, 97 Fed. 270; *Packet Co. v. Sickles*, 5 Wall. 580, 18 L. Ed. 550; *Nesbit v. Independent Dist.*, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562; *Railway Co. v. Leathe*, 84 Fed. 103, 28 C. C. A. 279; and *Bank v. Williams* (Wash.) 63 Pac. 511,—and they insist that, because the general finding and judgment in the first action do not

indicate which one of the several defenses pleaded in both actions was litigated, nor upon which one the judgment was based, that judgment cannot constitute an estoppel upon any one of these defenses or issues, and that every defense there presented may be again litigated in this action, unless the defendant proves by extrinsic evidence which one or more of them were actually litigated and determined in the former suit. The propositions that there is nothing in the record in the former action nor in the pleadings in this action that discloses which one of the several defenses interposed in both actions was sustained in the earlier one, and that, if it is essential to the estoppel in this case to determine this fact, this judgment cannot stand, must be conceded. But how is the determination of the question whether one or another of these defenses was sustained in the earlier action essential to the establishment of the estoppel? The pleadings upon which this judgment stands show that the same issues are made and that the same defenses are interposed here that were made and interposed in the former action. The judgment in the earlier action is conclusive evidence that at least one of these defenses was sustained, and that at least one of these issues was determined in favor of the defendant. By that judgment the plaintiff is estopped from again litigating that defense or that issue, and an estoppel from litigating one of many defenses or issues that are equally fatal to his case would seem to be as conclusive and as fatal as an estoppel from litigating them all. The quotation from *Russell v. Place*, and the general declarations of the courts in the other cases cited, must be read in the light of the facts then under consideration by those courts. In that class of cases in which the second action presents a material issue or matter which may not have been raised, litigated, and decided in the former action it is undoubtedly essential to the estoppel to show what issue was litigated and decided and what question was determined in the earlier case, in order to determine whether or not the issue there determined embraced the matter in litigation in the second action. But where, as in the case at bar, the pleadings conclusively show that all the defenses made and all the issues joined are identical in the two actions, it is difficult to perceive how it can make any difference to which one of the defenses or issues the estoppel applies, because the mere fact that it does apply to one defense and to one issue

is as fatal to the maintenance of the second action as it would be if it applied to all. When the opinions which have been cited by counsel for the plaintiff are carefully read, analyzed, and considered, they will not be found to be inconsistent with this distinction. The decisions which they cite all fall within the first class of cases to which we have adverted and fail to rule the question which is presented in the case in hand.

In *Russell v. Place*, 94 U. S. 606, 609, 24 L. Ed. 214, the question was whether a judgment at law against a defendant for damages for the infringement of a patent which contained two claims estopped the defendant in a subsequent suit against it for an injunction against the infringement from litigating the issues of the novelty, the prior public use, and the infringement of the invention, which had been pleaded in the action at law. The court answered this question in the negative, because there were two claims to the patent, one of which might be valid and the other void, and the judgment at law did not disclose whether it rested on a finding that both or only one of the claims was infringed, and, if but one, it did not show which one. In other words, the judgment in the action at law might have been founded upon the determination of an issue which would not have entitled the complainant to an injunction restraining the defendant from the use of both of the inventions described in the two claims of the patent.

In *Packet Co. v. Sickles*, 5 Wall. 580, 18 L. Ed. 550, the action was brought upon a contract to pay three-fourths of the fuel saved by the use of Sickles' cut-off on a steamboat for a certain length of time. The plaintiff, for the purpose of estopping the defendant from questioning the validity of this contract, offered in evidence the record of a former judgment in an action of like character for the fuel saved during an earlier term, together with the testimony of witnesses that the contract involved in the earlier action was the same as that upon which the second action was founded. The supreme court decided that in this state of the case it was competent for the defendant to introduce the testimony of witnesses to prove that the contract involved in the former action was in writing, while that in question in the latter suit was a parol agreement, and therefore void under the statute of frauds. In other words, the defendant was permitted to show that the former judgment was not an estoppel, because it had a new

defense in the second action, which was not pleaded, tried, or ruled upon in the former case.

In *Cromwell v. Sac Co.*, 94 U. S. 351, 359, 24 L. Ed. 195, the findings in the former action upon which the judgment for the defendant was based disclosed the fact that the bonds and the coupons that had been cut from them upon which the action was based were fraudulently issued, and they contained no finding that the holder of the bonds paid value for them. The supreme court held that a judgment upon this finding did not estop the holder of the bonds from maintaining a second action on other coupons taken from bonds of the same issue upon proof that he had purchased and paid value for them in good faith in reliance upon the recitals which they contained, before their maturity. In other words, it held that the earlier judgment did not estop the plaintiff from maintaining a second action upon different causes of action, and upon a state of facts which presented an issue of law and of fact that was not raised or litigated in the earlier suit. To the same effect is the decision in *Board v. Sutliff*, 97 Fed. 270, 274, 38 C. C. A. 167, 171.

In *Nesbit v. Independent Dist.*, 144 U. S. 610, 619, 12 Sup. Ct. 746, 36 L. Ed. 562, the converse of this proposition is maintained. It is there held that the litigation and defeat, in a prior action upon coupons by a purchaser for value without notice, of the defense that the debt of the district exceeded its constitutional limit when the bonds were issued did not estop the district in a subsequent action upon the bonds themselves from maintaining the defense that the debt was in excess of the constitutional limit against the same plaintiff who was there proved to have received notice of this fact before he bought the bonds.

This brief analysis of the controlling facts of the cases upon which the plaintiff places its chief reliance discloses the fact that in every one of them the record was such that the former judgment either was or might have been rendered without a litigation and decision of the crucial and determinative issue presented in the second action. In every case cited the second action presented some controlling issue, which either was not or might not have been litigated and decided in the former suit. It is not so in the case in hand. This case is presented upon the petition, answer, and reply. There is no averment or statement in any of these pleadings that

any issue or defense, any right, question, matter, or fact, that is or can be determinative of this action, was not raised, presented, litigated, and decided in the former suit. On the other hand, these pleadings admit that the same issues have been raised, that the same defenses have been interposed in both actions, that in the former action evidence was introduced in support of all the allegations of the petition, that the earlier action was duly tried, and that a judgment was rendered for defendant upon due consideration. It is true that the defendant interposed several defenses to that action, and that it is impossible to determine from the pleadings which one was sustained. Nor is that fact material. One of the defenses which the county has presented in both of the actions was necessarily sustained in the earlier suit, and all the bonds from which the coupons in both actions were taken and the coupons themselves were held to be void in view of that defense. The doctrine of *res adjudicata* is that the same parties are conclusively estopped from again litigating any issue, question, right, or matter which they have once lawfully raised and litigated, and which the court has once decided. This second action upon coupons cut from the same bonds as those involved in the first action cannot be sustained without a second litigation and an overruling of the very defense which the court sustained in the former action. Concede that all the other issues and defenses may be tried and decided in this suit without again litigating any issue presented before, yet there remains that one defense which was sustained in the former action which was fatal to the plaintiff's case then, and which is fatal to it now, unless the plaintiff can again in this action raise the issue which that defense presents, and can here obtain a decision and judgment upon it which shall be the converse of those which were rendered in the former action. This it may not do. The very purpose of the establishment and maintenance of civil courts is to finally determine controversies between the parties who present them. If the decisions of these courts upon questions lawfully submitted to and tried by them were not conclusive, if the courts left the questions which they decided open to repeated litigation and decision, their usefulness would immediately cease, and litigants would no longer invoke their aid to protect their rights or redress their wrongs. It is essential to the peace and repose—nay, it is essential to the very

existence—of civilized society that the decisions and judgments of the courts invoked for the protection of the rights of person and of property should be final and conclusive between the parties and their privies upon every question of fact and of law which they properly put in issue and the courts actually try and decide. The maintenance and application of this salutary principle have evoked these established rules for the administration of estoppel by judgment:

Where the second suit is upon the same cause of action, and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the former.²⁶¹

When the second suit is upon a different cause of action, but between the same parties, as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action, but it is not conclusive as to other matters which might have been, but were not, litigated or decided. *Linton v. Insurance Co.*, 104 Fed. 584, 587, 44 C. C. A. 54, 57; *Commissisoners v. Platt*, 79 Fed. 567, 571, 25 C. C. A. 87, 91, 49 U. S. App. 216, 223; *Board v. Sutliff*, 38 C. C. A. 167, 171, 97 Fed. 270, 274; *Southern Pac. R. Co. v. U. S.*, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. Ed. 355; *Southern Minnesota Ry. Extension Co. v. St. Paul & S. C. R. Co.*, 55 Fed. 690, 5 C. C. A. 249.

Where the record is such that there is or may be a material issue, question, or matter in the second suit upon a different cause of action which may not have been raised, litigated, and decided in the former action, the judgment therein does not constitute an estoppel from litigating this issue, question, or matter, unless by pleading or proof the party asserting the estoppel establishes the fact that the issue, question or matter in dispute was actually and necessarily litigated and determined in the former action. *Russell v. Place*, 94 U. S. 606, 608, 24 L. Ed. 214.

A former judgment, based upon a general finding for the defendant, which does not disclose which one of several defenses therein was sustained, constitutes an estoppel of the plaintiff therein from maintaining a second suit against the same defendant upon different causes of action in which the same defenses are interposed and the same issues are pre-

sented that were made in the earlier action, unless the party denying the estoppel makes it appear by pleading or proof that some new and material issue, question, or matter is involved in the second action, which was not or may not have been litigated or decided in the first action. *Bissell v. Spring Valley Tp.*, 124 U. S. 225, 236, 8 Sup. Ct. 495, 31 L. Ed. 411; *Pittsburgh, C., C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 46 C. C. A. 639, 644, 107 Fed. 781, 786, 787.

Where the same issues are made and the same defenses are interposed in both actions, and there is no pleading or proof that any new determining issue, question, or matter is or may be involved in the second action, it is not material upon which defense or issue the former judgment was based, because an opposite judgment cannot be rendered without relitigating at least one defense and issue determined in the former action, and overruling the decision upon that defense which was there rendered.

The pleadings in this case leave no avenue of escape from the conclusion that at least one of the defenses pleaded in this action was actually and necessarily litigated and sustained in the former action between these parties, wherein there was a judgment for the defendant. That defense proved fatal to the validity of the bonds and coupons in that earlier action. In the absence of pleading or proof that this action presents some determining issue which might not have been litigated and decided in the former action, the defense which was there sustained is as conclusively established in this action by the judgment in that action, and is as fatal here as it was in the earlier suit.

The judgment below must be affirmed, and it is so ordered.

261 "The general expression, often found in the reports, that a judgment is conclusive of every matter which the parties might have litigated in the action is misleading. What is really meant by this expression is, that a judgment is conclusive upon the issues tendered by the plaintiff's complaint. It may be that the plaintiff might have united other causes of action with that set out in his complaint; or that the defendant might have interposed counterclaims, cross-bills, and equitable defenses, or either of the parties may have acquired new rights pending the litigation, which might, by permission of the court, be pleaded by supplemental complaint or answer, and therefore might have been litigated in the action. But as long as these several matters are not tendered as issues in the action, they are not affected by it. Whatever material allegations the plaintiff makes in his pleadings he must maintain, if they are controverted, and failing to do so, a judgment against him is conclusive of their falsity. The defendant, on his part, must controvert all these

allegations which he wishes to gainsay, and failing to do so, their truth is incontestably established against him. He cannot by failing to deny any of them, or if he denies them, by failing to offer evidence to controvert that offered by plaintiff in support of any of them, successfully claim that it has not been litigated and determined against him. * * * The plaintiff must support all the issues necessary to maintain his cause of action. The defendant must bring forward all the defenses which he has to the cause of action asserted in the plaintiff's pleadings at the time they were filed." 1 Freeman on Judgments, § 249.

223 } (c) *Impeaching Judgments.*

Ida Morrill
MORRILL v. MORRILL.

Supreme Court of Oregon. 1890.

20 Oregon, 96.

[This was a suit to quiet title to lot 3, block 116, in the city of Portland. Plaintiff, Ida Morrill, alleged title by mesne conveyances from the United States and also by adverse possession. The answer alleged that defendant, Eli Morrill, instituted a partition suit in 1883 against this plaintiff, and a decree was therein made, adjudging that the plaintiff and defendant were tenants in common of the said lot, and awarding to Eli Morrill in severalty the north 19 feet and to Ida Morrill in severalty the south 31 feet thereof. To this answer Ida Morrill replied that she was in exclusive and adverse possession of the whole of said lot when the partition suit was instituted, that the evidence in that suit did not justify the decree, and that her attorney by fraud and collusion, and without her knowledge, entered into a stipulation in that suit whereby Eli Morrill obtained the decree. The issues were referred to a referee who reported in favor of plaintiff, and a final decree was given quieting plaintiff's title to the whole of lot 3. From this decree the defendant appealed.]

BEAN, J. It is conceded by the parties that, if the decree in the partition suit of *Morrill v. Morrill* is valid and binding on her, this case should be reversed. * * *

It is first important to determine whether this is a direct or collateral attack on this decree. The contention of respondent is that it is a direct attack, and therefore no pre-

sumptions are to be invoked in order to sustain it. The complaint contains no allegations concerning this decree, but the first mention thereof is in the answer, where defendant pleads it as an estoppel. The plaintiff then seeks to avoid its effect by averring in the reply matters which she claims are sufficient to indicate it. This is undoubtedly a collateral attack. It is an attempt to impeach the decree in a proceeding not instituted for the express purpose of annulling, correcting, or modifying the decree or enjoining its execution. A collateral attack on a judgment is any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying such decree or enjoining its execution. 12 Amer. & Eng. Enc. Law, 147j. The fact that the parties are the same, and that the plaintiff seeks to attack the decree by the allegation of the reply, cannot change the rule, or make the attack any the less a collateral one.

The first objection to the validity of this decree is based upon the stipulation of the attorney "that the defendant in the partition suit has since February 4th been in the actual, exclusive occupancy of all of said premises, and has lived there as a home, and that neither the defendant, nor any person for him, has actually occupied said premises or any part thereof since February 4, 1882, as a home or otherwise." The contention is that a plaintiff, in order to maintain a suit for partition, must not only be a tenant in common, but in the possession, of the land sought to be partitioned. If he has been ousted or disseised, and his co-tenant is holding adversely to him, the suit cannot be maintained, and many authorities are cited to that effect. * * * But, however that may be, it was a question for the court before whom the suit was pending, and its decision, however erroneous it may have been, is binding on the parties, until reversed or annulled in some proper proceeding. *Atkins v. Kinnan*, 20 Wend. 246; *Voorhees v. Bank*, 10 Pet. 473; *Dolph v. Barney*, 5 Or. 192; *Woodward v. Baker*, 10 Or. 491; *Norton v. Harding*, 3 Or. 361; *Hill v. Cooper*, 8 Or. 254.

After a court has acquired jurisdiction, it has a right to decide any question arising in the case, and, however erroneous its decision may be, it is binding on the parties until reversed or annulled. Here we have a competent court with admitted jurisdiction of the subject-matter and the parties, with full power and authority to decide all questions arising

in the case, and it is sought to impeach the validity of its decree, because, forsooth, it was mistaken, either as to the law applicable to the facts before it, or to the facts themselves. Baldwin, J., in the case of *Voorhees v. Bank*, *supra*, speaking on this subject, says: "The errors of the court, however apparent, can be examined only by an appellate power; and by the laws of every country a time is fixed for such examination, whether in rendering judgment, issuing execution, or enforcing it by process of sale or imprisonment. No rule can be made more reasonable than that the person who complains of an injury done him should avail himself of his legal remedy in a reasonable time, or that that time should be limited by law. This has wisely been done by acts of limitations on writs of error and appeals. If that time elapses, common justice requires that what a defendant cannot directly do, in the mode pointed out by law, he shall not be permitted to do collaterally, by evasion. A judgment irreversible by a superior court cannot be declared a nullity by any authority of law. If, after its rendition, it is declared void for any matter which can be assigned for error only on a writ of error or appeal, then said court not only usurps the jurisdiction of an appellate court, but collaterally nullifies what such court is prohibited by express statute law from even reversing. If the principle once prevails that any proceeding of a court of competent jurisdiction can be declared to be a nullity by any court after a writ of error or appeal is barred by limitation, every county court or justice of the peace in the Union may exercise the same right, from which our own judgments or process would not be exempt." We need not pursue the examination of this question any further, for the principle is so well settled that it is said to be "an axiom of the law" that, when a court has jurisdiction of the subject-matter and the parties, its judgments cannot be impeached collaterally for errors of law or irregularity in practice. *Cooper v. Reynolds*, 10 Wall. 308; *Sibley v. Waffle*, 16 N. Y. 191.

* * * * *

The next question in this case is, can the decree in the partition suit be impeached for fraud? It is claimed by respondent that the evidence and findings of the referee show that the decree was obtained by fraud and collusion between her attorney in that suit and the defendant here. It is argued

with much force and learning that, since defendants rely upon the particular decree as one of the muniments of their title, plaintiff should be permitted to show, if the facts are with her, that such decree was obtained by fraud and collusion between her attorney and adversary; that, since fraud vitiates every transaction, even a judgment, she ought to be permitted to treat this decree as invalid, when sought to be enforced or relied upon even in a collateral proceeding. This, we believe, is the first time this question has ever been before this court for decision. In the case of *Murray v. Murray*, 6 Or. 19, the court held that a judgment of a sister state could be attacked collaterally for fraud by a party, when offered in evidence in the courts of this state, for the reason that the party sought to be affected thereby has no opportunity to attack it in our own courts by a direct proceeding, and should not be required to go into a foreign state to do so. As we have already said, this cannot be considered a direct attack upon this judgment. No reference is made to the judgment in the complaint. No facts are alleged upon which a court could have a decree annulling the decree or judgment. The plaintiff in the complaint claims title by good and sufficient mesne conveyances from the government of the United States, and by virtue of the statute of limitations. This is not sufficient to entitle her to attack this judgment. *U. S. v. Flint*, 4 Sawy. 42; *Mayor, etc., v. Brady*, 115 N. Y. 599, 22 N. E. Rep. 237; *U. S. v. Throckmorton*, 98 U. S. 61. It is a general rule, at common law, that parties and privies to a judgment may not attack it collaterally for fraud. And, after a party has been duly served with process, it is his duty to see that such a judgment is not obtained against him, and, if it is, he must take some proper proceedings to have it annulled. As long as it remains in full force and effect the parties cannot treat it as invalid, unless such invalidity appears upon the face of the judgment. It is true, fraud vitiates every transaction into which it enters, even a judgment, but such fraud must be made to appear in some appropriate proceeding known to the law. The statute points out ample methods by which a party may be relieved from such a judgment, such as a new trial, review for error of law, an application to be relieved therefrom; and, beyond the methods provided by statute, courts possess inherent powers, as has been said, "to an almost unlimited extent, to redress wrongs by modifying or setting aside judg-

ments obtained by fraud or mistake." These methods, however, must be resorted to. They give no countenance to the idea that a judgment wrongfully obtained may be completely ignored, and the rights of the parties again inquired into in a collateral proceeding. *Freem. Judgm.* § 334; *Davis v. Davis*, 61 Me. 395; *Mussey v. White*, 58 Vt. 45, 3 Atl. Rep. 319; *Granger v. Clark*, 22 Me. 128; *Railroad Corp. v. Sparhawk*, 1 Allen 448; *Demerit v. Lyford*, 27 N. H. 541; *Krekeler v. Ritter*, 62 N. Y. 372; *Weiss v. Guérineau*, 109 Ind. 438, 9 N. E. Rep. 399; *Callahan v. Griswold*, 9 Mo. 457; *Mason v. Messenger*, 17 Iowa, 273. From these, and many other authorities that could be cited, we take the law to be that a judgment of a court of this state having jurisdiction over the subject-matter and the parties cannot be questioned collaterally for fraud *aliunde* the record by the parties or privies. The case relied upon by the respondent as announcing a contrary doctrine is *Mandeville v. Reynolds*, 68 N. Y. 528. This was an action on a judgment, the defense to which was based upon a satisfaction of the judgment of record, and upon an order of court ratifying that satisfaction. The plaintiff offered to show that the entry upon the docket and the order were obtained by fraud and collusion. The court held that such evidence was competent, and in the opinion there are statements to the effect that a judgment obtained by fraud could be attacked collaterally. This decision was made under the reformed Code of Procedure of the state of New York, which permits equitable defenses to be pleaded in actions at law; and the court say: "The court acts upon the matters involved in the action now in a double capacity,—as a court of law and one of equity. As a court of equity it meets the question of the validity of the judgment, not as one of law, but as of equity, and takes hold of the facts offered to it, not as a collateral attack upon the judgment, but as a direct assault, which, by the changing nature of the suit and trial, has become the main question and legitimately before it for trial." In this state the distinction between proceedings at law and in equity is still maintained. *Burrage v. Mining Co.*, 12 Or. 169, 6 Pac. Rep. 766. Authorities under the reformed Codes of Procedure are therefore not applicable here. * * *

It follows, therefore, that the decree of the court below

must be reversed, and a decree entered here in favor of defendants.²⁷

²⁷ "It is only third persons who have the right to collaterally impeach judgments. They are accorded this right because not being parties to the action, nothing determined by it is as to them, *res judicata*. * * * It must not, however, be understood that *all strangers* are entitled to impeach a judgment. It is only those strangers who, if the judgment were given full credit and effect, would be prejudiced in regard to some pre-existing right, that are permitted to impeach the judgment."—2 Freeman on Judgments, §§ 334, 335.

See extended note in L. R. A. 1918D, 470, on "What is a collateral, and what a direct attack upon a judgment, within the rule that a judgment that is not void cannot be collaterally attacked."

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Falsen FERGUSON v. CRAWFORD.
Court of Appeals of New York. 1877.

70 New York, 253.

Appeal from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of defendants, entered upon a decision of the court, on trial at Special Term. (Reported below, 7 Hun, 25.)

RAPALLO, J. This action was brought to foreclose a mortgage, held by the plaintiff, on certain real estate in the county of Westchester. One of the defenses was, that the right of the plaintiff, as mortgagee, had been barred by a judgment of foreclosure of a mortgage prior to his, in favor of one McFarquahar, covering the same premises, under which judgment the premises had been sold to the defendant Horton. It was alleged in the answer that the plaintiff was a defendant in the McFarquahar action, in which the judgment had been rendered, and appeared therein, by John W. Mills, as his attorney, but did not put in any answer.

On the trial of the present action, the defendants, in support of this defense, put in evidence the judgment-roll in the last-mentioned action, which roll contained a notice of appearance for the present plaintiff, and a consent that judgment be entered, purporting to be signed by Mills. The judgment was entered by default for want of an answer, and

on this consent, and recited that the summons had been served on the defendants therein, and that none of them had appeared, except the present plaintiff, by John W. Mills, his attorney, and some others named in the judgment.

Thereupon the plaintiff called Mills as a witness, and offered to prove by him, 1st. That the signature to the notice of appearance and consent was a forgery; 2nd. That Mills was never authorized to appear for the plaintiff; and 3rd. That he never did appear for him.

No proof of service of the summons on the plaintiff is attached to or contained in that judgment-roll, and it appears to be conceded on the present argument, as matter of fact, that no such service was made. The defendants rely wholly upon the effect of the recital in the judgment and the notice of appearance contained in the judgment-roll, and claim that in a collateral action these import absolute verity and cannot be contradicted by extrinsic evidence.

* * * * *

It is an elementary principle recognized in all the cases that, to give binding effect to the judgment of any court, whether of general or limited jurisdiction, it is essential that the court should have jurisdiction of the person as well as the subject-matter, and that the want of jurisdiction over either may always be set up against a judgment when sought to be enforced, or any benefit is claimed under it. There is no difference of opinion as to the general rule, but the point of difficulty is as to the manner in which this want of jurisdiction must be made to appear, in the case of a judgment of a domestic court of general jurisdiction, acting in the exercise of its general powers, when it comes in question in a collateral action: Whether, when the record is silent as to the steps taken to bring the parties into court, it may be proved by evidence that they were not legally summoned and did not appear; or whether, when the record recites that they were summoned or appeared, such recitals may be contradicted by extrinsic evidence; or whether the jurisdiction over the person and subject-matter is a presumption of law, which cannot be contradicted, unless it appears on the face of the record itself that there was a want of such jurisdiction, as in cases where the record shows that the service of process was by publication or some other method than personal.

On these points there has been as much diversity of opin-

ion, especially between the courts of this State and those of other States, as upon any general question which can be mentioned, although there has as yet been no authoritative adjudication in this State on the subject. It is well settled by our own decisions, that in the case of a judgment of a court of general jurisdiction of a sister State, although it is entitled to the benefit of the presumption of jurisdiction which exists in favor of a judgment of one of our own courts, yet the want of jurisdiction may be shown by extrinsic evidence, and that even a recital in the judgment record that the defendant was served with process, or appeared by attorney, or of any other jurisdictional fact, is not conclusive, but may be contradicted by extrinsic evidence. (*Borden v. Fitch*, 15 Johns. 121; *Starbuck v. Murray*, 5 Wend. 148; *Shumway v. Stillman*, 6 Wend. 447; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30.)

And the same rule prevails in some of the other States in regard to the judgments of courts of sister States. Although some have held, even in regard to such a judgment, that if the record contains recitals showing jurisdiction, they cannot be contradicted (*Field v. Gibbs*, 1 Peters C. C. R. 155; *Roberts v. Caldwell*, 5 Dana, 512; *Ewer v. Coffin*, 1 Cush. 23; 1 R. I. 73; *Shelton v. Tiffin*, 6 How. [U. S.] 186.)

After considerable research, I have been unable to find a single authoritative adjudication, in this or any other State, deciding that in the case of a domestic judgment of a court of general jurisdiction, want of jurisdiction over the person may be shown by extrinsic evidence, while there are a great number of adjudications in neighboring States, holding that, in the case of such judgments, parties and privies are estopped in collateral actions to deny the jurisdiction of the court over the person as well as the subject-matter, unless it appear on the face of the record that the court had not acquired jurisdiction; and that in such cases there is a conclusive presumption of law that jurisdiction was acquired by service of process or the appearance of the party. * * *

* * * * *

It is quite remarkable, however, that notwithstanding the formidable array of authority in its favor, the courts of this State have never sustained this doctrine by any adjudication, but on the contrary the great weight of judicial opinion, and

the views of some of our most distinguished jurists, are directly opposed to it.

* * * * *

* * * The distinction which is made in almost all the other States of the Union between the effect of domestic judgments and judgments of sister States, in regard to the conclusiveness of the presumption of jurisdiction over the person, is sought to be explained, by saying that in regard to domestic judgments the party aggrieved can obtain relief by application to the court in which the judgment was rendered, or by writ of error, whereas in the case of a judgment rendered against him in another State he would be obliged to go into a foreign jurisdiction for redress, which would be a manifestly inadequate protection; and therefore the Constitution may be construed so as to apply only where the persons affected by the judgment were within the operation of the proceeding. This explanation, however, does not remove the difficulty in making the distinction, for if there is a conclusive presumption that there was jurisdiction, that presumption must exist in one case as well as in the other. The question whether or not the party is estopped, cannot be made to depend upon the greater inconvenience of getting rid of the estoppel in one case than in another.

But aside from this observation as to the effect of the authorities, an examination of them shows that our courts did in fact proceed upon a ground common to both classes of judgments. * * *

* * * In *Bolton v. Jacks*, 6 Rob. 198, Jones, J., says that it is now conceded, at least in this State, that want of jurisdiction will render void the judgment of any court, whether it be of inferior or superior, of general, limited or local jurisdiction, or of record or not, and that the bare recital of jurisdictional facts in the record of a judgment of any court, whether superior or inferior, of general or limited jurisdiction, is not conclusive, but only *prima facie* evidence of the truth of the fact recited, and the party against whom a judgment is offered, is not by the bare fact of such recitals estopped from showing, by affirmative proof, that they were untrue and thus rendering the judgment void for want of jurisdiction. He cites in support of this opinion several of the cases which I have referred to, and *Dobson v. Pearce*, 12 N. Y. 164, and *Hatcher v. Rocheleau*, 18 N. Y. 92.

It thus appears that the current of judicial opinion in this State is very strong and uniform in favor of the proposition stated by Jones, J., in 6 Rob. 198, and if adopted here, is decisive of the present case. It has not as yet, however, been directly adjudicated, and if sustained, it must rest upon the local law of this State, as it finds no support in adjudications elsewhere. There are reasons, however, founded upon our system of practice, which would warrant us in so holding. The powers of a court of equity being vested in our courts of law, and equitable defenses being allowable, there is no reason why, to an action upon a judgment, the defendant should not be permitted to set up, by way of defense, any matter which would be ground of relief in equity against the judgment; and it is conceded in those States where the record is held conclusive, that when the judgment has been obtained by fraud, or without bringing the defendant into court, and the want of jurisdiction does not appear upon the face of the record, relief may be obtained in equity.

* * * * *

The judgment should be reversed, and a new trial ordered with costs to abide the event. All concur; ANDREWS, J., in result.

Judgment reversed.

PART II.
APPELLATE PRACTICE.
CHAPTER IV.
WHAT IS REVIEWABLE.

SECTION 1. FINAL ORDERS.

WALLACE v. MIDDLEBROOK.

Supreme Court of Errors of Connecticut. 1859.

28 Connecticut, 464.

STORRS, C. J. The only error assigned in this case, and on which the plaintiff in error relies for the reversal of the proceedings of the city court, is, that that court granted a new trial in the original case on the ground that the verdict rendered therein was against the evidence; and the only question argued before us respects the competency of that court to grant a new trial for that cause. It appears, however, from the record presented on this writ of error, that that case has not been retried in that court, and that no proceedings have taken place in the case since the new trial was ordered. No final judgment, therefore, has been rendered in the case by the city court, and it remains before it undetermined; and we are of the opinion that, as the order of that court granting a new trial was at most only in the nature of an interlocutory judgment, and no final judgment has been rendered in the case, this writ of error is premature and ought to be dismissed.

The principle is well settled that a writ of error does not lie upon an interlocutory judgment in a cause until a final judgment has been rendered, or, as perhaps more precisely

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expressed by Lord Ellenborough, in *Samuel v. Judin*, 6 East., 336, "error can only be brought on final judgment;" by which, however, he does not mean that an error in an interlocutory judgment is not a good cause of reversal on writ of error, brought after final judgment in a cause, but only that such final judgment must be rendered before a writ of error can be brought; and then the writ of error is brought as upon the final judgment, on the ground that such judgment is rendered erroneous by the errors in the interlocutory proceedings. * * * So, in an action of account, a writ of error cannot be brought upon the judgment *quod computet*, until after the entire matter of the account be determined and the second or final judgment be rendered. *Ibid.* If there are any exceptions to this rule they have no application to the present case. This court has frequently adopted the same principle. In *Dunham v. Braiman*, 1 Root, 551, it was held that a writ of error upon a judgment arresting a verdict and ordering a repleader, brought before final judgment in the case, should be abated. In *Gleason v. Chester*, 1 Day, 27, after verdict for the plaintiff, the declaration on motion in arrest was adjudged insufficient which judgment was reversed by this court and the case remanded, and in the superior court, on motion for judgment on the verdict, it was denied, and a repleader awarded, and a writ of error brought to reverse the last judgment, before final judgment was rendered in the case, was abated. This case is precisely applicable to and decisive of the present, for the judgment of repleader, in regard to its interlocutory character, was analogous to the granting of a new trial in the case before us. See also *Ray v. Fitch*, 1 Root, 290, and *Treadway v. Coe*, 21 Conn., 283. Whether, in the present case, if the city court had no authority to grant a new trial, the plaintiff in error has any other remedy before a final judgment is rendered it is unnecessary for us to determine.

This writ of error should therefore be dismissed.¹

¹ It was held in *Metcalf's Case* (1615), 11 Coke 38, that a writ of error did not lie until the final judgment was given.

Statutes very commonly reaffirm the common law doctrine by allowing an appeal or writ of error from *any final order, judgment or decree*.

See Alabama, Civ. Code 1907, § 2837; Arkansas, Dig. 1921, § 2129, § 2233, § 2258, § 2287; California, Code Civ. Pro. § 963; Colorado, R. S. 1908, §§ 1536, 1540, 1556, 1603; Connecticut, Rev. 1918, § 5820; District of Columbia, Code, § 226; Florida, G. S. 1920,

§ 2901; Idaho, C. S. 1919, § 7152; Illinois, St. ch. 110, § 91; Indiana, Burns St. 1914, § 671; Iowa, Code 1919, § 8481; Kansas, Code 1909, § 6160; Kentucky, Stat. 1909, § 950; Maine, R. S. 1916, ch. 82, §§ 22, 97; Maryland, G. L. 1904, art. 5, §§ 26, 28; Massachusetts, G. L. 1921, ch. 250, § 22; Michigan, C. L. 1915, § 13736, 13753; Minnesota, R. L. 1905, § 4365; Missouri, R. S. 1919, § 1469; Mississippi, Code 1906, § 33; Nebraska, C. S. 1911, § 7153, 7155; Montana, R. C. 1921, § 9731; Nevada, R. L. 1912, § 5329; New Jersey, C. S. 1910, p. 1710, 2207; New Mexico, C. L. 1897, § 2687, Subsec. 161; New York, Civ. Prac. Act 1920, § 608; North Dakota, R. C. 1905, § 7225; Ohio, Gen. Code, § 12224; Oklahoma, R. L. 1910, § 5236; Oregon, L. 1920, § 548; Pennsylvania, Purd. Dig. Errors & Appeals, I; Rhode Island, G. L. 1909, ch. 289, § 25; South Carolina, Code Cir. Pro. 1902, § 11; South Dakota, R. C. 1919, § 3168; Tennessee, Shannon's Code 1917, § 4911; Texas, St. 1920, § 2078; Utah, C. L. 1917, § 6990; Vermont, G. L. 1917, § 1561; Virginia, Code 1919, § 6336; Washington, R. & B.'s Codes, § 1716; Wisconsin St. 1919, § 3043; Wyoming, C. S. 1920, § 6371.

"By our statutes an appeal is allowed from certain intermediate orders made in the progress of the cause, but there is no provision of our statute under which a failure to do so operates as a waiver of the error if an exception is taken to the ruling and an appeal be taken from the final judgment."—*Jones v. Chicago & N. W. RR. Co.*, (1872) 36 Ia. 68, 73.

But some statutes contain a provision denying the review after final judgment of interlocutory orders from which appeals might have been taken,—*Barry v. Barry*, (1880) 56 Cal. 10; or allowing such review only in so far as the final decree has been erroneously affected thereby,—*Cawley v. Jean*, (1905) 189 Mass. 220.

BANKS v. GUINYARD.

Supreme Court of Florida. 1912.

63 Florida, 334.

WHITFIELD, C. J. This is a proceeding for partition of real estate. A decree was rendered May 26, 1911, adjudicating the interests of the parties and appointing commissioners to make partition of the lands, with directions that if they find that partition in kind cannot be made without manifest prejudice to the parties, or to either of them, to report such findings to the court for its action thereon. The commissioners reported that, owing to the situation of the land and the nature of the improvements thereon, partition in kind could not be made without prejudice to the parties. On this report a decree ordering a sale of the property for partition was rendered May 31, 1911. On November 25, 1911, the defend-

ants took an appeal specifically from and limited to the decree of May 26, 1911.

A decree in a partition suit, adjudicating the rights and interests of the respective parties in the lands sought to be partitioned, ordering partition thereof, and appointing commissioners to make the same, is interlocutory merely, and not final; but a decree in such a suit, ordering a sale of the property by the commissioners, based upon their report that partition cannot be made without great prejudice to the owners of the lands, is final. *Camp Phosphate Co. v. Anderson*, 48 Fla. 226, 37 South. 722.

In this case a sale of the property for the purposes of partition was required, and was actually made. Therefore the decree of May 26, 1911, adjudicating the interest of the parties and appointing commissioners to make the partition, or to report if a sale was necessary to an equitable partition, was an interlocutory decree; the decree of May 31, 1911, ordering a sale of the property for partition, being the final decree in the cause.

An appeal in an equity cause, taken subsequently to the rendition of a final decree therein, solely and expressly from an interlocutory order therein, that does not bring up such final decree for review, cannot be considered by the appellate court, and will be dismissed. *Stanley v. Standard Cypress Co.*, 54 Fla. 583, 45 South. 478.

As the appeal was entered after the final decree of May 31, 1911, was rendered, and was taken from only the interlocutory decree of May 26, 1911, the appeal does not bring the final decree here; and in the absence of an appeal duly taken from the final decree, the appeal taken from the interlocutory decree after the final decree was rendered should be dismissed.

The appeal will be dismissed.*

* "The interlocutory judgment and the intermediate orders upon which that final judgment is based are all merged in the final judgment, and no right to review an interlocutory judgment or intermediate order upon which the final judgment was based survives the entry of the final judgment, except so far as a review of the interlocutory judgment or intermediate order is allowed on the appeal from the final judgment."—*Bates v. Holbrook*, (1904) 89 N. Y. App. Div. 548.

RUSSELL v. ST. LOUIS & SUBURBAN RAILWAY CO.

*Supreme Court of Missouri. 1900.**154 Missouri, 428.*

MARSHALL, J. (In Division one). Plaintiff, a passenger on one of the trains of the St. Louis & Suburban Railway Company, sues the defendants for ten thousand dollars damages for injuries sustained by her on the 4th of October, 1894, in consequence of a collision between the street car operated by the railway company with a steam car operated by the railroad company. The petition is in two counts,—the first, in equity, asking to have a release of all claim against both defendants, executed by her on the 11th of August, 1894, set aside and vacated on the ground that it was procured from her by the fraud of the agents of the defendants, while sick at the hospital from the effects of her injuries, and when she was not competent to contract, and offering to return the \$185 received by her as the consideration for the contract of release, and as compensation in full for her claim to damages; and the second, an action at law for ten thousand dollars damages for such injuries. The defendants pleaded the release and a general denial. The reply was, substantially, a reiteration of the equity count of the petition. The circuit court tried the equity count separately, and entered a decree canceling the release, and both defendants appealed to this court. The record before us does not show whether the count at law has ever been tried or not, or, if so, what the result was.

It is patent, upon this statement of the condition of the record, that this appeal was prematurely taken, and, hence must be dismissed. Section 2246, Rev. St. 1889, provides that: "Any person aggrieved by any final judgment or decision of any circuit court, in any civil cause," etc., might appeal, etc. This section was amended by the act of 1891 so as to allow appeals to be taken from certain orders and judgments entered in the progress of a cause before final judgment. By the act of April 11, 1895, (Acts 1895, p. 91), the act of 1891 amending section 2246 was itself amended so as to provide that any party to a civil suit might appeal from any of the following orders: (1) An order granting

a new trial or in arrest of judgment; (2) an order refusing to revoke, modify, or change an interlocutory order appointing a receiver; (3) an order dissolving an injunction; (4) any interlocutory judgment in partition which determines the rights of the parties; and (5) any final judgment, or any special order after final judgment. Except in the cases specified, an appeal will not lie until after a final judgment in the cause in the trial court.

* * * * *

The statute contemplates only one final judgment in any case. And while section 2040, Rev. St. 1889, permits a plaintiff to unite in the same petition, by separate counts, as many causes of action as he believes he has whether they "be such as have been heretofore denominated legal or equitable or both," just as section 2049, Id., permits a defendant to unite in the same answer as many defenses, stated separately, as he believes he has, whether the same be legal or equitable, still there can be but one final judgment in any case; and if a petition contains two counts, whether both at law or both in equity, or one at law and one in equity, and one is adjudged insufficient, there can be no final judgment or appeal from the order so adjudging it until after the whole issue is tried and determined, and the order adjudging one count insufficient is not a final judgment until the whole case is determined, and the whole judgment of the court is expressed in the final judgment on both counts. So, in this case, where the first count is in equity to cancel a release, which, without being canceled, would, if pleaded by the defendant, be a complete defense to the action at law, and the court properly tried the equity count first (*Blair v. Railroad Co.*, 89 Mo. 383, 1 S. W. 350; *Mateer v. Railway Co.*, 105 Mo., loc. cit. 350, 16 S. W. 847; *Homuth v. Railway Co.*, 129 Mo. 629, 31 S. W. 993; *Och v. Railway Co.*, 130 Mo. 27, 31 S. W. 962; *Courtney v. Blackwell*, 150 Mo., loc. cit. 245, 51 S. W. 668), there can be no final judgment as to the equity count until there is also a final judgment as to the count at law. Or, in other words, no matter how many counts there may be in a petition, there can be but one final judgment in the case. That judgment may be for one party on one count, and for the other party on the other count, but it must all be expressed in one judgment. For example, the plaintiff may win on the count in equity in this case, and the defendant

may win on the count at law, and the final judgment in the whole case would be entered accordingly, yet the defendant would have no occasion to, and could not, appeal. On the other hand, if the defendant won on the equity count, the plaintiff could not then appeal, because there would be no final determination of the right of the parties in the action, but the case would have to proceed; and when the plaintiff made out his *prima facie* case on the merits, and the defendant introduced the release in evidence, and the plaintiff did not disprove its execution (he would not be allowed to show that it was procured by fraud, because that issue would already have been ruled against him), the release being a complete defense to the cause of action, the court would be compelled to instruct the jury to find for the defendant. On the other hand, as in this case, the release being canceled by the chancellor, it would be out of the case upon the trial of the case on its merits, and, if the defendant offered it in evidence, the court would be obliged to exclude it; and, if the defendant lost the case, the ruling and finding of the court and of the jury on the counts in equity and law, respectively, would be entered in the same final judgment, and be covered by the same motions for new trial and in arrest, the same bill of final exceptions (if the exceptions on the trial of the equity count had been properly preserved by a bill of exceptions, filed during the term at which they were saved, as in other cases of saving exceptions), and by the same appeal.

As the record in this case does not bring the case within this rule, it follows that the appeal was prematurely taken, and must be dismissed. * * *

Appeal dismissed.

MARSHALL, J. The foregoing opinion, heretofore delivered in division No. 1, is hereby adopted as the opinion of the court *in banc*.

GANTT, C. J., and SHERWOOD, BURGESS, and VALLIANT, JJ., concur. ROBINSON, J., dissents.

NOLAN v. SMITH.

*Supreme Court of California. 1902.**137 California, 360.*

McFARLAND, J. The defendant Smith was a justice of the peace, and defendants Packard and Brown were sureties on his official bond. The action was brought against all three defendants to recover damages for an alleged unlawful imprisonment of plaintiff by the defendant Smith. Smith demurred to the complaint, and his demurrer was overruled, and from all that appears the action is still pending against him. Packard and Brown also demurred to the complaint, and their demurrer was sustained, and, plaintiff declining to amend, what purports to be a judgment for costs was entered in their favor. From this judgment, plaintiff appeals.

Respondents object to the hearing of the appeal, and contend that it should be dismissed because the purported judgment from which plaintiff attempts to appeal does not dispose of the whole case, and is not, therefore, a final judgment, from which an appeal can be taken. We think that this contention must prevail. It is clear that the appeal does not lie unless the action of the court below appealed from is a "final judgment," within the meaning of section 939 of the Code of Civil Procedure; and the conclusion that it is not such a final judgment seems to be unavoidable. The question has not, to our knowledge, been before this court in the exact form in which it is presented in the case at bar; that is, where the objection was that the judgment appealed from did not finally dispose of the rights of all the parties to the action. But this court has given definitions of the phrase "final judgment" which seem to exclude from that category the so-called judgment in the case at bar. In *Stockton Combined Harvester & Agricultural Works v. Glen's Falls Ins. Co.*, 98 Cal. 577, 33 Pac. 633, the court say: "The judgment or decree of December 19, 1890, denying to defendant the relief demanded in what is termed his cross-complaint, was not a final judgment, and the attempted separate appeal therefrom must be dismissed. There can be but one final judgment in an action, and that is one which, in effect, ends

the suit in the court in which it was entered, and finally determines the rights of the parties in relation to the matter in controversy. Elliott, App. Proc. §§ 90, 91; *W. U. Tel. Co. v. Locke*, 107 Ind. 9, 7 N. E. 579." See, also, *Fox v. Mining Co.*, 112 Cal. 571, 44 Pac. 1022; *Peck v. Vandenberg*, 30 Cal. 22, and cases there cited; *Welch v. Allen*, 54 Cal. 211. Mr. Freeman, in his work on Judgments, says that appellate courts will not review cases by piecemeal, and that "the general rule recognized by the courts of the United States and by the courts of most, if not all, the states is that no judgment or decree will be regarded as final, within the meaning of the statutes in reference to appeals, unless all issues of law and fact necessary to be determined were determined, and the case completely disposed of, so far as the court had power to dispose of it." Freem. Judgm. § 34. In other jurisdictions the question seems to have been definitely settled in favor of respondents' contention. The case of *Caulfield v. Farish*, 24 Mo. App. 110, is almost exactly like the case at bar. There Dockery, one of the defendants, had demurred to the complaint, and the other defendants had answered. His demurrer had been sustained, and, plaintiffs having declined to amend, judgment had been entered in favor of Dockery for his costs, etc., and from that judgment plaintiff had appealed. The supreme court of Missouri dismissed the appeal, and said: "Although the case has been submitted to us on the merits of the demurrer on both sides, without any question as to whether an appeal will lie, we must take the course of dismissing the appeal. The general rule is that there can be but one final judgment, and consequently but one appeal in a cause." And the court said further: "It was error on the part of the trial court to enter what purports to be a final judgment in favor of the defendant Dockery, without disposing of the other defendants. In the state of the record, the court could not make a final disposition as to the other defendants, because as to them the case stood upon petition and answer. The court should have made an interlocutory order as to Dockery, and proceeded to try the case as to the other defendants." In *Voorhis v. Association*, 59 Mo. App. 55, the court held: "An appeal from a judgment on demurrer in favor of one of several defendants, which leaves the case pending as to the others, is premature, and must be dismissed." What seems to be the

prevailing rule on the subject is clearly expressed by the civil court of appeals of Texas in *Railway & Real Estate Co. v. Becker*, 23 S. W. 1015, as follows: "A final judgment is one which disposes of the matters in litigation between all the parties before the court when the judgment is rendered. A judgment for costs, only, for or against any one of the parties, plaintiff or defendant, is not a final judgment. There must be an express adjudication of the subject-matter of controversy as to all of the parties plaintiff and all of the parties defendant; otherwise there is no final disposition of the matters litigated between the parties." The same rule is declared by the supreme court of Illinois in *Hutchinson v. Ayres*, 7 N. E. 476; *Bucklenn v. City of Chicago*, 46 N. E. 1073; and *Dreyer v. Goldy*, 49 N. E. 560; and also by the supreme court of Tennessee in *Lang v. Zinc Co.*, 42 S. W. 198. In *Watkins v. Mason* (Or.) 4 Pac. 524, a demurrer of one of the defendants, Mary Mason, had been sustained, and some time afterwards there had been a final judgment in favor of the other defendant, and on appeal by plaintiff there was a motion to dismiss the appeal as to Mary Mason, on the ground that the appeal had not been taken within the statutory time after the sustaining of the demurrer; but the supreme court of Oregon denied the motion to dismiss, and said: "In this court a motion was filed to dismiss the appeal as to Mary Mason because not taken within six months from the judgment on the demurrer, although within six months of the determination of the case as to O. P. Mason. The cases hold, however, that an appeal lies only when the controversy as to all the parties to the action has been finally determined." The same rule has also been declared by the supreme court of the United States. See *Bank v. Smith*, 156 U. S. 330, 15 Sup. Ct. 358, 39 L. Ed. 441; *Meagher v. Thresher Co.*, 145 U. S. 608, 12 Sup. Ct. 876, 36 L. Ed. 834, and cases there cited: *U. S. v. Girault*, 52 U. S. 22, 13 L. Ed. 587. The appeal is dismissed.³

³ In *Hutson v. Brookshire*, (Ind. App. 1923) 140 N. E. 440, the court said:—"In the instant case the plaintiff is appealing from a judgment based on a verdict that failed to find on all the issues as to all the parties, and where no objection was made in the trial court to the form of the verdict. Had appellant filed a motion for a *venire de novo* and reserved an exception to the overruling of that motion, a different question would be presented,"—citing, among other cases, *Groot v. Oregon*, etc., R. Co., 34 Utah, 152; *Carmichael v. City of Texarkana*, 116 Fed. 845, 54 C. C. A. 179.

MCAUSLAN v. MCAUSLAN.

*Supreme Court of Rhode Island. 1912.**34 Rhode Island, 462.*

SWEETLAND, J. This is an equity appeal. The bill is brought by certain *cestuis que trust*, beneficiaries under the trusts contained in the will of John McAuslan, and the assignee of certain interests in said trust estate, against the trustees named in said will and the assignee under the mortgage of the interest of certain other beneficiaries. The bill asks for the removal of George R. McAuslan, one of said trustees; that an account be taken of the trust property and the application thereof by said trustees; and for a decree ordering said trustees to pay to said trust estate what shall appear to be due from them on such account. The bill alleges, among other things: That said George R. McAuslan has assumed the active management of said trusts and practically has been the sole trustee; that said trusts have been mismanaged; that said George R. McAuslan is incompetent to perform the duties of trustee; that by reason of certain investments of the trust estate made by the trustees, as specified in the bill, the trust estate has lost large sums of money; that the trustees have failed to keep proper accounts, do not act in harmony, have become personally indebted to the trust estate in large amounts, and have been adjudged in contempt of court for failure to make payments of money from the trust estate in accordance with the decree of the superior court.

Of the respondents, other than the said trustees, one joins in the prayer of the bill, another has permitted the bill to be taken as confessed against him, and the others, as minors, have submitted their interests to the care of the court. The respondent trustee Amelia B. McAuslan in her answer admits all the essential allegations of the bill and joins in the prayer for a receiver. The other respondent trustee, George R. McAuslan, in his answer, among other things, admits that the trustees have made losses in the management of the trust estate, but sets out facts which he claims excuse him from blame. After replication filed, on motion of the complainants, and after notice to the respondents and hearing, the superior court, by decree entered April 2, 1910, referred the cause to a

master, "to examine and state the accounts of the executors and trustees with the estate of the said John McAuslan and report to the court" a number of particulars regarding the amount of the estate at the death of John McAuslan, the dealings of the trustees with the principal of the estate, the amount of the income received from the estate, and the disposition of said income by the trustees. The master by this decree was also directed to report to the court whether George R. McAuslan should or should not be removed as trustee of said estate.

After a number of hearings before the master, of which all the parties received due notice, the master prepared a draft of his report, and all the parties were notified by the master that said draft report was on file in his office for the inspection of the parties and their solicitors, and that at a certain day and hour named he would hear objections to said report. No objections were made by any of the parties, and the master filed his report unsealed in the superior court. On motion, of which the parties had due notice, the superior court, by decree entered on March 4, 1911, confirmed said report. By said report it appears that the master has taken testimony as to all the questions referred to him, and has endeavored by his consideration of such testimony and his conclusions thereon to give to the court the assistance which it had required. Thereafter the superior court, by decree entered April 15, 1911, removed said George R. McAuslan from being trustee as aforesaid, fixed the amount due from said trustees to said trust estate, ordered the said trustees to pay the sum so found to be due to the receiver of said trust estate, made said sum so found to be due a lien on the interests of said trustees in the trust estate, and provided that, if said sum so found to be due was not paid to said receiver within 30 days thereafter, the interests of the said trustees in the trust estate should be liable to be applied toward making good to the trust estate said sum, or such part thereof as might then remain unpaid. From this decree the said George R. McAuslan has appealed.

At the outset of the consideration of this appeal we are met by the objection of one of the respondents, whose interest in the present matter is similar to that of the complainants, that the reasons of appeal stated by the respondent George R. McAuslan cannot be considered, as they are objections to acts

of the superior court preceding the decree confirming the master's report; that the decree of April 15, 1911, from which this appeal is taken, is merely auxiliary to the decree confirming the master's report, which is the final decree; that an appeal from the decree of April 15, 1911, can bring in question before this court only the proceeding in the superior court subsequent to the decree confirming the master's report, and cannot interfere with that decree; that the respondent George R. McAuslan could have raised the objections stated in his reasons of appeal only upon an appeal from the decree confirming the master's report. This brings before us the question of what is the final decree in equity causes intended by our statute as the appealable decree in a cause. Previous to the passage of the Court and Practice Act equity appeals were unknown in our practice, since the period from 1867 to 1871, when appeals to the full court were permitted from both the final and interlocutory decrees made by a single justice of the Supreme Court. Under our present statute an appeal may be taken from the final decree of the superior court in an equity cause, and from the final decree alone, with these exceptions: An appeal may be taken from an interlocutory decree granting or continuing an injunction, appointing a receiver, or ordering a sale of real or personal property. *Hemenway v. Hemenway*, 28 R. I. 85, 65 Atl. 608.

What constitutes a final decree is a question not easily determined in every case. The decisions of the courts are far from uniform upon the subject. As was said by the court in *McGourkey v. Toledo & Ohio Ry.*, 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079: "Probably no question of equity practice has been the subject of more frequent decision in this court than the finality of decrees." The statutes of some of the states provide for an appeal from both final and interlocutory decrees, and the question before the courts in some reported cases has been whether a certain decree was an appealable one, not whether it was interlocutory or final. By the terms of the statutes of some states an appeal will lie in chancery from any decree or order "adjudicating the principles of the cause." In some jurisdictions, where the statutes permit appeals from final decrees alone, decrees which were strictly and technically interlocutory have been held to be final, when irreparable injury might result to a party if he was compelled to await the final outcome of the cause in the lower court be-

fore he could obtain a review in the appellate tribunal. For these and other reasons there is much confusion in the reports as to what constitutes a final decree for the purpose of appeal. Our statute regarding the appealability of decrees in equity is similar to the United States statute. It is in the federal courts that we find the subject, now under consideration, most frequently treated and the practice most consistent and reasonable.

We have frequently said, in regard to the removal of cases at law to this court for review, that the intent of the statute is that exceptions in such cases shall not be certified to this court until after all matters arising in the cause in the superior court have been determined. We see in the statute the same general intent with regard to appeals in equity, so far as the distinctive character of equity procedure makes such practice reasonable and expedient. From the nature of proceedings in equity, it must be held that the final decree is not necessarily the last order in the case. On the other hand, a decree should not be considered final, although it purports to declare the rights of the parties and to regulate all "actions that may be expected to be taken in the future disposition of the case." Such decrees "have no efficacy until put into the form of a judgment that is capable of being carried into execution." *Patterson v. Hopkins*, 23 Mich. 541. * * *

With the modification which we shall consider later, we adopt, as a reasonable definition of a final decree in equity under our statute, the one approved in *Grant v. Phœnix Ins. Co.*, 106 U. S. 429, 1 Sup. Ct. 414, 27 L. Ed. 237: "The rule is well settled that a decree, to be final within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeal, must terminate the litigation of the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the decree it had already rendered." * * *

The strict observance of this general rule would in some instances result in such possible hardship and injury that appellate courts in such cases have taken cognizance of appeals from decrees, which were technically interlocutory in their character, before the merits of the cause had been determined in the court below. These cases must be considered as representing a modification of the ordinary rule. As was said by the court in *Dufour v. Lang*, 54 Fed. 913, 4 C. C. A. 663:

"In the progress of an equity cause, orders and decrees may be made which so affect the parties or the property involved in the suit as to require that such order or decree, to be reviewed at all by an appellate court with effect, should be appealed promptly, and not await the full disposition of the whole suit; and whenever this is the case the decree is held to possess such an element of finality as to bring it within the terms of the statute limiting the right to appeal only from final decrees." In *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404, which is one of this class of cases, the court treats of the necessity for this modification of the ordinary rule as follows: "In this respect the practice of the United States chancery courts differs from the English practice. For appeals to the House of Lords may be taken from an interlocutory order of the Chancellor, which decides a right of property in dispute, and therefore there is no irreparable injury to the party by ordering his deed to be canceled, or the property he holds to be delivered up, because he may immediately appeal, and the execution of the order is suspended until the decision of the appellate court. But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees. And if, by an interlocutory order or decree, he is required to deliver up property which he claims, or to pay money which he denies to be due, and the order immediately carried into execution by the Circuit Court, his right of appeal is of very little value to him, and he may be ruined before he is permitted to avail himself of the right."

This case of *Forgay v. Conrad* was an appeal from a decree of the Circuit Court adjudging that certain deeds should be set aside as fraudulent and void, ordering that certain lands and slaves should be delivered up to the complainant, that one of the defendants should pay a certain sum of money to the complainant, and that the complainant should have execution for these several matters, although the bill was retained in court for other purposes. The Supreme Court, in holding that this decree authorized an appeal, said: "If these appellants, therefore, must wait until the accounts are reported by the master and confirmed by the court, they will be subjected to irreparable injury; for the lands and slaves which they claim will be taken out of their possession and sold, and the proceeds distributed among the creditors of the bankrupt, be-

fore they can have an opportunity of being heard in this court in defense of their rights." This case and others of like character are frequently cited as authorities for the extension of the ordinary rule in regard to appealable final decrees in equity. The case has been regarded by the United States Supreme Court itself as an exception to that rule. In *Barnard v. Gibson*, 7 How. 650, 12 L. Ed. 857, it was held that *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404, is supposed to be a departure from the uniform course of decision in the United States Supreme Court. * * *

In certain cases our statute has guarded against the possibility of injury arising from restricting appeals in all instances to final decrees, in the technical sense, by providing for appeals from interlocutory decrees granting or continuing injunctions, appointing receivers, or ordering a sale of property.⁴ Besides those provided for in the statute, other instances may present themselves of decrees, in a strict sense interlocutory, which by reason of their possible injurious consequences require an immediate review, and must be held for this reason to have such elements of finality as to permit an immediate appeal.

There is another class of decrees which is to a certain extent a modification of the general rule. Of this class is a decree made as to one of several defendants, whose interests are not at all connected with each other, with a direction for the payment of costs as to that defendant. Such decree is final as to him, although the cause may be still pending in the court, as to the rest. *Royall's Adm'rs v. Johnson*, 22 Va. 421; *Dickinson v. Codwise*, 11 Paige (N. Y.) 189. Of this nature was the decree considered in *Doty v. Oriental Print Works Company*, 28 R. I. 372, 67 Atl. 586. In that case the court heard and determined an appeal from the decree denying and dismissing the petition of one Tenney for leave to intervene in the above-entitled equity cause as a preferred creditor of the respondent.

It cannot be claimed in the case at bar that the decree confirming the master's report is within either of the exceptions to the general rule which we have discussed, and that for such reason it should be considered as a final decree, from which an appeal could and should have been claimed, if the respondent George R. McAuslan wished to raise the objections stated in his reasons of appeal. Under the general rule

which we have adopted, the decree confirming the master's report is not the final decree in the cause. More was required to give the complainants the relief which they desired in the cause, and which the superior court intended to grant, than the entry of a mere auxiliary decree or a decretal order in execution of the decree confirming the master's report. The final decree in an equity cause is the decree which finally determines the rights of the parties, provides for the relief which the court finds to be necessary that the parties may have the full benefit of the court's determination upon the merits, and at most merely requires one or more orders or supplemental decrees for its enforcement. The modifications which we have considered have been permitted to prevent the consummation of injury beyond redress during the progress of the cause, or because there has been a final determination of the cause as to one or more, but not as to all, the parties. These modifications have been permitted for the protection of the party aggrieved by the decree, and for that reason alone. They should be considered as exceptions to the general rule, and, if so considered, they will cause no confusion in practice.

* * *

* * * An appeal from a final decree in equity, as we have defined it, brings before this court for review all matters contained in such decree, and all previous rulings, orders, or decrees made or entered in the cause previous to the entry of such decree, unless such decree or such previous rulings, orders, or decrees, from the circumstances or the manner in which they have been made or entered, are not reviewable, as a decree entered by consent, a decree confirming a master's report, to which no exception has been taken, and others; and said decree, or such previous rulings, orders, or decrees, are not reviewable, unless it is specifically stated in the reasons of appeal that objection is made to such decree, or previous rulings, orders, or decrees.

A supplemental decree, or order for the execution of the final decree, as we have defined it, is also so far a final order or decree as to support an appeal; but an appeal from such order or supplemental decree will bring before the court for review only such matters as are involved in the order or decree itself, or matters arising subsequent to the entry of the final decree; but it cannot bring before the court any alleged error contained in the final decree itself, or any matters arising

ing in the cause previous to the entry of the final decree, and, as is true of all appeals in equity, it only brings up for review the alleged errors which are stated in the reasons of appeal.

* * * * *

⁴ Statutes allowing appeals from orders granting injunctions and appointing receivers are found in most states.

⁵ It is frequently said that an appeal may be taken from a final judgment or decree upon a collateral matter arising out of the action. *Bennett v. Thorne*, (1904) 36 Wash. 253; *Grant v. Los Angeles, etc., RR. Co.*, (1897) 116 Cal. 71; *Trustees v. Greenough*, (1881) 105 U. S. 527; *Williams v. Morgan*, (1883) 111 U. S. 684.

An order in a suit for divorce that plaintiff pay to the defendant money to enable her to make a defense to his action, has been held appealable and not appealable. *Clay v. Clay*, (1910) 56 Ore. 538, citing cases both ways on petition for rehearing.

In *Sharon v. Sharon*, (1885) 67 Cal. 185, 196, the court probably took too broad a position when it said:—"A final judgment is not necessarily the last one in an action. A judgment that is conclusive of any question in a case is final as to that question. The Code provides for an appeal from a final judgment, not from *the* final judgment, in an action."

"Where accounts are to be settled between the parties and the decree contains an order of reference by which the accounts are to be stated according to certain principles fixed by the decree, such order of reference will not have the effect of rendering the decree interlocutory; but where the chancellor fails to fix the principles by which the accounts are to be stated and judicial action on his part is contemplated and necessary, or where some equity other than that involved in the accounting remains for further adjudication, then such decree is interlocutory,, unless the status of the account or other matter to be thereafter determined is apart from the equities involved."—*Gray v. Ames*, (1906) 220 Ill. 251, 254. See also *McGourkey v. Toledo & Ohio Ry. Co.*, (1892) 146 U. S. 536.

In *Wynn v. Tallapoosa County Bank*, (1910) 168 Ala. 469, the court said:—"The test of finality of a decree to support an appeal is not whether the cause remains *in fieri*, in some respects, in the court of chancery, awaiting further proceedings, necessary to entitle the parties to the full measure of the rights it has been declared they have; but whether the decree which has been rendered ascertains and declares these rights—if these are ascertained and adjudged, the decree is final and will support an appeal."

In *Forgay v. Conrad*, (1848) 6 How. (U. S.) 201, the court suggested the wisdom of circuit courts refraining "from changing unnecessarily the possession of property, or compelling the payment of money by an interlocutory decree," in order that parties might be relieved from the burden and expense of successive appeals, since decrees of that character had a sufficient element of finality to be appealable.

As to appeals from part of a case. Elliott says:—"There is a class of cases which apparently form an exception to the general rule that an appeal will not lie from a part of a case, but the cases forming this class will be found on investigation to be apparent rather than actual exceptions. The class to which we refer is composed of cases wherein an issue, distinct, entire and complete, is formed between some of the parties and upon which issue a final judgment is given affecting only

the interests and rights of the parties to that issue. * * * The class is composed of cases where the judgment is final as to the particular issue and the parties to it, and the issue is one which neither affects the main action nor the parties generally. If the issue does affect the main action and does involve the rights of others than the parties to the particular issue, there can be no appeal until there has been a decree or judgment upon all the issues as to all the parties." Elliott: App. Proc., § 99.

CHICAGO PORTRAIT CO. v. CHICAGO CRAYON CO.

Supreme Court of Illinois. 1905.

217 Illinois, 200.

CARTWRIGHT, C. J. Appellant was plaintiff and appellee was defendant in this suit in the circuit court of Cook county. That court sustained the general demurrer of the defendant to the declaration, and the plaintiff elected to stand by the declaration. The recital of said facts in the record is followed by this judgment: "Therefore it is considered by the court that the defendant do have and recover of and from the plaintiff its costs and charges in this behalf expended and have execution therefor." There was no disposition of the rights of the parties or of the suit; but plaintiff prayed an appeal from said judgment to the Appellate Court for the First District, and assigned for error that the court sustained the demurrer and dismissed the suit. Neither party raised any question as to the jurisdiction of the Appellate Court, but submitted the cause on the merits. The Appellate Court, in the opinion filed, called attention to the fact that the judgment was not final, or such that an appeal could be taken from it, but, treating it as final, disposed of the case on the merits and affirmed the judgment. Appellant prosecuted its further appeal to this court, and assigns for error that the Appellate Court took jurisdiction of the appeal and decided the case on its merits, instead of dismissing the appeal.

In the argument for appellant the only error relied upon is that the Appellate Court had no jurisdiction of the appeal, for the reason that the judgment was not final. The answer of appellee to that argument is that appellant is estopped, by taking the appeal and submitting the cause upon the merits,

from now saying that the Appellate Court ought to have dismissed its appeal. The judgment was not final, and the statute only authorizes appeals from final judgments. The circuit court merely sustained a demurrer to the declaration, and neither adjudged that the plaintiff take nothing by the writ, nor that the defendant go hence without day, and the judgment contained no words of equivalent meaning. There was no trial of any issue resulting in a finding for the defendant, as there was no issue to be tried, and there was nothing in the nature of a determination of the rights of the parties. Such a judgment is not final. *Wenon v. Fossick*; 213 Ill. 70, 72 N. E. 732; 11 Ency. of Pl. & Pr. 925. The only question, therefore, is whether appellant is estopped, by taking the appeal, from questioning the jurisdiction of the Appellate Court. If a court on appeal has jurisdiction of the subject-matter and of the parties, any objection to the manner in which it reaches the court will be waived by the parties appearing and pleading without objection. *Lynn v. Lynn*, 160 Ill. 307, 43 N. E. 482. But, where the court has no jurisdiction of the subject-matter, the jurisdiction cannot be conferred by agreement of parties and the want of jurisdiction cannot be waived by failing to object. 2 Cyc. 536. The fact that appellant took the appeal to the Appellate Court does not affect the question. *Peak v. People*, 71 Ill. 278. It is not competent for parties to confer jurisdiction of the subject-matter upon an appellate court by their stipulation. *Westcott v. Kinney*, 120 Ill. 564, 12 N. E. 81. In this case the Appellate Court had no jurisdiction of the subject-matter, not being authorized by law to hear or consider an appeal from a judgment which is not final, and appellant is not legally estopped to set up a want of jurisdiction. A court, finding it has no jurisdiction of a cause, should dismiss it of its own motion, and the Appellate Court should have dismissed the appeal at appellant's cost. Appellant, having taken an appeal where by law no appeal would lie, will not be permitted to recover costs, but will be required to pay all costs occasioned by such appeal.

The judgment of the Appellate Court is reversed, and the cause is remanded to that court, with directions to dismiss the appeal at appellant's cost.

Reversed and remanded.

STATE v. SECURITY SAVINGS & TRUST CO.

*Supreme Court of Oregon. 1896.**28 Oregon, 410.*

BEAN, C. J. On this appeal two questions have been presented for consideration: First, whether the order overruling defendant's demurrer, and requiring it to answer the information and interrogatories as prayed for in the bill, is an appealable order; * * * The right of appeal is purely statutory, and, unless the order from which defendant's appeal is taken is a final order, judgment, or decree within the meaning of the statute, the appeal, of course, cannot be entertained. The law, as we understand it, is that an order or decree is final for the purposes of an appeal when it determines the rights of the parties; and no further questions can arise before the court rendering it, except such as are necessary to be determined in carrying it into effect. *Freem. Judgm. § 36; Elliott, App. Proc. § 90; St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.*, 108 U. S. 24, 2 Sup. Ct. 6. Within this principle we think the present order or decree is final. The suit was brought for the sole and only purpose of obtaining from the defendant an answer under oath to the several interrogatories, and for no other relief. The information is a pure bill of discovery, in aid of a contemplated action at law, asking no relief; and the only litigated question in the case is the right of the informant to the discovery sought. When, therefore, the demurrer was overruled, and the court held that the plaintiff was entitled to the relief demanded, and ordered and directed the defendant to answer the interrogatories, it effectually determined all the issues in the case, and ended the controversy between the parties so far as it could do so, leaving nothing to be done but to enforce its determination as made. No subsequent question could arise in the case except as to the form or sufficiency of the defendant's answers, and therefore, in our opinion, it was a final order or decree within the meaning of the statute, and consequently appealable; otherwise the defendant would be without remedy by an appeal, though it should be admitted that the order complained of was in violation of its clear legal rights. If, as contended by the plaintiff, before it can appeal it must com-

ply with the order of the court, and answer fully the information and interrogatories, an appeal would be a vain and useless proceeding, for the sole object of the suit would have been accomplished, and defendant's appeal could avail it nothing.

* * * * *

CITY OF PARK RIDGE v. MURPHY.

Supreme Court of Illinois. 1913.

258 Illinois, 365.

VICKERS, J. The city of Park Ridge instituted a proceeding in the county court of Cook county for a special assessment to pay for a local improvement costing \$64,050.50. James A. Murphy was the owner of certain real estate, which was assessed \$6,327.50 for said improvement. The proceedings on their face, up to and including the final confirmation of the assessment, appear to be regular. Judgment of confirmation by default was entered against the lands of appellee, Murphy, May 18, 1911. On May 5, 1912, appellee gave notice that he would file a motion to set aside the default and vacate the judgment entered against his lands on May 18, 1911, and for leave to file objections to said assessment. After overruling a demurrer of the city, and striking certain pleas filed by the city to said motion, the court proceeded to hear the motion to set aside the default against appellee on affidavits and evidence, and made an order setting aside the default and vacating the judgment of confirmation as to appellee's lands, and gave leave to file objections *instantly*, which was done. This appeal is prosecuted by the city from the order setting aside the default and vacating the judgment of confirmation.

* * *

* * * Having reached the conclusion that the order setting aside the default and permitting appellee to file objections is not a final and appealable order, it will not be necessary to consider any other question.

Where a defendant makes a motion to set aside a default and vacate a judgment in order to allow a defense, and such motion is denied, the denial of the motion is a final judgment,

which may be reviewed by appeal or writ of error (*Lake v. Cook*, 15 Ill. 353; *Boyles v. Chytraus*, 175 Ill. 370, 51 N. E. 563); but when the motion is allowed, and the judgment is set aside merely for the purpose of allowing the party to interpose a defense, the order is interlocutory, and an appeal will not lie therefrom. *Walker v. Oliver*, 63 Ill. 199. In such case the court does not finally determine the rights of the parties.

Where a default is set aside and a money judgment is vacated, the usual and proper practice is to allow the judgment recovered to stand as a security for the payment of any amount that may ultimately be recovered upon a retrial of the case, and any liens that have been acquired under the judgment are retained until the final determination of the merits of the controversy. Upon a retrial of the case the court may re-enter the same judgment, or modify it, or render an entirely different judgment; but until such final judgment is rendered there is no final disposition of the case, within the meaning of the statute which allows appeals and writs of error to review final judgments. If the opposite party desires to question the action of the court in setting aside the default and vacating the judgment, it is his duty to preserve exceptions thereto and assign error thereon as a part of the record after the controversy has been finally determined. *People v. Wells*, 255 Ill. 450, 99 N. E. 606.

A final judgment, within the meaning of the statute, is one that finally disposes of the rights of the parties, either upon the entire controversy or upon some definite and separate branch thereof. *Mutual Reserve Fund Life Ass'n v. Smith*, 169 Ill. 264, 48 N. E. 208, 61 Am. St. Rep. 172. Cases like *Owens v. Ranstead*, 22 Ill. 161, *Kochman v. O'Neill*, 202 Ill. 110, 66 N. E. 1047, and *Hilt v. Heimberger*, 235 Ill. 235, 85 N. E. 304, all of which were original bills in equity for relief against judgments at law, are not controlling under the facts in the case at bar. In those and other like cases this court has regarded a decree either setting aside the judgment complained of or refusing so to do as a final decree, which might be reviewed by an appeal or writ of error. The motion in the case at bar to set aside the default and vacate the judgment of confirmation was not an independent original action, but was simply a step taken in the original proceeding, which is authorized by section 89 of the Practice Act of 1907 (Laws 1907, p. 444).

There being no final judgment here, the appeal will be dismissed.⁶

⁶ "What are known as final orders are adjudications upon motions or other applications, not involving a hearing upon pleadings and proofs, but upon other issues interlocutory or collateral, whereby some supposed right of a party is definitely cut off, or some liability fixed upon him. Usually, if not always, an order made on such a side hearing is only final if made in a certain way; whereas if the decision had been otherwise it would have been interlocutory; while an absolute decree made in favor of either party is final. If the decision of a motion opens a case it is not generally final, unless it cuts off some acquired right under a decree. If it closes the matter and precludes any further hearing or investigation it is final."—*Kingsbury v. Kingsbury*, (1870) 20 Mich. 212, 215, per Campbell, C. J.

GREEN v. FISK.

Supreme Court of the United States. 1880.

103 United States, 518.

WAITE, C. J. This was a suit begun by Mrs. Fisk, the appellee, in a State court of Louisiana, to obtain a partition of real property. She alleged that she was the owner of one-half the property; that she was not willing to continue her joint ownership, and that a partition by sale was necessary, as a division could not be made in kind. The prayer of her petition was in accordance with these allegations.

Green, the defendant below, being a citizen of California, removed the case to the Circuit Court of the United States for the District of Louisiana. In that court, on the 31st of March, 1879, Mrs. Fisk was decreed to be the owner of one-half the property, and the case was referred to "J. W. Gurley, Esq., master, to proceed to a partition according to law, under the direction of the court." From that decree an appeal was taken by the defendant, which Mrs. Fisk now moves to dismiss, because the decree appealed from is not the final decree in the cause.

We think the motion must be granted. In the Circuit Court the suit was one in equity for partition. Although no formal order was entered assigning it to the equity side of the court, that was clearly its proper place, and it was so treated by the parties and the court.

In partition causes, courts of equity first ascertain the rights of the several persons interested, and then make a division of the property. After the division has been made, and confirmed by the court, the partition, if in kind, is completed by mutual conveyances of the allotments to the several parties. Mitford, Eq. Pl. (4th ed. by Jeremy), 120; 1 Story, Eq., sect. 650; 2 Daniell, Ch. Pr. (4th Am. ed.) 1151.

A decree cannot be said to be final until the court has completed its adjudication of the cause. Here the several interests of the parties in the land have been ascertained and determined, but this is merely preparatory to the final relief which is sought; that is to say, a setting off to the complainant in severalty her share of the property in money or in kind. This can only be done by a further decree of the court. Ordinarily, in chancery, commissioners are appointed to make the necessary examination and inquiries and report a partition. Upon the coming in of the report the court acts again. If the commissioners make a division the court must decide whether it shall be confirmed before the partition, which is the primary object of the suit, is complete. If they report that a division cannot be made and recommended a sale, the court must pass on this view of the case before the adjudication between the parties can be said to be ended.

In this case a partition by sale was asked for, because the property was not susceptible of division in kind. That the court has not ordered, and the reference to the master was undoubtedly to ascertain, among other things, whether such a proceeding was in fact necessary in order to divide the property. The master was in everything to proceed under the direction of the court. He had no fixed duty to perform. He was the mere assistant of the court, not in executing its process, but in completing its adjudication of the partition which was asked. There are still questions, in which the parties have each a direct interest, and they must be determined judicially before the relief has been granted which the suit calls for.

In foreclosure suits it has been held that a decree which settles all the rights of the parties and leaves nothing to be done but to make a sale and pay over the proceeds is final for the purposes of an appeal. The reason is that in such a case the sale is the execution of the decree of the court, and simply enforces the rights of the parties as finally adjudicated.

Here, however, such is not the case, because still the court must act judicially in making the partition it has ordered. What remains to be done is not ministerial but judicial. The law has prescribed no fixed rules by which the officers of the court are to be governed in the performance of the duty assigned to them. The court is still to exercise its judicial discretion in directing the movements and approving the acts of its assistants, until it has finally settled and determined on the details of the partition, if made in kind, or directed a sale by the ministerial officers and prescribed the rules for a division of the proceeds.

Appeal dismissed.

EGGLESTON v. MORRISON.

Supreme Court of Illinois. 1900.

185 Illinois, 577.

CARTWRIGHT, C. J. Appellants appealed from a decree of the superior court of Cook county for the foreclosure of a mortgage, and directing the sale of the mortgaged premises, and the branch appellate court for the First district affirmed the decree. It is here complained that the decree is a joint one for the gross sum of \$4,161.88 in favor of six different persons as complainants, holding separate notes for different amounts, and including a joint solicitor's fee of \$175. The decree finds the separate amount due each complainant on his note, and orders payment to the complainants of the said sums due them, respectively, and, so far as the debts are concerned, counsel are in error in their construction of the decree. There was a solicitor's fee allowed to the complainants jointly; but whether that was right or wrong is immaterial, because it did no harm to the defendants. The foregoing are presented as minor propositions, and the principal complaint is that the court in the decree found that Eggleston, Mallette & Brownell were personally liable for the indebtedness, and ordered that, in case of sale of said premises after the coming in and confirmation of the master's report of sale, in case any deficiency should be shown in the amount due complainants,

they should be respectively entitled to execution therefor against said defendants and one Dawson, who was also found personally liable. Said defendants are grantees of the mortgaged premises subsequent to the execution of the mortgage, and the bill alleges that they assumed and agreed to pay the mortgage indebtedness. It is urged against this feature of the decree that said defendants did not become personally liable, and that the decree is premature. The finding or conclusion of the court upon that subject in the decree is not premature, but the appeal from such finding is premature, because the decree is not final in that respect, but provisional merely. Section 16 of chapter 95 of the Revised Statutes provides that in foreclosure suits a decree may be rendered for any balance of money that may be found due to the complainant over and above the proceeds of the sale, and execution may issue for the collection of such balance. The decree may be rendered conditionally at the time of decreeing the foreclosure, or it may be rendered after the sale and the ascertainment of the balance due. Originally, a mortgagee was relegated to his action at law to obtain a judgment for any deficiency that might be due him after the sale of the mortgaged premises, but this statute makes provision by which he may, in the same proceeding, obtain a decree *in rem* for a sale of the property, and a decree *in personam* if there should be a deficiency. While the statute authorizes the decree to be entered conditionally at the time of decreeing the foreclosure, its only effect is that of a finding that the complainant is entitled to a personal decree for any balance that may be due after the application of the proceeds of the sale. An appeal will not lie from a finding or conclusion, either of law or fact, not accompanied by any final judgment or decree, and there can be no personal decree until there is a judicial determination of the amount due. That amount can only be ascertained after the sale, and such a decree as this is not final in that respect. *Cotes v. Bennett*, 183 Ill. 82, 55 N. E. 661. This decree lacks all the forms of a personal decree for the payment of money, and no action could be brought upon it. Whether anything, or how much, will ever be due from the defendants, is unknown. It has never been judicially determined that there is, or will be, any balance of money due over and above the proceeds of the sale. Unless a decree should be rendered against the defendants in the future, they will be entirely un-

affected by the interlocutory finding or conclusion of the court that they will be liable for a deficiency in case it shall exist. The observations of the appellate court, and their opinion on the subject of liability for a possible deficiency that may or may not exist, relate to an interlocutory finding, and not a final decree. The question whether a personal decree will be valid in case there should be a deficiency and such a decree should be entered is a mere theoretical one. If a personal decree should ever be entered, it may not be for such an amount as would authorize the review of it in this court. So far as the decree was final between the parties, we find no error in it, and the judgment of the appellate court affirming it in those respects is affirmed. Judgment affirmed.⁷

⁷ Some courts hold that an order conditional upon the happening of a subsequent event becomes final as soon as the event occurs,—*People ex rel. Hart v. York*, (1902) 169 N. Y. 452; *Abbott v. Sanders*, (1909) 83 Vt. 165; *Swanson v. Andrews*, (1901) 84 Minn. 168; but others hold that a new and final decree should be entered after the event,—*Griffiths v. Monongahela RR. Co.*, (1911) 232 Pa. 639.

A condition in favor of appellant may be waived, thus making the order final,—*Moore Printing Co. v. Nat. Sav. & Trust Co.*, (1908) 31 App. D. C. 452.

SECTION 2. ORDERS COMMONLY REVIEWABLE BY STATUTE.⁸

⁸ Many statutes specify with great detail particular orders, decrees or judgments from which appeals may be taken. These are usually definite and certain and present no difficulty. But in practically all states statutes are found authorizing appeals in classes of cases described by general terms, and the meaning of these terms has given occasion for much litigation. Some of the more common of these general classes of orders will be discussed in this section.

PLANO MANUFACTURING CO. v. KAUFERT.

Supreme Court of Minnesota. 1902.

86 Minnesota, 13.

From an order denying a motion to set aside service of summons, defendant appeals. *Affirmed.*

START, C. J. * * *

1. The plaintiff moves this court to dismiss the appeal because the order is not appealable. The motion was, in effect, one which challenged the jurisdiction of the court, for the summons is the notice whereby the defendant is brought into court. If it was void, the court acquired no jurisdiction by the attempted service, and the defendant was entitled to have the action dismissed. The order, then, involved not merely a question of practice or procedure, but the jurisdiction of the court to hear the case on the merits. It is to be distinguished in this respect from an order denying a motion for judgment on the pleadings, or to set aside the complaint because it does not comply with the summons, or to dismiss an appeal, or to dismiss the action. *McMahon v. Davidson*, 12 Minn. 357⁹ (Gil. 232); *Board v. Young*, 21 Minn. 335; *Rabitte v. Nathan*, 22 Minn. 266;¹⁰ *Pillsbury v. Foley*, 61 Minn. 434, 63 N. W. 1027.

* * * It is not appealable unless it is one "involving the merits of the action or some part thereof." Gen. St. 1894, § 6140, subsec. 3.

An order involves the merits of the action, or some part thereof, within the meaning of this statute, when and only when it determines the strict legal rights of the parties, as contradistinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the discretion or favor of the court. *Chouteau v. Parker*, 2 Minn. 118 (Gil. 95); *Piper v. Johnston*, 12 Minn. 60 (Gil. 27). Thus, an order setting aside a stipulation settling the issues to be tried, also one setting aside a stipulation to dismiss an action, have been held to be appealable because they deprived the parties of positive legal rights. *Bingham v. Winona Co.*, 6 Minn. 136 (Gil. 82); *Rogers v. Greenwood*, 14 Minn. 333 (Gil. 256). Now, an order which denies the motion of a defendant, appearing specially for that purpose, to set aside the service of the summons upon him, if his contention be correct, determines his positive legal rights, and compels him to take upon himself the burden of defending the action on the merits when the court has no jurisdiction over him. This court has repeatedly assumed, and able counsel conceded, that such an order is appealable. *Columbia Placer Co. v. Bucyrus Steam Shovel & Dredge Co.*, 60 Minn. 142, 62 N. W. 115; *Hillary v. Railway Co.*, 64 Minn. 361, 67 N. W. 80, 32 L. R. A. 448; *Bank v. Estenson*, 63 Minn. 28, 70

N. W. 775; *Strom v. Railway Co.*, 81 Minn. 346, 84 N. W. 46. We hold that the order is appealable.¹¹

⁹ In *McMahon v. Davidson*, (1867) 12 Minn. 357, the appeal was from an order denying a motion for judgment on the pleadings, the appellant claiming that it was an order "involving the merits of the action or some part thereof." The court said:—"An order from which an appeal lies under this clause of the statute, must be decisive of the question involved, or of some strictly legal right of the party appealing; an order which leaves the point still pending before the court, and undetermined, cannot be said to involve the merits, or affect a substantial right. The motion in this case was made on the ground that the complaint did not state facts sufficient to constitute a cause of action, and the refusal to allow the motion did not determine the sufficiency of the pleading, or prejudice the defendant's right to raise the question at a subsequent stage of the proceedings. * * * The order in which such question shall be presented is ordinarily a matter of discretion with the court below, and therefore not subject to review here."

¹⁰ In *Rabitt v. Nathan*, (1875) 22 Minn. 266, the appeal was from an order denying a motion to dismiss an appeal from the probate court. The court said: "The effect of the order appealed from was merely to retain the cause in the district court for trial and determination. * * * The order did not involve any part of the merits of the action."

¹¹ Statutes are common which allow the review of an *intermediate order involving the merits and necessarily affecting the judgment*. See Arkansas, Dig. 1921, § 2129; California, Code Civ. Pro. § 956; Idaho, C. S. 1919, § 7170; Iowa, Code 1919, § 8481; Kansas, Code 1909, § 6160; Minnesota, R. L. 1905, § 4365; North Carolina, Con. St. 1919, § 640; North Dakota, R. C. 1905, § 7226; Oklahoma, R. L. 1910, § 5236.

"The term 'merits' as used by the profession, when applied to actions, usually denotes the subject or ground of an action as stated in the complaint, or the grounds of defense as stated in the answer; and the trial of the merits of an action generally means the elicitation of evidence in support of the averments of fact set out in the pleadings. But the courts, in construing statutes governing appeals from interlocutory orders, have frequently enlarged this meaning and have held that the phrase 'involves the merits' must be so interpreted as to embrace orders which pass upon the substantial legal rights of the suitor, whether such rights do or do not relate directly to the cause of action or subject-matter in controversy."—*Bolton v. Donavan*, (1900) 9 N. D. 575.

In *St. John v. West*, (1850) 4 How. Pr. (N. Y.) 329, the court held that the term merits applies to strict legal rights as distinguished from those mere questions of practice which every court regulates for itself.

In *Peter Schoenhofen Brewing Co. v. Giffey*, (1913) 162 Ia. 204, the court laid down the following test of an intermediate order involving the merits:—"If the question is or will be inherent in the final judgment and may be presented on appeal from that judgment, it must be treated as an interlocutory order review of which may only be had upon the general appeal, excepting in such instances, as to pleading, where appeal is expressly allowed; but if the ruling is of such a nature and affects rights in such a manner that they cannot be protected or affected by the final judgment, then appeal will lie." But a qualification was added in *Northwestern Trading Co. v. Insurance Co.*, (1917) 180 Ia. 878, where the court said that waiver by proceeding to final judgment was not enough to mark an order as appealable, adding, "There

must be something in addition to indicate that something substantial will be lost because of the waiver."

Statutes allowing appeals from interlocutory orders are to be strictly construed.—*Nisius v. Chapman*, (1912) 178 Ind. 494.

In *Lynch v. Spartan Mills*, (1902) 66 S. C. 12, the appeal was from an order requiring the plaintiff to make his complaint more definite and certain by alleging what acts were negligent and what acts wilful. The court said: "The word 'merits' naturally bears the sense of including all that the party may claim of right in reference to his case. * * * The order deprived the plaintiff of the [statutory] right to jumble in one statement all acts of negligence or other wrongs; and its practical effect was to compel the plaintiff to formulate his allegations so as to set out two or more causes of action. It was, therefore, appealable." The same court holds that the refusal to require two causes of action to be separately stated and numbered involves the merits and is appealable.—*Matheson v. Am. Tel. & Tel. Co.*, (1923) — S. C. —, 118 So. 617.

PEOPLE v. NEW YORK CENTRAL RAILROAD CO.

Court of Appeals of New York. 1864.

29 New York, 418.

[Appeal from an order making an extra allowance of costs against the plaintiff.]

DENIO, Ch. J. * * * The question, therefore, is, whether an order for an extra allowance made by a single judge before judgment, is the subject of an appeal to the general term. By the section of the code, providing for appeals from orders of a single judge to the general term (sec. 349), one of the cases in which an appeal lies is where the order involves the merits of the action, or some parts thereof, *or affects a substantial right*. It may, perhaps, be doubted whether a question respecting the costs can be said to involve the merits of the action; but I think this order affects a substantial right, within the meaning of the section. In construing the section we see in the first place that it concedes that there are some orders of a special term which are not the subjects of an appeal to the general term, and that such as affect a substantial right are not within that category. In a general way it may be said that every order which may be made in a cause affects the rights of the parties in some appreciable manner. What, then, is meant

by the term substantial right? In my opinion it is distinguished from a formal right. Suitors have a certain right to require the observance of all the terms of legal procedure; but inasmuch as it would be productive of infinite delay and expense if every decision upon a matter of practice was subject to be examined on appeal, the legislature wisely determined that the litigation upon such points, which were generally of minor importance, should be limited to the court or judge who first made the order. Parties frequently commit laches in the proceedings in an action, and are obliged to apply to the court for relief, or to be let in to answer or the like, and proceedings are frequently set aside for irregularity, upon or without terms; and the cause proceeds; and it may be eventually determined in favor of the party who was beaten on the motion. These orders, or some of them, are only important in respect to the manner in which the case is eventually to be tried on the merits. Without now undertaking further to classify them, it is sufficient to say that an order which peremptorily and finally charges a party with the payment of a sum of money, great or small, which he ought not to pay, or with a greater amount than he ought to pay, affects his rights, not in a matter of form but in substance; and such was the nature of the order in this case. It was, therefore, examinable at the general term, and it was error in the general term to refuse to take cognizance of and to examine it on the merits, on the plaintiff's appeal.

* * * * *

¹² Many statutes allow an appeal from *any order affecting a substantial right which determines the action and prevents judgment from which an appeal might be taken*.—See Arizona, R. S. 1913, § 1227; Arkansas, Dig. 1921, § 2129; Iowa, Code 1919, § 8481; Minnesota, R. L. 1905, § 4365; Nebraska, C. S. 1911, § 7154; New York, Civ. Prac. Act 1920, § 609; North Carolina, Con. St. 1919, § 638; North Dakota, R. C. 1905, § 7225; Ohio, Gen. Code, § 12258; Oregon, L. 1920, § 548; South Carolina, Code C. Pro. 1902, § 11; South Dakota, R. C. 1919, § 3168; Washington, R. & B.'s Code, § 1716; Wyoming, C. S. 1920, § 6369; Wisconsin, St. 1919, § 3069.

And a number of statutes provide for the review of *an order affecting a substantial right made in a special proceeding*: See Arizona, R. S. 1913, § 1227; Arkansas, Dig. 1921, § 2129; Iowa, Code 1919, § 8481; Minnesota, R. L. 1905, § 4365; Oklahoma, R. L. 1910, § 5237; Wisconsin, St. 1919, § 3069.

"It is claimed that a substantial right, within the meaning of the Code, is an absolute right, and that a matter which is discretionary is not a substantial right, and hence not appealable to the General Term. There are judicial expressions made during the earlier period of the Code

which favor this view, but it is an erroneous construction, and it has been settled that the General Term may review orders that affect substantial rights, although discretionary."—*Martin v. Windsor Hotel Co.*, (1877) 70 N. Y. 101.

ALLARD v. SMITH.

Supreme Court of Wisconsin. 1897.

97 Wisconsin, 534.

A judgment was rendered in a justice's court against the appellant. He at once, on the 15th day of January, 1897, presented to the justice a notice of appeal, with the proper affidavit, and tendered him \$7.50 as and for the sum required to be paid to the justice upon taking an appeal. The justice told him the sum was too small, and refused to receive it, but claimed that \$9.50 was the proper sum. The appellant made no further tender, and the justice declared that he would not make a return. The appellant at once applied to the appellate court for an order to compel the justice to make a return. The application was denied on February 13, 1897, and the appellant appeals.

NEWMAN, J. * * *

Whether the order is appealable depends upon whether it is "an order affecting a substantial right, made in an action, where such order, in effect, determines the action and prevents a judgment, from which an appeal might be taken." Laws 1895, c. 212, § 1, subd. 1. That the order affects a substantial right is clear. The right of appeal is an important and valuable right. It is favored by the courts. The purpose of the appeal is frustrated entirely by the want of a return. The order was made in the action. The perfecting of the appeal alone brought the action within the power of the appellate court. For some purposes it was pending there. It could not be tried there, in the absence of a return. But the appellate court had power to compel a return (Rev. St. § 3763) or to dismiss the appeal. *Bruins v. Downey*, 45 Wis. 496. The action was, potentially, in that court, where all proceedings necessary to make the appeal effectual were due. The order practically prevents a judgment from which

an appeal might be taken. The respondent might move the dismissal of the appeal, and so afford room for the entry of a judgment dismissing the appeal. But it is at his option whether he does so. On the other hand, if the defendant moves to dismiss his own appeal, it is a judgment by consent. From such a judgment no appeal lies. *Hughes v. Feeter*, 23 Iowa, 547; *Imley v. Beard*, 6 Cal. 666; *Sleeper v. Kelly*, 22 Cal. 456; *Atkinson v. Manks*, 1 Cow. 691; *Treat v. Hiles*, 75 Wis. 265, 44 N. W. 1088. So the order practically prevents a judgment from which an appeal might be taken, and is appealable.

* * * * *

YOUNG v. SHALLENBERGER.

Supreme Court of Ohio. 1895.

53 Ohio State, 291.

WILLIAMS, J. * * *

A final order to which error will lie is defined by the Code to be "an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment." Rev. St. § 6707. It is clear that the overruling of the motion of plaintiff in error for a new trial was not an order made in a special proceeding, or upon a summary application after judgment. It was made in a civil action, as contradistinguished from special proceedings, and in the ordinary course of procedure in such actions. Nor is it an order in an action which both affects a substantial right, and, in effect, determines the action, and prevents judgment, within the meaning of the section of the Code alluded to. The action ends with the judgment; and the motion, which is an application to the court to reconsider its judgment, and for a retrial, is usually, though not always, essential to the proper preservation and presentation of the errors preceding the judgment, when relied on to obtain a reversal of it. Error

lies to the judgment, but not to the decision of the motion though that decision may be made a ground for the reversal of the judgment. It has long been settled in this state that "an order of the court granting or overruling a motion to set aside the verdict of a jury and grant a new trial is not a final judgment or order, for the reversal of which error can be prosecuted before the final disposition of the case." *Conord v. Runnels*, 23 Ohio St. 601. Such a motion, it is held in that case, is addressed to the sound discretion of the court. If granted, it does not determine the action, but merely compels the parties to retry their case before the same tribunal; and, if overruled, it simply permits the determination of the action already reached to stand. It may be said that sustaining the motion has the effect of preventing a judgment in favor of the successful party at the trial, and affects a substantial right of his by subjecting him to the costs and uncertainties of another trial, and it undoubtedly does temporarily prevent final judgment, but not eventually; and the costs and uncertainties of another trial is the result of some error which the court, in the exercise of its discretion, deems sufficient to warrant it. And so, if the motion be overruled, the unsuccessful party must incur the expense of a proceeding in error, if he is dissatisfied with the result; but neither the overruling nor sustaining of the motion is, within the meaning of the Code, such final order as may itself be the foundation of a proceeding in error.

* * * * *

¹³ Statutes sometimes expressly allow appeals from orders granting new trials,—Missouri, Ann. St., 1906, § 806; Montana, R. C. 1921, § 9731; Oregon, L. 1920, § 548; Washington, R. & B.'s Codes, § 1716(6); West Virginia, Code 1909, § 4038; Wisconsin, St. 1919, § 3069; or from orders either granting or refusing new trials,—Alabama, Civ. Code 1907, § 2846; California, Code Civ. Pro. § 963; Iowa, Code 1919, § 8481; Kansas, Code 1909, § 6160; Minnesota, R. L. 1905, § 4365; New York, Civ. Prac. Act 1920, § 609; North Carolina, Con. St. 1919, § 638; Oklahoma, R. L. 1910, § 5236; South Carolina, Code Civ. Pro. 1902, § 11; South Dakota, R. C. 1919, § 3168.

CITY OF ASHLAND v. WHITCOMB.

*Supreme Court of Wisconsin. 1902.**114 Wisconsin, 99.*

WINSLOW, J. * * *

* * * * *

But it is objected by the respondent that the order striking a case from the calendar is not an appealable order, because it does not, in effect, determine the action, or prevent judgment from which an appeal might be taken. Certainly, an order striking a cause from the calendar because of insufficient notice or other irregularity not affecting the question of the pendency of the action is not appealable because it affects procedure alone, and merely postpones the trial to a future time; but when such an order is based upon the ground that no such action is pending in the court it is manifest that a different question is presented. Such an order is, in effect, a ruling that the court has no jurisdiction, and hence that it can never be brought to trial or judgment in that court. Thus, in *Cooper v. Village of Waterloo*, 88 Wis. 433, 60 N. W. 714, which was an action against a village for personal injuries suffered by reason of a defective sidewalk, an order was made striking the case from the calendar because a third person, alleged to be primarily liable for the defect, had not been joined as a defendant. Upon appeal this order was held to be appealable, because it affected a substantial right, and in effect determined the action, and prevented a judgment from which an appeal might have been taken. That case cannot be distinguished in principle from the present case. In the present case it appears from the record that the action is still pending in the state court, that removal to the United States court has been denied, and there is nothing to show that the United States court has assumed jurisdiction notwithstanding the denial. Hence, so far as the record before us is concerned, the state court conclusively appears to be the proper court in which the case is to be tried; but that court has refused to try it, and has stricken it from the calendar, upon a ground which will prevent its trial for all time in the future, and hence render any judgment in the action impossible.

Order reversed, and action remanded for further proceedings according to law.¹⁴

¹⁴An order striking an amendant which adds a new party and sets out grounds of attachment against him, is an order preventing a judgment as to such party and therefore appealable.—*Kay & Stevens v. Pruden*, (1897) 101 Ia. 60.

SUMNER IRON WORKS v. WOLTEN.

Supreme Court of Washington. 1911.

61 Washington, 689.

MORRIS, J. On February 10, 1909, the Sumner Iron Works sold to the S. D. Lumber Company, under a conditional bill of sale, certain mill machinery. The bill of sale contained the usual provision that title should remain in the Sumner Iron Works until the property was wholly paid for, and that it should have the right to the possession of the property upon default in the payments, retaining the amount paid as the rental use and value of the property. * * *

On July 28, 1909, the lumber company upon petition of J. W. Stout was declared insolvent, and respondent appointed its receiver. He duly qualified as such, and took possession of all the property of the lumber company, including the machinery covered by the conditional bill of sale. Thereafter the appellant filed a claim in the receivership case, in which it set forth the terms of the sale of the machinery to the lumber company, and the default in the payments as provided for in the contract, asserted its right to the possession of the machinery under the terms of the contract, and asked that it be permitted to remove it, or that it be secured in the payment of the amount then due. The receiver made a motion to strike this claim. * * * This motion was granted, and appellant's claim dismissed, and it brings this appeal.

Respondent moves to dismiss the appeal upon the ground that the order granting his motion and dismissing appellant's claim is not an appealable order. In support of this contention respondent argues that the court below treated his motion as a demurrer, and that an order sustaining a de-

murrer is not appealable. It is true we have so held and such is still the rule. A plaintiff to whose complaint a demurrer has been sustained may plead over, or he may elect to stand on his plea, and appeal from the subsequent order of dismissal, should such an order be entered. This is, in effect, the situation here. Appellant could not amend its claim. It had stated the whole situation upon which it based its claim to retake the machinery, and when the court held as a matter of law that it had no right to retake the machinery, but must submit its claim as an ordinary creditor for the amount claimed to be due, and take its chances upon a distribution, it was in effect a final order, depriving it of the right to recover the possession of the machinery, and in effect determining the proceedings, so far as appellant sought to enforce its rights under the conditional bill of sale. It could hardly be said that such an order did not affect a substantial right of appellant to have its interest in the machinery determined in the receivership case upon its plea of title and ownership. Rem. & Bal. Code, § 1716, provides for an appeal "(6) from any order affecting a substantial right in a civil action or proceeding, which (1) in effect determines the action or proceeding and prevents a final judgment therein; or (2) discontinues the action." We believe the order dismissing appellant's claim was such an order and appealable. The motion to dismiss is therefore denied.

* * * * *

TATUM v. GEIST.

Supreme Court of Washington. 1905.

40 Washington, 575.

Action by H. L. Tatum and another, doing business as Tatum & Bowen, against W. A. Geist and others; the Niagara Fire Insurance Company and another being garnishees. From an order vacating a judgment against the garnishees, and quashing the service of the writ of garnishment, plaintiffs appeal. On motion to dismiss the appeal. Denied.

RUDKIN, J. * * *

The statute provides that an appeal lies to this court from any order affecting a substantial right in a civil action or proceeding, which either in effect determines the action or proceeding and prevents a final judgment therein or discontinues the action, and from a final order made after judgment which affects a substantial right. Ballinger's Ann. Codes & St. § 6500.

The right to appeal from an order vacating a judgment has been the subject of more or less controversy ever since the organization of this court. * * *

The rule deducible from these decisions is this: If an order vacating a judgment or quashing a summons or the service thereof is or may be followed by further proceedings in the cause and the entry of a final judgment therein, such order may be reviewed on appeal from the final judgment, and is not itself appealable. If, on the contrary, the order vacating the judgment or quashing the summons or the service thereof in effect determines the action or proceeding and prevents a final judgment therein, the order itself is a final one, and is therefore appealable. Within this rule an order vacating a judgment in a garnishment proceeding, which does not determine the proceeding and prevent a final judgment therein, is not appealable.

What is the effect of quashing the service of a writ of garnishment? A decision of this question involves a brief consideration of the purpose of the garnishment and the effect of the service of the writ. Section 5393, Ballinger's Ann. Codes & St., provides that the writ shall command the garnishee to appear and answer under oath "what, if anything, he is indebted to the defendant, or was when such writ was served, and what property or effects, if any, of the defendant he has in his possession or under his control, or had when such writ was served." Section 5395 prescribes the form of the writ in substantially the same language. Section 5398 provides that it shall not be lawful for the garnishee to pay to the defendant any debt, or to deliver to him any effects, after the service of the writ. Section 5401 provides that, in case the garnishee makes default, it shall be lawful for the court to render judgment against him for the full amount claimed by the plaintiff against the defendant, or, in case the plaintiff has a judgment against the defendant, for the full amount of such judgment, with all accruing

interests and costs. Section 5402 provides that if it appears, from the answer of the garnishee or otherwise, that the garnishee is indebted to the defendant, or was so indebted when the writ was served, judgment shall be entered in favor of the plaintiff and against the garnishee for the amount of such indebtedness.

It will thus be seen that the garnishment only affects the indebtedness due from the garnishee to the defendant at the time of the service of the writ, or at any time thereafter until final judgment in the garnishment proceeding, or effects in the hands of the garnishee belonging to the defendant between said dates. An order quashing the service of the writ of garnishment, not only releases all such indebtedness and effects, but in effect determines that particular proceeding and prevents a final judgment or any judgment whatever therein. If we concede that a second writ may issue on the same affidavit, yet the second writ will only have the same operation as the first, viz., to bring within the jurisdiction of the court indebtedness due from the garnishee to the defendant or effects in the hands of the garnishee belonging to the defendant at the time of the service of the second writ, or thereafter until final judgment on the second writ. In other words, the proceedings under the second writ are to all intents and purposes independent of the proceedings under the first. There is a different subject matter and different issues. True, the judgment on the first writ would be *res adjudicata* as to all issues there determined, but it would have no other or further effect. We are therefore of opinion that an order quashing the service of a writ of garnishment is in effect a final determination of that proceeding, and prevents a final judgment therein. Such an order is appealable, and, being a final order, the appeal in this case was taken within the time limited by law.

* * * * *

¹⁵ An order vacating a judgment is not appealable under such statutes because "such order may be reviewed on appeal from the final judgment, and thus avoid the probable necessity of more than one appeal in the same action.—State ex rel. v. Superior Court, (1903) 31 Wash. 53. This is the general rule, and the same is true of an order refusing to vacate a judgment. 3 C. J. § 355.

SECTION 3. DISCRETIONARY ORDERS.

BAILEY v. TAAFFE.

*Supreme Court of California. 1866.**29 California, 422.*

SANDERSON, J.: This is an appeal from an order setting aside a judgment by default. * * *

It is true, as claimed by the learned counsel for the respondents, that orders like the present, in legal parlance, rest very much in the discretion of the Court below, and will not be disturbed by this Court unless we are satisfied that the order is so plainly erroneous as to amount to an abuse of discretion. (*Rowland v. Kreyenhagen*, 18 Cal. 455; *Haight v. Green*, 19 Cal. 113; *Mulholland v. Heyneman*, 19 Cal. 605; *Barrett v. Graham*, 19 Cal. 632; *Woodward v. Backus*, 20 Cal. 137; *People v. O'Connell*, 23 Cal. 281; *Howe v. Independence Consolidated G. and S. M. Co.*, ante, 72.)

The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case, this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit *in foro legis*, when examined under those rules of law by which Judges are guided to a conclusion, the judgment of the Court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the Court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other.¹⁶

¹⁶ Discretionary orders are very numerous and of great variety, such as allowing or disallowing amendments to pleadings, granting, modifying or dissolving injunctions, appointing and removing receivers, granting change of venue, allowing or refusing continuances, extending time

for various proceedings, passing upon the qualifications of jurors, admitting cumulative evidence, determining the order of proof, reopening the case for further proof, extent and manner of examinations of witnesses, granting a view by the jury, dismissal, non-suit and directing a verdict, granting or refusing a new trial based on questions of fact arising during or after the trial, vacating judgments, setting aside defaults, etc. See a vast number of cases cited under these and similar heads in 4 C. J. 796-843.

SECTION 4. EFFECT OF AGREEMENTS.

TOWNSEND v. THE MASTERSON, ETC., STONE DRESS- ING CO.

Court of Appeals of New York. 1857.

15 New York, 587.

Motion by the defendants to dismiss an appeal taken by the plaintiff, on the ground that the parties had, intermediate the judgment of the special term and the hearing of an appeal at the general term, stipulated that no appeal should be taken to this court. The action was brought in the Superior Court, among other things to compel the defendant, Abernethy, who, as a trustee for the defendant, The Master-son Company, held a mortgage for a large amount which the plaintiff had executed, to cancel that mortgage, on the ground that it had been satisfied. The mortgage was given to secure the performance, on the part of the defendant, of certain engagements for furnishing dressed stone for the plaintiff. The defendant set up, by way of counterclaim, that the plaintiff was indebted to it on account of the transaction referred to, and that the mortgage was a security in its hands for that indebtedness. The case was tried before a referee, who reported, June 2, 1856, that there was due the defendant, The Masterson Company, \$3,647.20, and that on payment of that amount, and not otherwise, the plaintiff was entitled to a cancellation of the mortgage. Judgment was entered in accordance with the report at the special term, both parties having excepted to certain decisions made against them. On the 25th of June, 1856, the attorneys for both parties signed a stipulation, allowing twenty days to

the parties to prepare and serve a case and that The Master-son Company might use the plaintiff's case to insert their exceptions. On the 21st of July, 1856, the attorneys for the respective parties signed the stipulation upon which the present motion is based, which, after giving the title of the action in the Superior Court, is in the following words: "It is hereby mutually stipulated that the appeal in this cause from the referee's report be brought to a hearing before the general term of this court as soon as practicable, *and that no appeal shall be taken from the decision of the general term to the Court of Appeals.* It is further stipulated that this case shall be settled according to the decision of the general term of this court, under its directions. July 21, 1856." The plaintiff, in his affidavit, read upon the motion, admitted that the stipulation was signed on his behalf by his direction. The plaintiff's notice of appeal to the general term was given on the 6th and the defendant's on the 8th of August, 1856. On the hearing at the general term the stipulation was read to the court by the defendant's counsel, and after the decision of the general term, the court, on the motion of the defendant's counsel, made an order that said stipulation should be incorporated into the judgment roll. By the judgment of the general term, upon the appeal, that part of the judgment entered upon the referee's report, by which the amount mentioned was found due to the defendant, was affirmed; and it was ordered that the defendant recover that sum against the plaintiff, with costs; but the general term held that only the sum of \$35.84 was secured by the mortgage, and the judgment directed that it should be canceled on the payment of that sum, with costs. It was shown upon this motion that the mortgage had been cancelled pursuant to the judgment.

DENIO, C. J. The suggestion made on the argument by the plaintiff's counsel, that the stipulation had relation only to the appeal on his part, seems not to be well founded. When the stipulation was signed, neither party had served any notice of appeal to the general term. Both parties had, however, taken exceptions to decisions of the referee, and it is clear from the stipulation in regard to time for making a case, and from the terms of the other stipulation upon which the motion is founded, that both parties contemplated appealing to the general term. That stipulation was mutual,

therefore, in its terms and effect. Both parties concurred that they had reason for complaining of the report of the referee, and they deliberately agreed that each should be content with what the general term should decide, and that they would not protract the litigation by an appeal to this court.

It is insisted by the defendants' counsel that the jurisdiction of this court is limited to hearing appeals upon their merits, and that it cannot enforce stipulations made by the parties in the subordinate courts. But certainly, the duty of hearing appeals involves the jurisdiction of determining whether a particular case is properly before us on appeal. It is perfectly competent for the parties to determine in the preliminary steps of the litigation, whether they will place the question in dispute in a condition to be reviewed here. They may omit to except to the decision of the court before whom the primary decision is made, or after excepting they may waive or abandon the exception absolutely or to a modified extent. There is no reason, therefore, why they may not mutually agree that exceptions which have been taken shall only be effectual to sustain an appeal to the general term of the same court. This is what has been done in effect in this case. We should not regard any less authentic evidence of such an arrangement than a plain stipulation in writing; but when we are furnished with such evidence, and especially where the court from which the appeal is taken has sanctioned the agreement by making it a part of the record, we ought to enforce it by refusing to pass upon the questions which have thus formally been waived.

The appeal must be dismissed with costs, to be paid by the appellant.

CHAPIN v. PERRIN.

Supreme Court of Michigan. 1881.

46 Michigan, 130.

COOLEY, J. This is an appeal in chancery. From the record it appears that the appeal is taken from a decree entered

in pursuance of the following stipulation which is signed by the solicitors: "It is hereby stipulated and agreed by and between the solicitors in above entitled cause: 1st. That as the jurisdiction of this court is in doubt, and for the purpose of settling said jurisdiction in the Supreme Court, the demurrer of defendant Andrew Perrin to the bill of complaint may be sustained by the court, and the bill dismissed without prejudice and without costs of any kind to either party; and said complainant agrees to appeal said suit for the purpose above set forth, and upon the conditions hereinafter stated. * * *

Appeals bring up for review some action of the court below which is complained of as erroneous. In this case there has been no such action. The chancery court has performed no judicial act whatever, except what is implied in permitting a consent order to be entered. But neither party can complain of a consent order, for the error in it, if there is any, is their own, and not the error of the court. It follows that there is nothing to appeal from, and the case must be dismissed and the record remanded.

POWELL v. TURNER.

Supreme Judicial Court of Massachusetts. 1885.

139 Massachusetts, 97.

MORTON, C. J. This being a *scire facias* against a trustee, the Superior Court had authority to enter, as it did, a judgment for costs in favor of the plaintiff, if the case was properly pending in that court. Pub. Sts. c. 183, §§ 81-83.

The case was begun in the Municipal Court of the city of Boston; in that court an agreement, signed by the parties, that the case might be discontinued without costs to the plaintiff, was filed, and thereupon a judgment was entered that the case was "discontinued, without costs to plaintiff, by written agreement." Within the time prescribed by statute, the plaintiff claimed an appeal. She presented to the judge of the Municipal Court a paper repudiating the agreement, on the ground that it was obtained by fraud, and claimed an appeal. The judge permitted this paper to be filed as of a

time prior to the entry of the judgment of discontinuance, and allowed her appeal. A proper bond to prosecute the appeal was filed, and the case was duly entered in the Superior Court, and there fully heard upon the merits, without objection by the defendant.

By our statutes, any party aggrieved by a judgment of the Municipal Court of Boston has the right to appeal to the Superior Court. If a judgment is rendered against a party by his consent, he cannot be said to be aggrieved. *Volenti non fit injuria*. But if rendered without his consent, he has the right of appeal. If the Municipal Court had entered a judgment of discontinuance upon the faith of a forged agreement, there is no doubt that the plaintiff could appeal.

If the agreement upon which the court acted was obtained by fraud practiced on the plaintiff, she had the right, upon discovery of the fraud, to treat the agreement as void *ab initio*. If she had discovered the fraud before the adjournment without day of that court, she could have repudiated the agreement, and insisted upon a trial of its validity in that court, with the right of appeal if the decision was adverse to her. Having discovered it after the adjournment of the court, but before the time limiting her right of appeal had expired, we see no objection to allowing her appeal. Until that time expires, the case is pending, and has not passed to a final judgment which excludes further consideration of it. An appeal is her only adequate remedy, and there is no hardship on the defendant, for the whole case goes to the Superior Court, and he can there try the question of the validity of the agreement, if he desires to do so.

We are of opinion that, under the circumstances of this case, the plaintiff had the right of appeal, and that the Superior Court had jurisdiction of the case.

*Judgment affirmed.*¹⁷

¹⁷ Release of errors has always been recognized as a good plea,—*Elwell v. Fosdick*, (1889) 134 U. S. 500.

SECTION 5. ESTOPPEL AND WAIVER OF RIGHT TO REVIEW.

ELWERT v. MARLEY.

*Supreme Court of Oregon. 1909.**53 Oregon, 591.*

This suit was brought by Carrie M. Elwert against P. H. Marley, H. E. Noble, and J. Olsen to restrain them from interfering with, or making use of, certain alleged wharfage rights on the Willamette river, alleged to be appurtenant to and abutting upon lot 5, block 2, East Portland, Multnomah county, and to belong to the plaintiff as owner of said lot, and to adjudicate and determine any claim of title thereto asserted by the defendants adversely to plaintiff's alleged rights.

* * *

SLATER, C.

1. Plaintiff moves to dismiss the appeal on the ground that, subsequent to the rendition of the decree, and before the appeal, Olsen took from M. W. Parelus, who is plaintiff's grantee, a lease of the premises in dispute, thereby recognizing and acknowledging the validity of the decree, and estopping himself from further contesting the title and right to the enjoyment of the premises by plaintiff and those in privity with her. It appears from the affidavits of Parelus in support of the motion, and from Olsen's in answer thereto and the former's reply, that on August 21, 1906, which was after the cause had been submitted, Parelus received from plaintiff a conveyance of lot 5 and the wharfage rights claimed to be appurtenant thereto, in pursuance of a contract of purchase entered into between them prior to the origin of the suit; that the deed was recorded, of which Olsen had knowledge; that on April 26, 1907, and after the entry of decree, Olsen entered into a written contract of lease with Parelus respecting the property rights in dispute. The contract is mutual in its covenants, and was executed by both parties under seal. By its terms Parelus, for the consideration of \$2 per month, to be paid by Olsen, leased to the latter the right and privilege of mooring and keeping for two months a certain scow or houseboat owned by him upon certain premises, described as being "between ordinary high-

water mark in the Willamette river and the established harbor line of said river and abutting upon lot 5 in block 2 in East Portland," etc., being the identical property and rights in litigation herein. In consideration of the lease Olsen therein agreed to pay the monthly rent in advance, beginning on May 1, 1907, and that at "the expiration of said term he will quit, vacate, and surrender up said premises to Parelius." It is stated in the latter's affidavit that one month's rent was paid. This is denied by Olsen; but it appears to be uncontroverted by him that he continued in the possession of the leased premises, and has never at any time offered to surrender them to Parelius.

A party to an action may, by his acts subsequent to a judgment or order against him, waive his right to have such right or order reviewed by an appellate court, as by acquiescing therein by payment or part payment, or by accepting the benefits thereof. *Moore v. Floyd*, 4 Or. 260; *Portland Const. Co. v. O'Neil*, 24 Or. 54, 32 Pac. 764.

2. In *Ehrman v. Astoria Ry. Co.*, 26 Or. 377, 38 Pac. 306, it was held that the right to appeal from a decree refusing to foreclose a mechanic's lien is waived by bringing an attachment action after the entry of the decree, when the right of attachment is conditioned upon the fact that the claim is not secured by any lien or mortgage. *Kansas City, etc., Ry. Co. v. Murray*, 57 Kan. 697, 47 Pac. 835; *Fidelity & Deposit Co. v. Kepley*, 66 Kan. 343, 71 Pac. 818. So any act, on the part of a defendant, by which he impliedly recognizes the validity of a judgment against him operates as a waiver of his right of appeal therefrom or to bring error to reverse it. 2 Cyc. 656. The case of *Sheldon v. Motter*, 59 Kan. 776, 53 Pac. 127, was a proceeding brought to review an order confirming a sale of real estate at which the defendant Motter was the purchaser. Since the petition in error was filed, plaintiff and her husband accepted a lease from Motter for the land sold, and attorned and paid rent for the same. It was held that this was a recognition of the defendant's title which was inconsistent with the prosecution of the writ of error, and the same was dismissed. *Stauffer et al. v. Salimonie Mining & Gas Co.*, 147 Ind. 71, 46 N. E. 342, * * * *Ewing v. Ewing*, 161 Ind. 484, 69 N. E. 156.

* * * * *

* * * It follows that the motion to dismiss should be allowed.

CLEVELAND, C., C. & ST. L. RY. CO. v. NOWLIN.

Supreme Court of Indiana. 1904.

163 Indiana, 497.

MONKS, J. Appellant commenced this proceeding under section 5160, Burns' Ann. St. 1901 (section 3907, Rev. St. 1881, and section 3907, Horner's Ann. St. 1901), to condemn real estate owned by appellees for a right of way. After the appraisers returned their award, appellant filed exceptions to the award, and thereafter paid to the clerk of the court below the amount of said award, and took possession of said strip of land described in the instrument of appropriation, and constructed its railroad thereon. Appellees received said money from the clerk, and filed no exceptions to the award. To appellees' answer averring said facts appellant replied that it paid said money to said clerk and took possession of said strip of land without any intention of waiving its right of appeal or of confirming the amount of said award, but solely for the purpose of obtaining the right to enter upon said strip of land and construct its railroad thereon while awaiting the determination of the amount of damages on appeal. The court below held that by the payment of said award to the clerk appellant was estopped from prosecuting its exceptions to said award, and rendered final judgment against appellant.

The question to be determined in this case is whether, in the exercise of the power of eminent domain under section 5160 (3907), *supra*, a railroad company, if it excepts to the award, pays the amount assessed to the clerk, and takes possession for the purpose of constructing its railway, is thereby estopped from prosecuting its appeal. Appellees insist (1) that appellant, having voluntarily paid the amount assessed, and taken possession of the land and constructed its road thereon, has accepted the benefit of the award, and cannot appeal therefrom; * * * (2) that no appeal can be taken

from a judgment by a party who voluntarily pays the same. It is provided by section 644, Burns' Ann. St. 1901 (section 632, Rev. St. 1881, and section 632, Horner's Ann. St. 1901), that "the party obtaining a judgment shall not take an appeal after receiving any money paid or collected thereon." This provision applies only to judgments which are made appealable to the Supreme and Appellate Courts. It is, however, a general rule that a party who accepts the benefit of a judgment waives the right to prosecute an appeal from it. *Holland v. Spell*, 144 Ind. 561, 564, 42 N. E. 1014, and authorities cited; Elliott's Appellate Procedure, §§ 150, 151; Ewbank's Manual, § 112. This rule was enforced in *Baltimore, etc., Co. v. Johnson*, 84 Ind. 420, in which it was held that, when benefits are awarded to a landowner in condemnation proceedings under section 5160 (3907), *supra*, an acceptance of the sum awarded will preclude him from prosecuting an appeal. It has been held by this court, however, that payment of a judgment by a defendant does not estop him from prosecuting an appeal from such judgment. * * * Elliott's Appellate Procedure, § 152, says: "It is obvious that there is an essential difference between one who pays a judgment against him and one who accepts payment of a sum awarded by a judgment. Payment by a party against whom a judgment is rendered may often be necessary to protect his property from sacrifice, and what a party does to prevent the sacrifice of his property cannot, with any tinge of justice, be held to preclude him from assailing the judgment." * * *

In *Indianapolis, etc., R. Co. v. Brower*, 12 Ind. 374, * * * the award was paid by the company and was received by the landowner. Thereupon the company appealed, and on motion of the landowner reciting the payment the circuit court dismissed the appeal from the award. This court, in reversing said ruling, said: "It is insisted that, if an appeal is permitted in this case, it is at the expense of the twenty-first section of the Bill of Rights of our state Constitution, which provides that no man's property shall be taken by law, etc., without compensation first assessed and tendered; that upon such assessment and payment to the satisfaction of the owner of the land the applicant is at liberty to enter immediately upon the land thus condemned; and that the payment of the amount assessed, followed by the entry upon the land, was virtual acquiescence in the determination arrived at. We do

not view it in that light. We think that under the provisions of the Constitution referred to it was the duty of the appellants to tender the amount assessed before the right to enter could arise. If it was important to the interest of the appellants that the entry should be made immediately, before the appeal from the judgment upon the assessment could be finally disposed of, we think the party seeking to make the entry would not be precluded from further litigating the amount of the damages by making such a tender as would, under the constitutional provision, authorize him to enter on the lands. The tender at that stage of the proceedings would have to be the full amount of the assessment. We do not think the fact that the defendant accepted the tender changes the rights of the parties." It was held in *Fort St., etc., v. Peninsular, etc.*, 103 Mich. 637, 61 N. W. 1007, that the right of appeal is not lost to the condemner by paying the award and taking possession of the land pending the appeal. The following authorities also sustain the view adopted by this court in *Baltimore, etc., R. Co. v. Brower, supra*; *Fort St., etc., Co. v. Backus*, 92 Mich. 33, 52 N. W. 790; *Oliver v. Union, etc., R. Co.*, 83 Ga. 258, 9 S. E. 1086; *Matter of N. Y. W. S. & B. R. Co.*, 29 Hun, 646; *Id.*, 94 N. Y. 287; *St. Louis, etc., Co. v. Evans*, 85 Mo. 307; *Commonwealth v. Hall*, 8 Pick. 440; *Peterson v. Ferreby*, 30 Iowa, 327; *Chicago, etc., Co. v. Phelps*, 125 Ill. 482, 17 N. E. 769; 7 Ency. Pleading and Practice, 632, 633; 2 Lewis on Eminent Domain (2d Ed.) § 556, p. 1226; Mills, Eminent Domain (2d Ed.) § 139.

* * * * *

It is evident under the authorities cited that when a railroad company appeals from the award within the 10 days allowed, and pays the award to the clerk for the purpose of entering upon the property described in the instrument of appropriation, that such a payment is not a voluntary payment in a legal sense, and the company is not thereby estopped from prosecuting its appeal.

* * * * *

¹⁸ *Accord.* *Patterson v. Keeney*, (1913) 165 Cal. 465; *Lott v. Davis*, (1914) 262 Ill. 148; *Nashville, C. & St. L. Ry. Co. v. Bean's Ex'r*, (1908) 128 Ky. 758; *Ellers Plano House v. Pick*, (1911) 58 Ore. 54; *Chapman v. Sutton*, (1887) 68 Wis. 657.

Contra, unless the payment is forced by execution,—*Comeaux v. West*, (1908) 78 Kan. 404; *Hintrager v. Mahoney*, (1889) 78 Ia. 537; *Cowell*

v. Gregory, (1902) 130 N. C. 80; Rolette County v. Pierce County, (1899) 8 N. D. 613.

See comprehensive note in 45 Am. St. Rep. 271-274, citing many cases, and stating that the weight of authority is with the principal case.

"A party against whom a judgment has been rendered is not prevented from appealing to this court by the fact that he has paid the judgment, unless such payment was made by way of compromise, or with an agreement not to take or pursue an appeal."—Hayes v. Nourse, (1887) 107 N. Y. 577.

STATE v. PRAY.

Supreme Court of Nevada. 1908.

30 Nevada, 206.

NORCROSS, J. Appellants were convicted in the Second judicial district court in and for Churchill county of the crime of receiving stolen goods, and were each fined \$1,000, with the proviso that in default of payment they be imprisoned at the rate of one day for each \$2 of said fine. From the judgment, and from an order denying their motion for a new trial, an appeal is taken.

The state has moved to dismiss the appeal of C. A. Pray upon the ground that he paid the fine imposed upon him, and having fully satisfied the judgment against him his right of appeal is lost. This motion is resisted by counsel for appellant Pray upon the ground that by payment of the fine imposed the defendant does not lose his right of appeal, and further that, when defendant Pray paid his fine, it was under such circumstances that he reserved such right. We will concede, for the purposes of this opinion, that the facts relative to the payment of this fine are substantially as set forth in a stipulation entered into between counsel for appellant and the district attorney of Churchill county and filed in the lower court four months after the appeal was taken.

Said stipulation reads as follows: "That the record on appeal shall and may show * * * That the said defendant, C. A. Pray, not only paid his said fine, under protest, as above set forth, but that the said sum so paid is still held by the clerk of the court pending the outcome and final decision of his said appeal, and that the state of Nevada, so represented

by said district attorney, is entirely willing for said defendant to have his full rights of appeal in said cause, and for the said money to be returned to him in case the appeal should be decided in his favor."

It is not contended that the arrangements entered into between the clerk and defendant Pray were in pursuance of any order of court or were authorized by law. Counsel for appellant admit that they were irregular.

* * * * *

Under the provisions of sections 666, 667, of the Criminal Practice Act (Comp. Laws, §§ 4631, 4632) it was the imperative duty of the clerk within 30 days after the receipt of the amount of the fine to pay the same over to the county treasurer. A heavy penalty is imposed for failure so to do. The full amount of all fines imposed and collected must be transmitted by the county treasurer to the State Treasurer (Comp. Laws, §§ 1208, 4645), when the same becomes a part of the state school fund, and may only be paid out upon the warrant of the State Controller pursuant to law (Comp. Laws, § 1987). When a fine is paid in pursuance of a judgment, the statute determines what disposition shall be made of it, and neither the trial court nor this court has power to alter such disposition, and certainly ministerial officials could not. The judgment against appellant Pray must be treated as satisfied.

There is a conflict among authorities as to whether a voluntary satisfaction of a judgment waives the right of appeal. Counsel for the state have cited a number of decisions holding that it does. It is contended by appellant, however, that the weight of authority is the other way, and this view is taken in 2 Cyc. pp. 647-648, where numerous authorities are cited in the notes. We think it unnecessary to determine between these conflicting positions, for under the view we take this case falls within that class of cases referred to in Cyc., *supra*: "Where an order appealed from is of such a nature that its execution has left nothing upon which a judgment of reversal can operate, the appeal will be dismissed, unless such right was specially reserved." Conceding that in this case an attempt was made to reserve such right, we have already shown that such attempted reservation was by acts clearly void.

The Supreme Court of the United States in the case of *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293, said:

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence." *Book Co. v. Kansas*, 193 U. S. 49, 24 Sup. Ct. 394, 48 L. Ed. 613; *School District v. San Diego County*, 97 Cal. 438, 32 Pac. 517; *Negley v. Short* (City Ct. N. Y.) 7 N. Y. Supp. 674.

Upon a reversal of this case, neither this court nor the trial court has power to direct that the fine paid by defendant Pray be restored to him. Had the clerk of the trial court performed his plain duty under the statute, the amount paid for the fine would long since have reached the state treasury. For this or the trial court to give defendant Pray relief from the fine and order it restored to him would be to give countenance to the illegal acts of the clerk and himself for which there is no warrant. The appeal of defendant Pray will be dismissed.

* * * * *

WALNUT IRRIGATION DISTRICT v. BURKE.

Supreme Court of California. 1910.

158 California, 165.

SHAW, J. This is a motion by the plaintiff to dismiss the defendants' appeal from the judgment.

The controversy involved in the case is the respective rights of the plaintiff and defendants in the use of certain water diverted from the San Gabriel river. The judgment of the court below is that each party is entitled to a certain portion

of the water, to be used in a certain manner at specified times, and that each be enjoined from interfering with the use of the water to which the other is entitled. It is also adjudged that the defendants recover of the plaintiff their costs laid out in the action. After the decision was filed, the defendants filed a memorandum of their costs. Before the judgment was drawn or entered, the plaintiff paid and the defendants accepted the amount of the costs as stated in said memorandum. The defendants have appealed from the judgment "and from each and every part, and the whole thereof." The ground of the plaintiff's motion to dismiss the appeal is that by the acceptance of payment of the costs awarded to them by the judgment the defendants are estopped and barred from prosecuting an appeal from the whole, or any part of the judgment, of which the judgment for costs is a part.

There is no doubt that the general rule is that if a party to a judgment accepts payment or satisfaction of a part thereof which is favorable to him, and that part is of such a character that the part adverse to him cannot be reversed without affecting the part which is in his favor and requiring the reversal of that part also, the party so accepting the fruits of a part of the judgment in his favor is estopped from prosecuting an appeal from those parts which are against him. *Turner v. Markham*, 152 Cal. 246, 92 Pac. 485, and cases there cited.

The following statement of the rule, taken from Baylies on New Trials, p. 18, sec. 7, has been approved by this court: "If all the provisions of a judgment are connected and dependent, so that a part cannot be reversed without a reversal of the whole, a party cannot proceed to enforce such portions of the judgment as are in his favor, and appeal from the part which is against him. In such case the right to proceed on the judgment and enjoy its fruits, and the right to appeal, are not concurrent, but wholly inconsistent, and an election to assert one right is a waiver and renunciation of the other." *Storke v. Storke*, 132 Cal. 353, 64 Pac. 578. This suggests that there may be exceptions. As to these the court, in *San Bernardino Co. v. Riverside Co.*, 135 Cal. 620, 67 Pac. 1048, says: "A limitation to this rule exists where a reversal of the judgment or order cannot affect the right of the party to the benefit which he has secured thereby; as, for example, where there is no controversy as to his right for the amount

for which the judgment was given, but he claims that he was entitled to a greater amount. In such a case he is not precluded from an appeal, even though he has received the amount awarded to him." In 2 Cyc. 653, one of the exceptions is thus stated: "So an appellant, by the collection of a judgment in his favor, will not be estopped from appealing for the purpose of modifying the judgment so as to increase the amount of his recovery—as where the judgment allows a counterclaim, makes a deduction for usurious interest, for the value of improvements, or disallows certain items of account,"—citing *New Rochelle, etc., Co. v. Van Benschoten*, 47 App. Div. 477, 62 N. Y. Supp. 398; *Monnet v. Mertz* (Super.) 17 N. Y. Supp. 380; *Beals v. Lewis*, 43 Ohio St. 222, 1 N. E. 641; *Clay v. Miller*, 7 Ky. 461, and *Bryam v. Polk Co.*, 76 Iowa, 75, 40 N. W. 102. These cases support the text. See, also, *Embry v. Palmer*, 107 U. S. 8, 2 Sup. Ct. 25, 27 L. Ed. 346; *Knapp v. Brown*, 45 N. Y. 210.

The appeal in this case is from the whole of the judgment. If the judgment should be reversed for a new trial, the judgment for the costs which defendants have received would be vacated, and their ultimate right thereto would depend upon the result of the new trial. The appeal, in that event, would directly affect their right to that which they have accepted, they would be estopped from prosecuting it, and the court would necessarily refuse such relief or dismiss the appeal. But this would not be true, if the relief which the defendants seek by their appeal can be given by a modification of the judgment, eliminating therefrom the part which was erroneously adjudged against them, leaving the remainder in force. A reversal for that purpose would not require a new trial nor affect their right to the costs already received. No injustice would thereby be done to the plaintiff. It will have paid that which it should have paid, and no more. Under the rules above stated there would be no estoppel, and the appeal may be retained, unless upon an examination of the merits it appears that a new trial must be ordered. The appeal has been submitted in department on the merits. The matter will there be determined upon the principles here stated.

The motion to dismiss the appeal is referred to the court in department, to be there further considered and decided.

We concur: BEATTY, C. J.: SLOSS, J.; LORIGAN, J.

ANGELLOTTI, J. I concur in the judgment on the authority

of *Stockman v. Riverside, etc., Co.*, 64 Cal. 57, 59, 28 Pac. 116.

Department 1. Appeal from Superior Court, Los Angeles County; Geo. H. Hutton, Judge.

SHAW, J. * * *

It is not necessary to order a new trial of the action. There was no substantial conflict in the evidence as to the facts really in issue, and there is nothing indicating that different evidence could be produced, or throwing doubt upon the facts above stated. Such of the findings as were properly made under the issues were fully proven, and they sufficiently declare the facts upon which the rights of the parties depend. The unnecessary findings may be disregarded and a new judgment may be framed, omitting the objectionable parts, as herein indicated. The seventh and twelfth paragraphs of the judgment should be omitted and the eighth and thirteenth changed so as to leave out all the restrictions upon the defendants as to the times of using the water, the manner of such use, and the requirements concerning notice to plaintiff. There are other particulars in the way of detail, which should be changed so far as necessary to make them consistent with what we have said herein.

The judgment is reversed, and the cause remanded, with directions to the court below to enter judgment in accordance with this opinion. The motion to dismiss the appeal is denied for the reasons given in the opinion thereon by the court in bank.

SECTION 6. JURISDICTIONAL AMOUNT.

CAMERON v. UNITED STATES.

Supreme Court of the United States. 1892.

146 United States, 533.

This was a proceeding by the United States to compel the defendant to abate a wire fence, by which he was alleged to have inclosed a large tract of public lands belonging to the United States, and subject to entry as agricultural lands, in

violation of the act of February 25, 1885, (23 St. p. 321), to prevent the unlawful occupancy of public lands. The first section of the act reads as follows: "All inclosures of any public lands in any state or territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, * * * to any of which land included within the inclosure the person * * * making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim made in good faith, with a view to entry thereof at the proper land office under the general land laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use or occupancy of any part of the public lands of the United States in any state or any of the territories of the United States, without claim, color of title, or asserted right, as above specified, as to inclosure, is likewise declared unlawful, and hereby prohibited."

The answer denied, in general terms, that the defendant had inclosed any of the public lands without any title or claim or color of title acquired in good faith thereto, or without having made application to acquire the title thereto, etc. The answer was subsequently amended by setting up a Mexican grant of the lands in question, and an application then pending before Congress for the confirmation of such grant. Upon the trial the court found the issue in favor of the United States, and decreed that the inclosure was of public land, and was therefore unlawful, and rendered a special judgment, in the terms of the act, that the fence be removed by the defendant within five days from date, and, if defendant fail to remove said fence, that the same be destroyed by the United States marshal, etc.

Defendant thereupon appealed to the supreme court of the territory, by which the judgment was affirmed. Defendant was then allowed an appeal to this court.

BROWN, J. By the act of March 3, 1885, (23 St. p. 443,) "no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity * * * in the supreme court of any of the territories of the United States, unless the matter in dispute, exclusive of costs, shall

exceed the sum of five thousand dollars." The proceeding in this case was a special one to compel the abatement and destruction of a wire fence, with which the defendant was alleged to inclose 800 acres of the public lands of the United States, without title or claim or color of title thereto, acquired in good faith. Defendant's answer was a general denial of the fact, and in an amended answer he set forth the title claimed by him. The question at issue between the parties, then, was whether the defendant had color of title to the lands in question, acquired in good faith. Defendant justified under a Mexican grant of "cuatro sitios de tierra para cria de ganado mayor," (literally, four places or parcels of land for the raising of larger cattle;) and the case turned largely upon the question whether, under the laws, usages, and customs of the country, and the local construction given to these words, a grant of four square leagues or four leagues square was intended. The court found for the United States, and held that the defendant had no colorable title to the four leagues square which he had fenced.

We are of the opinion that this case must be dismissed for want of jurisdiction by this court. The only evidence that it involves the requisite jurisdictional amount consists of three affidavits of persons who swear they are acquainted with the property in dispute, and that the value of said property is more than \$5,000, and the finding of the chief justice, in his allowance of an appeal, that the property in controversy in this action exceeds in value this sum. This evidently refers to the value of the land inclosed by the fence in question. It is not, however, the value of the property in dispute in this case which is involved, but the value of the color of title to this property, which is hardly capable of pecuniary estimation; and, if it were, there is no evidence of such value in this case. Had the defendant succeeded in the action, he would not have established a title to the property, but a color of title to it; and the adjudication would have been of no value to him, except so far as to permit the fence to stand. He could not have made it the basis of an action of ejectment or other proceeding to test his actual title to the premises in question. If the proceeding be considered as one involving the value of the fence, only, it is also sufficient to say there is no evidence of such value.

* * * * *

The appeal is therefore dismissed.¹⁹

¹⁹ *Pecuniary limitations* are often restricted in terms to cases sounding in damages.—*Leopold v. The People*, (1892) 140 Ill. 552; *Gordon v. Cummings*, (1914) 78 Wash. 515. And such limitations are sometimes held to be impliedly restricted to cases involving rights measurable in money.—*State v. McKone*, (1897) 95 Wis. 216; *Conant v. Conant*, (1858) 10 Cal. 249. On the other hand some statutes having a general pecuniary limitation are held to apply to all cases and to exclude appeals in cases not involving matters which can be estimated in money.—*Simms v. Simms*, (1899) 175 U. S. 162; *Renshaw v. Cook*, (1908) 129 Ky. 347; *Perrine v. Slack*, (1896) 164 U. S. 452; *Smith v. Adams*, (1888) 130 U. S. 167.

Express exceptions to the pecuniary limitations are very common, such as cases involving a constitutional question,—*Wood v. City of Chicago*, (1903) 205 Ill. 70; *Underwood Typewriter Co. v. Piggott*, (1906) 60 W. Va. 532; cases involving taxation,—*Zabriskie v. Torrey*, (1862) 20 Cal. 174; *Ayers Asphalt Paving Co. v. Loewengardt*, (1903) 109 La. 439; cases involving the validity of a statute or ordinance,—*Boehringer v. Yuma County*, (1914) 15 Ariz. 546; *Washington Twp. v. Ratts*, (1913) 54 Ind. App. 229; cases involving franchises,—*Neal v. Commonwealth*, (1871) 21 Gratt. (Va.) 511; *Spangler v. Green*, (1895) 21 Colo. 505; and cases involving title to land,—*Jones v. Blumenstein*, (1889) 77 Ia. 361; *Getman v. Ingersoll*, (1889) 117 N. Y. 75.

GIBSON v. SHUFELDT.

Supreme Court of the United States. 1886.

122 United States, 27.

GRAY, J. The question presented by this motion can hardly be considered an open one. But the subject has been so often misunderstood that the court has thought it convenient to review the former decisions, and the grounds on which they rest. By the act of February 16, 1875, c. 77, § 3, which differs from earlier laws only in increasing the amount required to give this court appellate jurisdiction from a circuit court of the United States, it is necessary that "the matter in dispute shall exceed the sum or value of five thousand dollars, exclusive of costs." 18 St. 316. The sum or value really in dispute between the parties in the case before this court, as shown by the whole record, is the test of its appellate jurisdiction, without regard to the collateral effect of the judgment in another suit between the same or

other parties. *Elgin v. Marshall*, 106 U. S. 578, 1 Sup. Ct. Rep. 484; *Hilton v. Dickinson*, 108 U. S. 165, 2 Sup. Ct. Rep. 424; *The Jessie Williamson, Jr.*, 108 U. S. 305, 2 Sup. Ct. Rep. 669; *New Jersey Zinc Co. v. Trotter*, 108 U. S. 564, 2 Sup. Ct. Rep. 875; *Opelika v. Daniel*, 109 U. S. 108, 3 Sup. Ct. Rep. 70; *Wabash, etc., R. R. v. Knox*, 110 U. S. 304, 3 Sup. Ct. Rep. 638; *Bradstreet Co. v. Higgins*, 112 U. S. 227, 5 Sup. Ct. Rep. 117; *Bruce v. Manchester & K. R. R.*, 117 U. S. 514, 6 Sup. Ct. Rep. 849.

The value of property sued for is not always the matter in dispute. In replevin, for instance, if the action is brought as a means of trying the title to property, the value of the property replevied is the matter in dispute; but, if the replevin is of property distrained for rent, the amount for which avowry is made is the real matter in dispute, and the limit of jurisdiction. *Peyton v. Robertson*, 9 Wheat. 527.

When the object of a suit is to apply property worth more to the payment of a debt for less than the jurisdictional amount, it is the amount of the debt, and not the value of the property, that determines the jurisdiction of this court. This is well illustrated by two cases, in one of which the appeal was taken by the creditor, and in the other by a mortgagee of the property.

In *Farmers' Bank of Alexandria v. Hooff*, 7 Pet. 168, this court dismissed an appeal from a decree of the circuit court for the District of Columbia, dismissing a bill to have land, worth more than \$1,000, sold for the payment of a debt of less than \$1,000, which was the limit of jurisdiction, Chief Justice Marshall saying: "The real matter in controversy is the debt claimed in the bill; and, though the title of the lot may be inquired into incidentally, it does not constitute the object of the suit."

In *Ross v. Prentiss*, 3 How. 771, land worth more, and mortgaged for more, than \$2,000, was about to be sold on execution of a debt for a less sum; and a bill by the mortgagee to stay the sale was dismissed. He appealed to this court, and insisted that its jurisdiction depended on the value of the property and the amount of his interest therein, and that he might lose the whole benefit of his mortgage by a forced sale on execution. But the appeal was dismissed, Chief Justice Taney saying: "The only matter in controversy between the parties is the amount claimed on the exe-

cution. The dispute is whether the property in question is liable to be charged with it or not. The jurisdiction does not depend on the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute between them, and, as that amount is in this case below \$2,000, the appeal must be dismissed."

When a suit is brought by two or more plaintiffs, or against two or more defendants, or to recover or charge property owned or held by different persons, (which more often happens under the flexible and comprehensive forms of proceeding in equity and admiralty than under the stricter rules of the common law,) the question what is the matter in dispute becomes more difficult. Generally speaking, however, it may be said that the joinder in one suit of several plaintiffs or defendants, who might have sued or been sued in separate actions, does not enlarge the appellate jurisdiction; that, when property or money is claimed by several persons suing together, the test is whether they claim it under one common right, the adverse party having no interest in its apportionment or distribution among them, or claim it under separate and distinct rights, each of which is contested by the adverse party; that when two persons are sued, or two parcels of property are sought to be recovered or charged, by one person in one suit, the test is whether the defendants' alleged liability to the plaintiff, or claim to the property, is joint or several; and that, so far as affected by any such joinder, the right of appeal is mutual, because the matter in dispute between the parties is that which is asserted on the one side and denied on the other.

In the leading case of *Oliver v. Alexander*, 6 Pet. 143, upon a libel in admiralty against the owners of a vessel to recover seamen's wages, and an attachment of the proceeds of the vessel in the hands of assignees, the libelants obtained a decree for the payment out of those proceeds to them respectively of sums less than \$1,000, but amounting in all to more than \$2,000, and the assignees appealed. This court, at January term, 1832, in a judgment delivered by Mr. Justice Story, dismissed the appeal, for the reasons that the shipping articles constituted a several contract with each seaman to all intents and purposes; that, although the libel was in form joint, the contract with each libelant, as well as the decree

in his favor, was in truth several, and none of the others had any interest in that contract, or could be aggrieved by that decree; that the matter in dispute between each seaman and the owners, or other respondents, was the sum or value of his own demand, without any reference to the demands of others; that it was very clear, therefore, that no seaman could appeal from the circuit court to this court, unless his claim exceeded \$2,000; "and the same rule applies to the owners or other respondents, who are not at liberty to consolidate the distinct demands of each seaman into an aggregate, thus making the claims of the whole matter in dispute; but they can appeal only in regard to the demand of a seaman which exceeds the sum required by law for that purpose as a distinct matter in dispute."

In equity, as in admiralty, when the sum sued for is one in which the plaintiffs have a joint and common interest, and the defendant has nothing to do with its distribution among them, the whole sum sued for is the test of the jurisdiction.

The earliest case of that class is *Shields v. Thomas*, 17 How. 3, in which this court held that an appeal would lie from a decree in equity, ordering a defendant, who had converted to his own use property of an intestate, to pay to the plaintiffs, distributees of the estate, a sum of money exceeding \$2,000, and apportioning it among them in shares less than that sum. The case was distinguished from * * * *Oliver v. Alexander* * * *, above cited, upon the following grounds: "The matter in controversy," said Chief Justice Taney, "was the sum due to the representatives of the deceased collectively; and not the particular sum to which each was entitled, when the amount due was distributed among them according to the laws of the state. They all claimed under one and the same title. They had a common and undivided interest in the claim, and it was perfectly immaterial to the appellant how it was to be shared among them. He had no controversy with either of them on that point; and, if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him. It is like a contract with several to pay a sum of money. It may be that the money, when recovered is to be divided between them in equal or unequal proportions. Yet, if a controversy arises on the contract, and the sum in dispute upon it exceeds two thousand dol-

lars, an appeal would clearly lie to this court, although the interest of each individual was less than that sum."

But in equity, as in admiralty, when several persons join in one suit to assert several and distinct interests, and those interests alone are in dispute, the amount of the interest of each is the limit of the appellate jurisdiction.

Upon the same principle, neither party can appeal from a decree upon a bill by a single plaintiff to enforce separate and distinct liabilities against several defendants, if the sum for which each is alleged or found to be liable is less than the jurisdictional amount. For instance, it was decided in *Paving Co. v. Mulford*, 100 U. S. 147, that the plaintiff could not appeal from the dismissal of a bill to assert a right against two defendants in two distinct certificates of indebtedness, held by them severally, for sums severally less, though together more, than that amount; and in *Ex parte Phoenix Ins. Co.*, 117 U. S. 367, 6 Sup. Ct. Rep. 772, that four insurance companies could not appeal from a decree that each of them should pay \$3,000 to the plaintiff.

The true line of distinction, as applied to cases like that now before us, is sharply brought out by the recent decisions of *Stewart v. Dunham*, 115 U. S. 61, 5 Sup. Ct. Rep. 1163, and *Estes v. Gunter*, 121 U. S. 183, 7 Sup. Ct. Rep. 854, in each of which a preferred creditor for more than \$5,000 was on one side, and general creditors for less than \$5,000 each were on the other. In *Stewart v. Dunham*, the suit being brought by the general creditors against the debtor and the preferred creditor, to whom the debtor had made the conveyance alleged to be fraudulent, and the latter seeking no affirmative relief, the matter in dispute as between the defendants and each of the plaintiffs was the amount of the claim of that plaintiff; but in *Estes v. Gunter*, the suit being brought by the preferred creditor against the trustee in the deed of assignment by which he was preferred, and the general creditors being summoned in as defendants, and themselves asking no affirmative relief, the matter in dispute was the value of the debt preferred, and of the property assigned to secure the preference.

The case at bar is exactly like *Stewart v. Dunham*. The suit is by the general creditors, only one of whose debts amounts to \$5,000. The trustee and the preferred creditor appear as defendants only, file no cross bill, and ask no af-

firmative relief; and the decree sets aside the fraudulent conveyance so far only as it affects the plaintiffs' rights. The sole matter in dispute, therefore, is between the defendants and each plaintiff as to the amount which the latter shall recover; and the motion to dismiss the appeal of the defendants as to all the plaintiffs except the one whose debt exceeds \$5,000 must be granted.

* * * * *

COLVIN v. CITY OF JACKSONVILLE.

Supreme Court of the United States. 1895.

158 United States, 456.

This was a bill filed by John H. Colvin, a citizen of the state of Illinois, on May 8, 1894, against the city of Jacksonville, Fla., and its mayor, in the circuit court of the United States for the Northern district of Florida, to enjoin and restrain the issue, sale, delivery, pledge, or other disposition of a certain issue of bonds, to the amount of \$1,000,000.

FULLER, C. J. * * *

The certificate is as follows:

"* * *

"In the bill and amended bill filed herein complainant alleged that he was a citizen of the State of Illinois; that he owned property within the limits of the city of Jacksonville; that the city was about to issue and sell bonds of the said city to the amount of one million dollars; that the amount of taxes that would be assessed upon the property owned by him in the city of Jacksonville, on account of the issue of said bonds, as interest and sinking fund, would exceed two thousand dollars; * * *

"* * * The court found as a matter of fact that the amount of taxes which the complainant would be obliged to pay as interest and sinking fund on account of the said proposed issue of bonds would not exceed two thousand dollars, and as a matter of law that the interest which the complainant had in the issue of bonds and not the amount of the entire issue thereof was the amount in controversy, and found there-

fore that this court had no jurisdiction of such controversy, and therefore dismissed said complainant's bill."

* * * * *

We are confined, in the disposition of the case, to the certificate, from which it appears that the case was heard upon a motion for an injunction and for the appointment of a receiver, on the bill and amended bill, answer, and affidavits; and that the court found, as matter of fact, that the entire amount of taxes which complainant would be obliged to pay, as interest and sinking fund, on account of the proposed issue of bonds, would not exceed \$2,000, and thereupon dismissed the bill, for want of jurisdiction. It was contended by complainant that the amount of taxes he would have to pay was not the amount in controversy, but that the total amount of the issue of bonds was. But this contention was overruled, and if the court did not err in that particular, and assuming, as we must, that complainant's liability did not exceed \$2,000, the decree of the court was right, since it was its duty, when it appeared to its satisfaction that the suit did not really and substantially involve a dispute or controversy properly within its jurisdiction, to proceed no further, and to dismiss the case. *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289.

This leaves the only question to be considered whether the amount of the interest of complainant, and not the entire issue of bonds, was the amount in controversy; and, in respect of that, we have no doubt the ruling of the circuit court was correct.

In *El Paso Water Co. v. City of El Paso*, 152 U. S. 157, 159, 14 Sup. Ct. 494, which was a bill filed by the water company against the city of El Paso for an injunction, it was alleged, among other things, that if certain bonds were issued the complainant would be compelled to pay taxes on its property for the interest on the bonds, and to provide a sinking fund for the principal thereof, but the amount of the tax that would be thereby cast upon complainant's property was not disclosed; and we said, upon the question whether there was a sufficient amount in controversy to give this court jurisdiction: "The bill is filed by the plaintiff to protect its individual interest, and to prevent damage to itself. It must therefore affirmatively appear that the acts charged against the city, and sought to be enjoined, would result in its dam-

age to an amount in excess of \$5,000. So far as respects the matter of taxes which, by the issue of bonds, would be cast upon the property of the plaintiff, it is enough to say that the amount thereof is not stated, nor any facts given from which it can be fairly inferred." The case is in point, and is decisive.

Brown v. Trousdale, 138 U. S. 389, 394, 11 Sup. Ct. 308, is not to the contrary. There several hundred taxpayers of a county in Kentucky, for themselves and others associated with them, numbering about 1,200, and for and on behalf of all other taxpayers in the county, "and for the benefit likewise of said county," filed their bill of complaint against the county authorities and certain funding officers, and all the holders of the bonds, seeking a decree adjudging the invalidity of two series of bonds aggregating many hundred thousand dollars, and perpetually enjoining their collection; and an injunction was also asked, as incidental to the principal relief, against the collection of a particular tax levied to meet the interest on the bonds. The leading question here was whether the case had been properly removed from the state court, and no consideration was given to the case upon the merits. As to the jurisdiction of this court, we said: "The main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay interest thereon, and finally the principal thereof and not the mere restraining of the tax for a single year. The grievance complained of was common to all the plaintiffs, and to all whom they professed to represent. The relief sought could not be legally injurious to any of the taxpayers of the county, as such, and the interest of those who did not join in or authorize the suit was identical with the interest of the plaintiffs. The rule applicable to plaintiffs, each claiming under a separate and distinct right, in respect to a separate and distinct liability, and that contested by the adverse party, is not applicable here; for although, as to the tax for the particular year, the injunction sought might restrain only the amount levied against each, that order was but preliminary, and was not the main purpose of the bill, but only incidental. The amount in dispute, in view of the main controversy, far exceeded the limit upon our jurisdiction, and disposes of the objection of appellees in that regard."

Decree affirmed.

PITTSBURG BRIDGE CO. v. ST. LOUIS TRANSIT CO.

*Supreme Court of Missouri. 1907.**205 Missouri, 176.*

LAMM, J. Defendant appeals here from a judgment against it for \$5,789.30.

Plaintiff held a contract to reconstruct a certain power station belonging to defendant for so much money; a day being set for full performance, and \$50 *per diem* named for failure in time. Alleging performance, it sued for \$7,043.97, the balance due on that contract.

Defendant answered, denying owing plaintiff that sum, or any other sum. Referring to the contract counted on, defendant pleaded full payment of the contract price. Further referring to the contract, defendant pleaded a counterclaim in two items: First, for \$4,300 damages for 86 days' delay in performing the contract after the day set for full performance; and, second, for certain extra work, \$142.74.

The reply put in issue the new matter.

With cross-claims and pleadings in this fix (both parties denying liability), the amount in dispute at the beginning was the amount claimed in the petition, plus the two items of the counterclaim, aggregating \$11,486.71.

Presently the case came on for trial before Judge Hough, sitting as a jury, and the parties litigant did not stand on the amount in dispute outlined in the pleadings. To the contrary, defendant admitted it owed plaintiff on the building contract the sum sued for, and plaintiff admitted it owed defendant the smaller of the two items of the counterclaim. This left the amount in dispute the first item of defendant's counterclaim, to wit, \$4,300. That issue was threshed out at the trial. To that issue the evidence was limited. To that issue the instructions were directed. On that issue the court made its finding. It found that defendant was entitled to damages at \$50 a day for 37 days' delay, aggregating \$1,850. To this sum it added the admitted item of \$142.74, with interest aggregating \$2,006. It deducted the ascertained and determined amount of defendant's counterclaim from the amount admitted to be due plaintiff, and rendered judgment for the difference. From that judgment plaintiff took

no appeal; defendant alone appealing, as said. So much for the amount in dispute below.

In this court the case is presented by abstracts, statements, and briefs on both sides, on the theory that the balance on the contract price is not in dispute; that the smaller item in defendant's counterclaim is not in dispute; and that (as plaintiff took no appeal) the allowance of damages in the sum of \$1,850 for 37 days' delay on the larger item of the counterclaim is no longer in dispute. The single bone of contention is the issue whether defendant was entitled to damages for 86 days' delay in performing the contract, as claimed in the answer, or the 37 days allowed by the court.

As there is no federal or constitutional question raised, and the title to real estate is not involved, our jurisdiction must hinge on the amount in dispute. Laws 1901, p. 107.

We are given jurisdiction in all cases where the amount in dispute, exclusive of costs, shall exceed the sum of \$4,500. In determining the amount in dispute, we may look within the mere shell of the pleadings and judgment—the mere colorable amount in dispute—and seek out the real amount. *Vanderberg v. Gas Co.*, 199 Mo. 455, 97 S. W. 908. In that case it was said: "Frequently the amount in dispute is materially affected by eliminating items and elements at the trial, and the record shows this. Would it not be an act sounding to folly for us to say that, for the purposes of jurisdiction on appeal, we must continue to consider such eliminated matters."

* * * * *

In *re Burke's Estate* (*Green, Executor, v. Hussey*), 169 Mo. 212, 69 S. W. 277, an executor makes final settlement in the probate court. After taking certain credits, he charges himself with a balance of \$3,530.85. A distributee, Hussey, files exceptions. These exceptions are disallowed, and Hussey appeals to the circuit court. That court increases the amount of the executor's indebtedness by \$2,979.97 and adjudges him to stand indebted to the estate in the sum of \$6,510.82. Thereupon the executor appeals here. This court looked beneath the mere surface of the judgment, and into the record, and there ascertains that the only amount in dispute is the increase made by the circuit court, to wit, \$2,979.97. Accordingly, it refused to entertain

jurisdiction. See, also, *Douglas v. Kansas City*, 147 Mo. 428, 48 S. W. 851.

In the case at bar, the amount in dispute on the surface is the amount of the judgment against defendant. That amount would be sufficient to give this court jurisdiction. But looking deeper into the record for the kernel of the thing, it is not so; and, applying the settled rule of construction as shown in the cases cited, it will be seen that if the real amount in dispute is considered to be the first item of the counterclaim, \$4,300, yet we have no jurisdiction; and, *a fortiori* have we no jurisdiction if we come nearer to the real amount in dispute, to wit, plaintiff's liability for damages for the number of days' delay after deducting the 37 days allowed by the court, to wit, 49 days, at \$50 per day, say \$2,450.

Having no jurisdiction, the cause is transferred to the St. Louis Court of Appeals for determination. All concur.²⁰

²⁰ Most of the cases involving counter-claims and set-offs seem to be decided in accordance with the rule that where the appellant loses in whole or in part on both the original claim and the counter-claim, the amount in dispute is the sum of the amounts so lost, but where he loses on one and wins on the other, the amount of the claim won cannot be added to the claim lost, but the latter alone constitutes the amount in dispute. See *Charlton v. Scoville*, (1895) 144 N. Y. 691, 696; *Gorham-Revere Rubber Co. v. Auto Co.*, (1913) 71 Wash. 578; *Shriver v. Bowen*, (1877) 57 Ind. 266; *Morgan v. Johnson*, (1914) 158 Ky. 417; *Moshier v. Shear*, (1881) 100 Ill. 469; *Dickey v. Smith*, (1896) 42 W. Va. 805. Other cases seem to hold that claim and counter-claim may always be added together to get the amount in dispute,—*Davis v. Laughlin*, (1910) 147 Ia. 478; or that they can never be so added together,—*Crosby v. Crosby*, (1899) 92 Tex. 441; *Norfolk & W. R. RR. Co. v. Potter*, (1909) 110 Va. 427 (*Semble*).

ZOELLER v. RILEY.

Court of Appeals of New York. 1885.

7 New York Civil Procedure Reports, 303.

Motion to dismiss appeal taken by the plaintiff from a judgment of the city court of Brooklyn general term affirming a judgment of trial term dismissing the complaint.

The action was brought for the conversion of a carriage,

and the complaint alleged its value to be \$500 and demanded judgment for that sum. The only evidence offered on the trial as to the value of the carriage was that it was worth about \$300. The respondent claimed that, for that reason, the amount in controversy was less than \$500 and the appeal should therefore be dismissed.

PER CURIAM.—This action is not founded upon contract and hence the sum for which the complaint demands judgment is deemed to be the amount of the matter in controversy, within the meaning of section 191 of the Code. Here the complaint demands judgment for \$500. It matters not that proof given upon the trial shows that the plaintiff's damages were less. If he can succeed upon his appeal, upon a new trial it will be open to him to show that his property was worth \$500, or more, if he can.

The motion must be denied, with \$10 costs.

HILTON v. DICKINSON.

Supreme Court of the United States. 1883.

108 United States, 165.

This was a bill of interpleader filed by Charles D. Gilmore against Benjamin S. Hilton, William H. Dickinson, John Devlin, and others, to determine the ownership of \$2,500, which Gilmore held as trustee. The fund was paid into court, and when the decree below was rendered had increased by investment to more than \$3,000. Hilton, Dickinson, and Devlin each claimed the whole. The court, at special term, decreed the whole to Hilton. From this decree both Dickinson and Devlin appealed to the general term. There the decree at special term was modified so as to direct the payment of the fund to Hilton and Dickinson in equal moieties, and to adjudge the costs against Devlin alone. Hilton took an appeal to this court from this decree, "in so far as it modifies the decree of the court below, to wit, the special term in equity," and citation was issued to Dickinson alone. This appeal was docketed here in due time. * * * Dickinson now moves to dismiss the appeal of Hilton, on the ground

that the value of the matter in dispute does not exceed \$2,500.

* * *

WAITE, C. J. At the last term, in the case of *The S. S. Osborne*, 105 U. S. 451, it was decided that "cross-appeals must be prosecuted like other appeals. Every appellant, to entitle himself to be heard on his own appeal, must appear here as an actor in his own behalf by having the appearance of counsel entered, and giving the security required by the rules." * * * The question is then presented whether upon the face of this record it appears that the value of the matter in dispute, for the purpose of our jurisdiction, exceeds \$2,500, and that depends on whether the "matter in dispute" is the whole amount claimed by Hilton below, or only the difference between what he has recovered and what he sued for. * * *

In *Wilson v. Daniel*, decided in 1798, and reported in 3 Dall. 401, upon a writ of error brought by a defendant below from a judgment against him for less than \$2,000, it was held that the jurisdiction of this court depended, not on the amount of the judgment, but "on the matter in dispute when the action was instituted." Chief Justice Ellsworth, in his opinion, said:

"If the sum or value, found by a verdict, was considered as the rule to ascertain the magnitude of the matter in dispute, then, whenever less than \$2,000 was found, a defendant could have no relief against the most erroneous and injurious judgment, though the plaintiff would have a right of removal and revision of the cause, his demand (which is alone to govern him) being for more than \$2,000. It is not to be presumed that the legislature intended to give any party such an advantage over his antagonist; and it ought to be avoided, as it may be avoided, by the fair and reasonable interpretation, which has been pronounced."

Mr. Justice Iredell, in a dissenting opinion, thus states the argument on the other side:

"The true motive for introducing the provision, which is under consideration, into the judicial act, is evident. When the legislature allowed a writ of error to the supreme court, it was considered that the court was held permanently at the seat of the national government, remote from many parts of the Union, and that it would be inconvenient and oppressive to bring suitors hither for objects of small importance. Hence, it was provided, that unless the matter in dispute

exceeded the sum or value of \$2,000, a writ of error should not be issued. But the matter in dispute here meant, is the matter in dispute on the writ of error."

In *Cooke v. Woodrow*, 5 Cranch, 13 decided in 1809, trover had been brought in the circuit court of the District of Columbia for sundry household goods, and the judgment was in favor of the defendants. Upon a writ of error by the plaintiff below, a question arose as to the way in which the value of the matter in dispute should be ascertained, and Chief Justice Marshall, in announcing the decision, said: "If the judgment below be for the plaintiff, that judgment ascertains the value of the matter in dispute; but when the judgment below is rendered for the defendant, this court has not, by any rule or practice, fixed the mode of ascertaining that value."

* * * * *

The case of *Gordon v. Ogden*, 3 Pet. 33, was decided in 1830. There the action was instituted for the violation of a patent, and the amount of the recovery in damages was \$400 by the verdict of a jury. The damages laid in the declaration were \$2,600. The defendant brought the writ of error, and on a motion to dismiss because the value of the matter in dispute was not enough to give jurisdiction Chief Justice Marshall, speaking for the court, said:

"The jurisdiction of the court has been supposed to depend on the sum or value of the matter in dispute in this court, not on that which was in dispute in the circuit court. If the writ of error be brought by the plaintiff below, then the sum which his declaration shows to be due may be still recovered should the judgment for a smaller sum be reversed; and consequently the whole sum claimed is still in dispute. But if the writ of error be brought by the defendant in the original action, the judgment of this court can only affirm that of the circuit court, and consequently the matter in dispute cannot exceed the amount of the judgment. Nothing but that judgment is in dispute between the parties."

The writ of error was consequently dismissed, all the judges agreeing that there was no jurisdiction. This case was followed at the same term in *Smith v. Honey*, 3 Pet. 469.

Nothing further of importance connected with the par-

ticular question we are now considering appears in the reported cases until 1844, when, in *Knapp v. Banks*, 2 How. 73, which was a writ of error brought by a defendant against whom a judgment had been rendered for less than \$2,000, Mr. Justice Story said for the court:

"The distinction constantly maintained is this: Where the plaintiff sues for an amount exceeding \$2,000, and the *ad damnum* exceeds \$2,000, if by reason of any erroneous ruling of the court below, the plaintiff recovers nothing, or less than \$2,000, there the sum claimed by the plaintiff is the sum in controversy for which a writ of error will lie. But if a verdict is given against the defendant for a less sum than \$2,000, and a judgment passes against him accordingly, there it is obvious that there is, on the part of the defendant, nothing in controversy beyond the sum for which the judgment was given; and consequently he is not entitled to any writ of error. We cannot look beyond the time of the judgment in order to ascertain whether a writ of error lies or not."

The rule as thus stated by Mr. Justice Story, was cited in *Walker v. U. S.* 4 Wall. 163, and in *Merrill v. Patty*, 16 Wall. 345. But these were cases in which the question was as to the right of a defendant to bring up for review a judgment against himself for less than \$2,000.

In *Ryan v. Bindley*, 1 Wall. 66, the plaintiff below sued for \$2,000, and the defendant pleaded set-off to the amount of \$4,000. Under such a plea, if the set-off had been sustained, the defendant would have been entitled to a judgment for the difference between the amount of his claim and that established by the plaintiff. The plaintiff recovered a judgment for \$575.85, and the defendant brought a writ of error, upon which jurisdiction was sustained because the defendant sought to defeat the judgment against him altogether, and to recover a judgment in his own favor and against the plaintiff for at least two thousand dollars, and possibly four thousand. Thus the matter in dispute in this court exceeded \$2,000.

* * * * *

We understand that *Wilson v. Daniel* is overruled by *Gordon v. Ogden*, in which Chief Justice Marshall states the opinion of the court to be that "the jurisdiction of the court depends upon the sum in dispute between the parties, as

the case stands upon the writ of error," and that *Wilson v. Daniel* was not followed because "a contrary practice had since prevailed." It is undoubtedly true that until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction, but it is equally true that when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail. *Lee v. Watson*, 1 Wall. 337; *Schacker v. Hartford Fire Ins. Co.*, 93 U. S. 241; *Gray v. Blanchard*, 97 U. S. 565; *Tintsman v. National Bank*, 100 U. S. 6; *Banking Ass'n v. Insurance Ass'n*, 102 U. S. 121. Under this rule it has always been assumed, since *Cooke v. Woodrow*, *supra*, that when a defendant brought a case here, the judgment or decree against him governed our jurisdiction, unless he had asked affirmative relief, which was denied; and this because, as to him, jurisdiction depended on the matter in dispute here. As the original demand against him was for more than our jurisdictional limit, and the recovery for less, the record shows that he was successful below as to a part of his defense, and that his object in bringing the case here was not to secure what he had already got, but to get more. As to him, therefore, the established rule is that, unless the additional amount asked for is as much as our jurisdiction requires, we cannot review the case.

We are unable to see any difference in principle between the position of a plaintiff and that of a defendant as to such a case. The plaintiff sues for as much as, or more than, the sum required to give us jurisdiction, and recovers less. He does not, any more than a defendant, bring a case here to secure what he has already got, but to get more. If we take a case for him when the additional amount he asks to recover is less than we can consider, he has "an advantage over his antagonist," such as, in the language of Chief Justice Ellsworth, *supra*, "it is not to be presumed it was the intention of the legislature to give," Such a result ought to be avoided, and it may be by holding, as we do, that, as to both parties, the matter in dispute, on which our jurisdiction depends, is the matter in dispute "between the parties as the case stands upon the writ of error" or appeal; that is to say, as it stands in this court. That was the question in *Wilson v. Daniel*, where it was held that, to avoid giving one

party an advantage over another, it was necessary to make jurisdiction depend "on the matter in dispute when the action was instituted." When, therefore, that case was overruled in *Gordon v. Ogden*, and it was held, as to a defendant, that his rights depended on the matter in dispute in this court, we entertain no doubt it was the intention of the court to adopt as an entirety the position of Mr. Justice Iredell in his dissenting opinion, and to put both sides upon an equal footing. Certainly it could not have been intended to give a plaintiff any advantage over a defendant, when there is nothing in the law to show any such superiority in position.

Under this rule we have jurisdiction of a writ of error or appeal by a plaintiff below when he sues for as much as or more than our jurisdiction requires and recovers nothing, or recovers only a sum which, being deducted from the amount or value sued for, leaves a sum equal to or more than our jurisdictional limit, for which he failed to get a judgment or decree. And we have jurisdiction of a writ of error or appeal by a defendant when the recovery against him is as much in amount or value as is required to bring a case here, and when, having pleaded a set-off or counter-claim for enough to give us jurisdiction, he is defeated upon his plea altogether, or recovers only an amount or value which, being deducted from his claim as pleaded, leaves enough to give us jurisdiction, which has not been allowed. In this connection it is to be remarked that the "amount as stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment, at its conclusion, must be considered in determining whether this court can take jurisdiction." *Lee v. Watson*, and the other cases cited in connection therewith, *supra*. The same is true of the counter-claim or set-off. It is the actual matter in dispute as shown by the record, and not the *ad damnum* alone, which must be looked to.

Applying this rule to the present case, it is apparent we have no jurisdiction. The original matter in dispute was \$3,000. On appeals from the supreme court of the District of Columbia we have jurisdiction only when the matter in dispute exceeds \$2,500. Hilton recovered below one-half of the \$3,000. It follows that as to him the matter in dispute in this court is only \$1,500.

The appeal of Hilton is dismissed for want of jurisdiction,

* * *21

§1 Where the statute made the sum stated in the writ or declaration the basis for appeal, all other evidence of the matter in demand was held to be excluded,—*Burke v. Grace*, (1885) 53 Conn. 513. Some statutes base the right of review on the amount in controversy as shown in the pleadings, in which cases the amount of the judgment is immaterial,—*Hancock v. Hancock*, (1907) 134 Ia. 475. Sometimes the value of the property in controversy is to be ascertained from the certificate of the trial judge, and in default of such a certificate there is no right of appeal,—*Matthews v. Rising*, (1899) 194 Pa. 217. Under some statutes the judgment alone determines the amount in controversy,—*Rupel v. Ohio Oil Co.*, (1909) 172 Ind. 300. In Colorado the judgment or, in case of replevin, the value as found by the court or jury, is the basis of jurisdiction,—*Conly v. Boyvin*, (1898) 25 Colo. 498. In California "the demand" which determines the right of review is held to mean the demand as alleged in the complaint, and this is the sole basis for estimating the jurisdictional amount,—*Dashiell v. Slingerland*, (1882) 60 Cal. 653; whether the appeal be taken by the plaintiff or defendant,—*Lord v. Goldberg*, (1889) 81 Cal. 596.

Where the amount of the judgment is made the test, there is no appeal from a judgment of non-suit or that the plaintiff take nothing.—*Timerman v. Real Estate Co.*, (1894) 20 Colo. 147; *Meyer v. Brophy*, (1890) 15 Colo. 572; *Sons of America Bldg. Assn. v. City of Denver*, (1890) 15 Colo. 592.

EDINBURGH LOMBARD INVESTMENT CO. LIMITED,
v. COOPER.

Supreme Court of Kansas. 1904.

68 Kansas, 517.

ATKINSON, J. The Edinburgh Lombard Investment Company, Limited, filed its petition of foreclosure in the district court of Rooks county on the 11th day of May, 1900, against Emma Cooper et al., to foreclose a mortgage upon premises in said county. Defendants answered, claiming a set-off. Upon the trial in the district court defendants were allowed a set-off against the claim of plaintiff, and plaintiff recovered judgment against defendants for the sum of \$515.66, with interest at 10 per cent. per annum, costs of suit, and foreclosure of mortgage. Plaintiff prosecuted error to the Supreme Court, and the judgment of the trial court was affirmed. *Edinburgh Lombard Investment Company, Limited,*

v. Emma Cooper et al., 64 Kan. 888, 68 Pac. 1127. On June 25, 1902, and after the mandate of the Supreme Court had been filed in the district court, defendants filed their motion to correct the journal entry in said cause. A hearing was had upon said motion, which was by the court sustained, and the court made its order correcting said journal entry to show plaintiff should not recover interest and costs on said judgment of \$515.66. To this order of the court correcting said journal entry plaintiff excepted, and brought proceedings in error to the Supreme Court. We have carefully examined the record filed in this court. The amount in controversy, exclusive of costs, would be the amount of loss in interest plaintiff sustained by the order of said court correcting said journal entry. This amount is less than \$100. The appellate jurisdiction of the Supreme Court cannot be exercised in any civil action unless the amount or value in controversy, exclusive of costs, exceeds \$100, except in certain cases; and the present case does not come within any of the exceptions. Gen. St. 1901, § 5019; *Coal Co. v. Barber*, 47 Kan. 29, 27 Pac. 114; *Loomis v. Bass*, 48 Kan. 26, 28 Pac. 1012; *Skoin v. Limerick*, 50 Kan. 465, 31 Pac. 1051.

As there is no jurisdiction to review the case, it will be dismissed from this court. All the Justices concurring.

ZECKENDORF v. JOHNSON.

Supreme Court of the United States. 1887.

123 United States, 617.

WAITE, C. J. A judgment was rendered September 28, 1885, by the district court of Arizona, in and for the county of Pima, against L. Zeckendorf & Co., the appellants, and in favor of Johnson, the appellee, for \$4,304.93, "with interest on \$2,800 of said sum, at the rate of two per cent. per month from the date hereof until paid, and interest on \$1,504.33, at the rate of ten per cent. per annum from the date hereof until paid." This judgment was affirmed by the supreme court of the territory, on appeal, November 8, 1886. From that judgment of affirmance this appeal was

taken, which the appellee moves to dismiss, on the ground that the value of the matter in dispute does not exceed \$5,000, as now required by law. Act March 3, 1885, c. 355, (23 St. 443.) The value of the matter in dispute is to be determined by the amount due at the time of the judgment brought here for review, to-wit, the judgment of the supreme court of the territory, and not at the time of the judgment of the district court. Adding the interest to the judgment of the district court until the date of that of the supreme court, as we must for the purpose of determining our jurisdiction, (*The Patapsco*, 12 Wall. 451; *Railroad v. Bank*, 118 U. S. 608, 7 Sup. Ct. Rep. 23), we find that the amount due at the time of the judgment of the supreme court was considerably more than \$5,000. The motion to dismiss is therefore denied.

* * * * *

²² *Accord*: *Smith v. City of Rochester*, (1887) 104 N. Y. 674. But some courts hold otherwise. "The amount involved in a suit is the amount in controversy between the parties at the time the suit is brought, and interest accruing during the pendency of the suit cannot be added in order to make up the amount necessary to an appeal to this court."—*Lydston v. Auburgh*, (1905) 216 Ill. 210.

NORFOLK & WESTERN RAILROAD CO. v. CLARK.

Supreme Court of Appeals of Virginia. 1895.

92 Virginia, 118.

HARRISON, J. In this case judgment was rendered by a justice of the peace for Pulaski county in favor of P. B. Clark against the Norfolk & Western Railroad Company for \$10, the sum claimed as damages for killing a steer, and costs of judgment, \$2.70, consisting of \$1 magistrate's fee, \$1 witnesses' fees, and 70 cents constable's fee. The justice denied an application for an appeal to the county court of Pulaski, upon the ground that the matter in controversy did not exceed \$10. Thereupon the defendant company presented to the judge of the circuit court of Pulaski a petition praying for a writ of *mandamus* to compel the justice to

grant the appeal. This petition being refused, a writ of error and *supersedeas* was awarded to this court.

The sole question presented by the record is whether, under section 2947, Code Va. 1887, as amended March 1, 1894, costs are to be included as forming a part of the matter in controversy in computing the sum fixed by the statute as the limit of appeal to the county court from the decision of a justice.

As the matter in controversy, exclusive of interest, must exceed \$10, in order to give the right of appeal, the question arises, what is the matter in controversy?

These words have received judicial interpretation by this court. Judge Burks, in *Harman v. City of Lynchburg*, 33 Grat. 38, quotes with approval the following exposition of their meaning by Mr. Justice Field in *Lee v. Watson*, 1 Wall. 337; "By 'matter in dispute' is meant the subject of litigation, the matter for which the suit is brought, and upon which issue is joined, and in relation to which jurors are called, and witnesses examined." It is, however, contended that the numerous decisions of the state and federal courts holding costs to be no part of the matter in controversy are not applicable in determining the right of appeal from a justice, because they relate to the jurisdiction of the courts by which they were pronounced, and in fixing said jurisdiction costs are expressly excluded by statute. It is so manifest upon principle, and for reasons of public policy, that costs should be included in determining the right of appeal, that we do not doubt the decisions referred to would have been the same if there had been no statute on the subject. It is contended that the exclusion of costs by statute shows the opinion of the legislature to have been that costs formed a part of the matter in controversy. You cannot exclude what was never included, and therefore the legislative purpose seems rather to have been to put the question beyond the realm of controversy, and to emphasize the fact that costs did not form a part of the matter in controversy, and could not be so regarded. The subject of controversy exists before the suit is brought. The suit is the result which follows the existence of a matter of controversy. Costs follow as an incident in the growth or progress of the suit. There can be no costs until the matter in controversy has culminated in a suit, and costs can in no way alter the nature

or change the character of the matter in controversy. So far as we have had access to authorities, not one has been found holding costs to be any part of the matter in controversy. On the contrary, costs are everywhere regarded as adventitious and merely incidental, and in no way affecting the jurisdiction. As an incident of the controversy, costs are taxed under statutory authority, to pay officers who have rendered services in the case, or for witnesses who have testified.

Under the construction of this statute contended for by the plaintiff in error, that costs are to be treated as part of the matter in controversy, the judgment of a justice could never be final, notwithstanding the plain purpose of the legislature to make it so, for the reason that, if the litigants saw proper, either side could unnecessarily increase the costs, and thus secure the right of appeal, no matter how small the sum for which the suit was brought. In this way the power and right of the legislature to regulate the matter of appeals would be defeated, and transferred to the litigants, to be determined as their caprice might dictate. * * *

For the foregoing reasons we are of opinion that the circuit court properly refused to award the writ of *mandamus* prayed for by the plaintiff in error, and its judgment is therefore affirmed.²³

²³ Costs and interest are often expressly excluded by the statute.—Phoenix Ins. Co. v. Stahl, (1908) 78 Kan. 528; Wilson v. Faqua, (1912) 21 Colo. App. 449; Rupel v. Ohio Oil Co., (1909) 172 Ind. 300; Widman v. Gay, (1898) 101 Wis. 325; Hartsook's Adm'r v. Crawford's Adm'r, (1888) 85 Va. 413; Smith v. Rountree, (1900) 185 Ill. 219.

But in a new suit involving a former judgment which includes costs, such costs will constitute part of the matter in dispute.—McClelland v. Cragun, (1895) 54 Kan. 599; Nashville, C. & St. L. RR. Co. v. Mattingly, (1897) 101 Ky. 219; Bank of Union v. Loeb, (1912) 71 W. Va. 494; Mayo v. Hansen, (1896) 94 Wis. 610; Shipman v. Fletcher's Adm'r, (1898) 95 Va. 585.

STATE EX REL. OWENS v. FRASER.

*Supreme Court of Missouri. 1901.**165 Missouri, 242.*

BURGESS, J. The first question with which we are confronted is with respect to the jurisdiction of the supreme court over this appeal. The amount of the penalty of the instruments declared upon is \$2,500 each, and, unless by the consolidation of the suits the amounts are also consolidated, it is, of course, without jurisdiction; the amount being less than \$4,500. By section 749, Rev. St. 1899, it is provided that whenever several suits, founded alone upon liquidated demands, shall be pending in the same court by the same plaintiff against the same defendant, or whenever several such suits are pending in the same court against several defendants, the court in which the same shall be prosecuted may, in its discretion, if it appear expedient, order such suits to be consolidated into one action. Now, these suits were by the same plaintiff against the same defendants, but on different causes of action; but, the court having ordered their consolidation, thereafter, in contemplation of law, there was but one action,—as much so as if there had been but one in the first place, with a separate count on each cause of action,—while the amount to be found due, and for which judgment should have been rendered in the event of plaintiff's recovery on both counts, would have to be consolidated, and judgment rendered for the aggregate amount, for, under our statute, but one final judgment can be given in any action. Section 773, Rev. St. 1899. Under this view of the case, the amount involved is \$5,000, which gives the supreme court jurisdiction of the appeal.

* * * * *

²⁴ A few cases have held that where suits affecting different parties are consolidated and tried together by consent, the appellee cannot object to using the aggregate amount as the jurisdictional test.—*Skinner v. Cowley County*, (1901) 63 Kan. 557; *Tuthill Spring Co. v. Smith*, (1894) 90 Ia. 331.

CHAPTER V.

METHODS OF REVIEW.

SECTION 1. WRIT OF ERROR AND APPEAL.

DOWER v. RICHARDS.

Supreme Court of the United States. 1894.

151 United States, 658.

[This was an action of ejectment to recover possession of two lots in the city of Nevada, Cal. The plaintiffs claimed under a town-site patent from the United States granted in 1869; the defendants claimed under a mining location which, if in existence at the time of the patent, took precedence of it. The case was tried without a jury, and the court found as a fact that the location had been abandoned for more than a year before the issuance of the patent, and was not sought to be re-established until many years thereafter. And as a matter of law the court held that the defendants wrongfully withheld possession from the plaintiffs. On appeal to the Supreme Court of California that court affirmed the judgment for the plaintiffs, finding, upon the record before it, facts substantially identical with the facts found below, and that as a matter of law the town-site patent took precedence. The defendants thereupon sued out a writ of error in the Supreme Court of the United States.]

GRAY, J. * * *

The principal ground on which the plaintiffs in error seek to reverse the judgment of the supreme court of California is that its decision, in matter of fact, was erroneous, and contrary to the weight of the evidence in the case; but to review the decision of the state court upon the question of fact is not within the jurisdiction of this court.

In the legislation of congress, from the foundation of the government, a writ of error which brings up matter of law,

(788)

only, has always been distinguished from an appeal, which, unless expressly restricted, brings up both law and fact. *Wiscart v. D'Auchy*, 3 Dall. 321; *U. S. v. Goodwin*, 7 Cranch. 108; *Cohens v. Virginia*, 6 Wheat. 264, 410; *Hemmenway v. Fisher*, 20 How. 255, 258; *In re Neagle*, 135 U. S. 1, 42, 10 Sup. Ct. 658.

In the first judiciary act the whole appellate jurisdiction of this court was limited to matters of law. While an appeal lay from the district court to the circuit court in admiralty cases, neither the judgments or decrees of the circuit court, whether in law, equity, or admiralty, nor judgments or decrees of the highest court of a state, could be reviewed by this court, except by writ of error. Act Sept. 24, 1789, c. 20, §§ 19, 22-25, (1 Stat. 83-86).

Under that act it was held that a decree in admiralty could not be reviewed by this court in matter of fact; and Chief Justice Ellsworth, after laying down the rule that the appellate jurisdiction of this court could only be exercised within the regulations prescribed by congress, said: "It is to be considered, then, that the judicial statute of the United States speaks of an 'appeal' and of a 'writ of error;' but it does not confound the terms, nor use them promiscuously. They are to be understood, when used, according to their ordinary acceptance, unless something appears in the act itself to control, modify, or change the fixed and technical sense which they have previously borne. An appeal is a process of civil-law origin, and removes a cause entirely, subjecting the fact, as well as the law, to a review and retrial; but a writ of error is a process of common-law origin, and it removes nothing for re-examination but the law." *Wiscart v. D'Auchy*, 3 Dall. 327; *The Perseverance*, 3 Dall. 336; *The Charles Carter*, 4 Dall. 22.

In 1803 congress substituted an appeal from the circuit court to this court, instead of a writ of error, in cases in equity and in admiralty; and upon such an appeal the facts as well as the law were open to review in both those classes of cases until 1875, when the appeal in admiralty was restricted to questions of law. Act March 3, 1803, c. 40, (2 Stat. 244;) *The San Pedro*, 2 Wheat. 132; *The Baltimore*, 8 Wall. 377; Rev. St. § 692; Act Feb. 16, 1875, c. 77, § 1, (18 Stat. 315;) *The Francis Wright*, 105 U. S. 381.

Judgments of the circuit court in actions at law have re-

mained reviewable by writ of error only. *Jones v. La Valette*, 5 Wall. 579; Act July 4, 1840, c. 43, § 3, (5 Stat. 393;) Rev. St. § 691. Upon such a writ of error, this court, as is well settled, cannot review a decision of a question of fact, even if by the local practice, as in Louisiana, the law and the facts are tried together by the judge without a jury.

The only appellate jurisdiction which has ever been conferred by congress upon this court to review the judgments or decrees, at law or in equity, of the highest court of a state, has been by writ of error. *Cohens v. Virginia*, 6 Wheat. 264, 410; * * *

That this court, in an action at law, at least, has no jurisdiction to review the decision of the highest court of a state upon a pure question of fact, although a federal question would or would not be presented, according to the way in which the question of fact was decided, is clearly settled by a series of later decisions, some of them in cases very like the one now before us.

* * * * *

The case now before us is an action of ejectment, which was submitted to the supreme court of the same state, according to the local practice, upon findings of fact and a statement of evidence by an inferior court of the state. From the foregoing reasons and authorities it follows that this court cannot review the decision of the state court upon the question of fact whether the ledge, at the time when the town-site patent took effect, was known to be valuable for mining purposes; and, the only question of federal law in the case having been rightly decided by that court, its judgment is affirmed.

MR. JUSTICE HARLAN concurred in the judgment of affirmance, but not in all the reasoning of the opinion.²⁵

²⁵ The same limitation is adhered to in chancery cases coming up from state courts. In *Cedar Rapids Gas Co. v. Cedar Rapids*, (1911) 223 U. S. 655, which was a chancery case, the plaintiff sought to argue questions of fact in the United States Supreme Court, urging that this was permissible under Rev. St. § 709 providing that a writ of error to a state court "shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States." But the court refused to so construe the statute, saying that although there had been a suggestion to that effect in *Republican River Bridge Co. v. Kan. Pac. Ry.*, 92 U. S. 315, the practice had always been the other way.

"It was a well settled rule that all errors of the jury must be corrected

in the court where the trial was had. It is true the Supreme Court could, upon writ of error, take cognizance of errors of fact as well as of law. (Arnold v. Sanford, 14 Johns. 417.) But it was only errors of the court whether in fact or in law, which could be thus reviewed, cases where, in consequence of some fact unknown or unnoticed, some irregularity had occurred in the proceeding; such as permitting a married woman or an infant to appear by attorney."—Thurber v. Townsend, (1860) 22 N. Y. 517.

"Error in fact cannot be assigned where it contradicts the record, and where the matter of fact might have been put in issue and tried, and *a fortiori*, when it is put in issue and tried."—Riley v. Waugh, (1851) 8 Cushing (Mass.) 220.

"An assignment of errors is in the nature of a declaration, and is either of error in fact, or error in law. The former consist of matters of fact, not appearing on the face of the record, which if true, prove the judgment to have been erroneous; as that the defendant in the original action, being under age, appeared by attorney."—2 Saunders 101, Williams' note.

"When an issue in fact has been decided, there is no appeal in the English law from its decision, except in the way of motion for new trial, and its being wrongly decided is not error in the technical sense to which a writ of error refers. So if a matter of fact should exist which was not brought into issue, but which, if brought into issue would have led to a different judgment, the existence of such fact does not, after judgment, amount to error in the proceedings. * * * But there are certain facts which affect the validity and regularity of the legal decision itself; such as that the defendant, while under age, appeared in a suit by attorney and not by guardian, or the plaintiff or defendant having been a married woman when the suit was commenced. Such facts as these, however late discovered and alleged, are errors in fact, and sufficient to reverse the judgment upon writ of error.' * * * Stephen on Pl. 142. Thus a judgment against an infant without first appointing a guardian *ad litem*, is erroneous and may be reversed on error. *Swan v. Horton*, 14 Gray, 179; *Crockett v. Drew*, 5 Gray, 399. So, if judgment be rendered against one *non compos* or insane, by default, it will be reversed. *Leach v. Marsh*, 47 Maine, 549."—*Denison v. The Portland Co.*, (1872) 60 Me. 519. To the same effect see *Teller v. Wetherell*, (1858) 6 Mich. 45.

Statutory provisions relative to the power of appellate courts are frequently held to limit the writ of error to a review of errors of law. *Vrooman v. Arnold*, (1909) 29 R. I. 478; *Styles v. Tyler*, (1894) 64 Conn. 432; *Beall v. Powell*, (1848) 4 Ga. 525; *Lane v. Goldsmith*, (1867) 23 Ia. 240.

WINGFIELD v. NEAL.

*Supreme Court of Appeals of West Virginia. 1906.**60 West Virginia, 106.*

SANDERS, J. * * *

The first question for consideration is whether or not the plaintiff, Hannah Wingfield was a *pendente lite* purchaser. It is claimed by her * * * at the time she purchased, the appeal was not pending, and that she was not a *pendente lite* purchaser, but that she is a purchaser for value, without notice. But the appellees claim that she had actual knowledge of the suit, and also that she purchased within the time allowed by law for an appeal, and that an appeal was taken within that time, and, the decree of the circuit court being reversed, her title fell with such reversal.

* * * * *

Was the appellant a *pendente lite* purchaser? The property was purchased by her about 20 months after the final decree of the circuit court, and before the appellees procured an appeal from this court, which was allowed only a few days before the time for obtaining same would have expired by limitation. In order to make her a *pendente lite* purchaser there must be, at the time of the purchase, a pending suit. If there is no pending suit, there can be no *pendente lite* purchaser. Therefore, in order to determine whether there was a pending suit at the time of the purchase, it is necessary to ascertain whether or not our statutory appeal is a continuing suit. If it does not operate to continue the suit, then the suit cannot be said to have been pending at the time of the purchase, because it ended with the final decree of the circuit court, and the appeal operated as a new suit, and the purchase having been made in the interim, the purchaser could not be regarded as a *pendente lite* purchaser. In order to determine this question it will be proper to determine the scope and meaning of an appeal, in its origination, and in what way the remedy by appeal has been changed by statute, and then to compare our statutory appeal with a writ of error, as it is almost, if not universally, held that a writ of error is a new action, and that one who purchases the subject of the litigation between the time of the entry of the final judgment and

the suing out of the writ, is not regarded a *pendente lite* purchaser, but is considered a purchaser for value, without notice. And it may be well to remark that whatever may be said here in the discussion of this question is only intended to apply to appeals from the circuit court to this court, without, in any way, reflecting any views as to appeals from other tribunals to the circuit court.

An appeal was unknown to the common law. In the civil law and equity jurisprudence its object was to take the whole case to the higher tribunal, there to be tried and determined *de novo*, upon the issues between the parties, as though the cause had originated in the appellate court. It will be found, upon an examination of this question, that it is attended with considerable confusion from the fact that in some of the states the appellate proceeding is denominated "appeal," while in others the distinction between appeals in equity and review upon petition in error is strictly adhered to. "Appeal" is sometimes used with us, in legal language, to denote the nature of appellate jurisdiction as distinguished from original jurisdiction, without regard to the particular mode by which a cause is transmitted to a superior court. In fact our Constitution, art. 8, § 3, so denominates it. Mr. Powell, in his work on Appellate Proceedings (section 4, c. 6), says: "Although the various modes of proceedings are prosecuted in different ways and called by different appellations, as 'appeal,' 'review,' 'error,' and the like, and these names often confounded and misapplied, yet the object to be attained is one or the other of two results, either by an appeal to obtain a rehearing and new trial of the case upon its facts and merits, or a review of alleged errors in law in the record of the judgment and proceedings which will result either in the reversal or affirming of the judgment, which are properly called 'proceedings in error.' By the first—appeal—when perfected in accordance with the statute and the rules of the court, the whole case with its record and proceedings is taken from the court below into the appellate court, there to be again tried upon the issues between the parties as though the case originated in such appellate court; which appeal has the effect to set aside and vacate the original verdict and judgment in the case; and the result remains wholly dependent on the future judgment which may be rendered in the case upon the appeal and new trial. By the second proceeding—review and er-

ror—the result depends entirely upon the question whether the appellate court finds the alleged error in the record of the judgment and proceedings of the court below.”

Where an appeal was taken, the judgment or decree did not become operative until the cause was finally tried and determined in the appellate court, as the appeal was taken at the same term at which final judgment or decree was entered in the lower court, and upon taking appeal the judgment or decree thereby became vacated.

“An appeal is a process of civil law origin, and is the appropriate mode of review for causes originating in a court of chancery. Unless statutes otherwise provide, it removes the whole cause, subjecting the facts as well as the law to review and retrial.” 2 Ency. Pl. & Pr. 31. “An appeal is a process of civil-law origin, and removes a cause entirely, subjecting the facts, as well as the law, to a review and retrial; but a writ of error is a suit of common-law origin and it removes nothing for retrial but the law.” *Wiscart v. Dauchy*, 3 Dall. (U. S.) 331, 1 L. Ed. 619; *Dower v. Richards*, 151 U. S. 658, 14 Sup. Ct. 452, 38 L. Ed. 305; *Elliott v. Toeppner*, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200; *Lyles v. Barnes*, 40 Miss. 608; *Ketchum v. Thatcher*, 12 Mo. App. 185; *State v. Doane*, 35 Neb. 707, 53 N. W. 611; *U. S. v. Goodwin*, 7 Cranch (U. S.) 108, 3 L. Ed. 284; 4 Minor, 1059; 2 Cyc. 515; 3 Bl. Com. 453.

Having referred to the true meaning and scope of an appeal before statutory intervention, it will now be proper to determine what is the scope of the remedy afforded by appeal under our statute, and as compared with the remedy by writ of error. The remedy by appeal, under our statute, is not given as a matter of right, nor does it operate to remove the cause to this court for trial *de novo*, neither is it required to be taken at the same term at which the decree complained of is rendered, nor is application made to the trial court for the appeal, as under the civil law. It is a process issuing out of this court upon petition assigning errors, the same as upon application for writ of error. In fact, the writ of error, and appeal, under our statute, which are used to remove or bring causes to this court, are only distinguishable in this—appeal lies to equity proceedings, and writ of error to law causes. Therefore our statutory appeal cannot be considered a continuation of the same suit, because the decree of the lower

court, when not suspended, becomes final and operative upon the adjournment of the term, unlike at the civil law, for there, when an appeal was taken, it was done at the same term, upon application to the trial court, and when done, the decree never became final.

This being so, the reason ceases for holding that an appeal is a continuation of the suit, while the writ of error is a new action. The decree appealed from is final; so is the judgment. If a writ of error is a new suit, why not an appeal? Under our statute, the two proceedings are alike. The judgment and decree are both final, and become operative upon the adjournment of the term at which they are rendered, if not suspended, and can only then be rendered inoperative by the awarding of a writ of error and *supersedeas*, or an appeal and *supersedeas*, as the case may be. "Except where the statutory proceeding called an appeal is nothing more than a substitute for the common-law remedy, by writ of error, an appeal differs from the writ of error in that it is not a new suit, but a continuation of the suit below." 2 Cyc. § 518. "It is a well-established principle of appellate procedure that writ of error is an independent action with the nature and with the general characteristics of a new and original suit." 7 Ency. Pl. & Pr. § 823. * * *

The authorities can be multiplied to show that a writ of error is a new suit, and not a continuation of the suit, the proceedings of which are sought to be reviewed. There are a few cases which hold the contrary, and many which hold that an appeal is a continuation of the suit, but this is not where the statute has so restricted the appeal that in its nature it only operates to review, as does a writ of error. Entertaining the views we do, we must conclude that the suit cannot be regarded as pending at the time that Hannah Wingfield purchased, and therefore she could not be held to be a purchaser *pendente lite*.

* * * * *

26 *Statutory writs of error.* "We take it to be well settled that a writ of error is a new suit, and not merely a continuance of the suit the judgment in which it is brought to reverse. * * * This doctrine is not at all peculiar to the common law writ of error. It has been held equally applicable to the statutory writ of error which is given in some states, as in ours, in equity cases. *Taylor v. Boyd*, 3 Ohio, 337, 354. Indeed, this writ is now regulated in England, and probably in most of the American states, by statutes, as with us. But these statutes, it is

conceived, do not create a new remedy; they merely define and regulate a remedial process which existed at common law."—*Pierce v. Stinde*, (1881) 11 Mo. App. 364.

Statutes often make appeals and writs of error alternative remedies. Thus in Illinois, the court says: "By our statute the right of appeal is extended to common law causes and the right to a writ of error to chancery causes, and the technical distinction between the practice in the court of review in cases of appeal and writs of error is not observed, but if the suit follows the course of the common law it is reviewed for error, and if it is in the nature of a chancery cause it is considered upon the merits."—*Anderson v. Steger*, (1898) 173 Ill. 112, 116. See also *Coston v. Coston*, (1866) 25 Md. 500.

In *Levering v. National Bank*, (1912) 87 Ohio St. 117, the court said that the abolition of writs of error and certiorari and the substitution therefor of a petition in error, did not affect the character of the proceeding in error as a new suit, because the statute required issuance and service of a summons "as in the commencement of an action."

Whether the writ of error or its equivalent is used in a legal or equitable action, it is equally deemed the commencement of a new suit. *Lessee of Taylor v. Boyd*, (1828) 3 Ohio, 338; *Cheever v. Minton*, (1889) 12 Colo. 557; *Macklin v. Allenberg*, (1889) 100 Mo. 337.

STILES v. TOWN OF WINDSOR.

Supreme Court of Vermont. 1873.

45 Vermont, 520.

This was a complaint under the act for relief of the families of insane persons, approved November 10, 1870, alleging that the plaintiff was the wife of William L. Stiles, whose legal settlement was in the defendant town, and who was insane, and confined in the insane asylum at Brattleboro, Vermont; that the income of the said William's estate was not sufficient for the maintenance and support of the plaintiff and the minor children of the said William; and praying that the defendant be ordered to maintain and support said William at said asylum. * * *

The defendant claimed that it was liable for the expense of supporting him at the asylum, only from the rendition of the judgment in this case. The plaintiff claimed that the defendant was liable to pay such expense from the time this complaint was served, and the court so held, and ordered the defendant to maintain and support the said William at said asylum from and after the service of said complaint, and pay

the costs of this proceeding; to which the defendant excepted.

ROSS, J. The defendant has taken exceptions to the proceedings and action of the county court in making an order upon it, under the act of 1870, fixing the liability of the town to support William L. Stiles, an insane person, the husband of the complainant. The act makes the county court a special tribunal to determine and fix. In a summary manner, the liability of towns in such cases. In its action, that court was not exercising its jurisdiction "according to the course of the common law," but in a new course, different from that prescribed by the common law. By the common law, the town would have had the right to a trial and determination of the facts by a jury. By the act, the facts are all determined by the county court. That court rendered no judgment directly in favor of the complainant, and only granted her relief indirectly, by ordering the town to assume the burden of supporting the husband, and thus removed that burden from resting upon his property, from which the complainant derives, in part, her support. The jurisdiction is conferred upon that court and its proceedings are prescribed by the act. Writs of error or exceptions do not lie to the action of the county court, except when it exercises its jurisdiction, substantially, according to the course of the common law. When it exercises its jurisdiction in a new course, different from that prescribed by the common law, the party aggrieved by its proceedings, must seek redress by *certorari*, or *mandamus*, or some other proper writ. * * * We have not, therefore, considered the question attempted to be raised by the exceptions. The exceptions are dismissed, with costs to the complainant.²⁷

²⁷ The general rule, in the absence of statute, confines the use of the writ to cases in courts of record proceeding according to the course of the common law. 3 C. J. 308. As to what is a court of record, see *Thayer v. Commonwealth*, (1846) 12 Metc. (Mass.) 9. But in New Jersey the scope of the writ has been enlarged by the court without a statute. *Defiance Fruit Co. v. Fox*, (1908) 76 N. J. L. 482.

HAIGHT v. GAY.

*Supreme Court of California. 1857.**8 California, 297.*

On error; motion to quash the writ.

BURNETT, J. The appellate power of the Supreme Court is given by the fourth section of the sixth article of the Constitution, which expressly empowers this court to issue all writs and process necessary to the exercise of its appellate jurisdiction. The Legislature, therefore, can pass no Act impairing the exercise of this appellate power.

But while the Legislature cannot substantially impair the right of appeal, it is certainly competent to regulate the mere mode in which this right must be asserted. The Constitution only empowers this Court to issue such writs and process as may be necessary to the exercise of its appellate jurisdiction; and if this appellate jurisdiction can be exercised without this process, then it cannot be necessary, and should not be issued.

In the case of *Savage v. Gulliver*, 4 Mass. 177, it was said that "the statute, in giving an appeal, has, in our opinion, taken away by reasonable implication, the remedy by error, unless in cases where the aggrieved party, without laches on his part, could not avail himself of an appeal." (See also, 6 Mass. 4; 2 Gil. 65; 13 Ill. 144.)

But the construction of our Practice Act is not left to rest upon reasonable implication. The ninth article of the Act relates exclusively to appeals, and the three hundred and thirty third section provides that "a judgment or order in a civil action, except when expressly made final by the Act, may be reviewed as prescribed by this title, and not otherwise."

This provision is plain and positive, that a judgment or order may be received as prescribed by that title, and not otherwise. If therefore, an appeal be given by that title in a particular case, the judgment or order can only be reviewed in the manner therein prescribed. In reference to cases where no appeal is given, this negative provision, "not otherwise," need not apply.

Our conclusion is that in all cases where appeal is given by the statute, that remedy is exclusive and must be pursued,

and that a writ of error will only lie in cases where no appeal is given by the Act. * * *

Motion sustained.²⁸

²⁸ Some cases hold that where the statute gives an appeal the right to use a writ of error is impliedly revoked,—*Peebles v. Rand*, (1861) 43 N. H. 337; *Monk v. Guild*, (1841) 3 Metc. (Mass.) 372; *Lord v. Pierce*, (1851) 33 Me. 350. But other cases hold that in such case the two remedies are concurrent,—*Wellmuth v. Rogers*, (1912) 52 Colo. 454; *Bowers v. Green*, (1832) 1 Scam. (Ill.) 42; *Baier v. Schermerhorn*, (1897) 96 Wis. 372.

The writ of error was a writ of right at common law,—*Granat v. Kruse*, (1904) 213 Ill. 328; *People v. Tweed*, (1874) 67 Barb. (N. Y.) 496; *Rochester v. Roberts*, (1852) 25 N. H. 495; and it is frequently made so by statute,—*Smith v. Moseley*, (1911) 234 Mo. 486; *Yates v. People*, (1810) 6 Johns. (N. Y.) 337. If its use is preserved by the constitution no statute can curtail it, but “while this writ is in most cases a writ of right at the common law, it may by statute, unless the constitution forbids, be limited or abolished altogether.”—*People v. Richmond*, (1891) 16 Colo. 274, 282. And see note to 19 L. R. A. (N. S.) 377.

IN RE BURNETTE.

Supreme Court of Kansas. 1906.

73 Kansas, 609.

BURCH, J. On September 2, 1903, the district court of Sumner county rendered a judgment revoking the license of Cleo D. Burnette to practice as an attorney and counsellor at law. From that judgment an appeal was taken to this court under the provisions of section 403, Gen. St. 1901, which reads as follows: “In case of a removal or suspension being ordered by a district court, an appeal therefrom lies to the Supreme Court, and all the original papers, together with a transcript of the docket entries, shall thereupon be transferred to the Supreme Court, to be there considered and finally acted upon. A judgment of acquittal in the district court is final.” When the appeal was heard it was argued that the judgment was erroneous, because the accusation had been verified upon information and belief only, and because, after appellant had failed to answer, the court, acting under section 402, Gen. St. 1901, rendered such judgment as the case required without hearing evidence. Upon consultation it was

understood that a majority of the court believed that the judgment should be reversed, because it had been rendered without evidence in support of the accusation. A minority also thought the accusation to be insufficiently verified. Therefore an order was made remanding the cause to the district court, with instructions to set aside its judgment and to proceed with a hearing upon the accusation.

Upon the return of the cause to the district court a trial was had, and a judgment of disbarment was again entered, from which the present appeal was taken. The accused now claims this court had no power to remand the cause; that the appeal is for the purpose of a hearing *de novo*; that the object of filing all original papers and a transcript of the docket entries in this court is that a trial *de novo* may be had; that, when the original papers are transferred to this court, they are to be considered independently of the judgment of the district court; and that a final judgment must be rendered upon them here. * * *

In this state, except in certain specified matters, the Supreme Court is a court of error and review. In criminal cases it may reverse, affirm, or modify the judgment appealed from, or may order a new trial. In civil cases it may affirm, reverse, vacate, modify, or grant new trials, and, if the facts be found or agreed to, may designate the character of judgment to be entered. But in all appellate cases the Supreme Court considers the conduct of the lower court. Error must be assigned as inhering in the rulings, orders, and judgments appealed from. The Supreme Court decides the questions thus presented as they arise upon the record, and issues its mandate to the tribunal from which the appeal was taken to carry the judgment rendered into execution. Such being the general character of appellate procedure in this state, a trial *de novo* here would be an anomaly and can take place only under the compulsion of some sovereign command. Elsewhere it is held that trials *de novo* can be had in appellate courts only by virtue of express authority, and statutes to that effect are to be strictly construed. 3 Cyc. 260. It is doubtful if the disbarment statute of this state is of the peremptory kind required. The use of the word "appeal" does not alone import a trial *de novo*. * * *

Appellant cites the case of *State v. Mosher* (Iowa) 103 N. W. 105, in support of his contention. * * * Contrary to

the law of Kansas, the practice of trying certain cases *de novo* in the Supreme Court is an established feature of the judicial system of Iowa. * * *

The jurisdiction to consider and decide causes *de novo* is in its essence original. The manner in which a case reaches the higher court is not the test. Jurisdiction being the power to hear and determine, the nature of the functions to be exercised controls, whether they are brought into activity by primary process or by removal from an inferior tribunal. Upon a trial *de novo* the power of an appellate court in dealing with the pleadings and the evidence, in the application of the law and in the rendition of judgment according to the right of the case, all independent of the action of the lower court, is no different from what it would be if the case were begun there originally, and hence is not "appellate," within the meaning of laws creating jurisdiction. *Lacy v. Williams*, 27 Mo. 280; *Co. of St. Louis v. Sparks*, 11 Mo. 203; *Ex parte Henderson*, 6 Fla. 279; *State ex rel. v. Vann*, 19 Fla. 29.

In the case of *Klein v. Valerius*, 87 Wis. 54, 57 N. W. 1112, 22 L. R. A. 609, it was held that, since the jurisdiction of the Supreme Court of Wisconsin, under the Constitution of that state, was appellate only, except in specified cases, a statute attempting to make it the duty of the court to examine and review the evidence preserved by bill of exceptions, and give judgment according to the right of the case regardless of the decision by the court below, upon questions of fact as well as of law, was unconstitutional and void. * * *

The statute in question does no more than to provide in part a special method for bringing disbarment cases to this court for consideration according to its constitutional jurisdiction, which includes nothing except a revision of errors appearing upon the record and power to enforce the decision rendered. Therefore the judgment upon the first appeal, remanding the cause, was valid, and invested the district court with authority to proceed as directed. -

* * * * *

²⁹ In *State v. Williams*, (1893) 40 S. C. 373, 378, the court held that an appeal did not carry a right to a trial *de novo*, but rather "involves the idea of a review of the proceedings had in a trial which has already been had, and not a new trial of the case."

In *Ganoe v. The Scow Jack Robinson*, (1869) 18 Mich. 455, it was held that jurisdiction given to the Supreme Court under the water craft

law in appeal cases was none the less appellate because it allowed new testimony.

SULLIVAN v. HAUG.

Supreme Court of Michigan. 1890.

82 Michigan, 548.

CHAMPLIN, C. J. The relator shows that on the 20th of March, 1890, he was arrested on a warrant issued by the police justice of the city of Detroit, charging him with an assault and battery upon one Thomas P. Murrin, of the same place, on March 17th; that he was arraigned, pleaded not guilty, was tried, convicted, and sentenced to pay a fine of \$12, and \$3 costs, and in default of such payment he be imprisoned in the Detroit House of Correction for the period of 20 days. He avers that his conviction and sentence is unjust; that he was acting in self-defense; that on the 3d day of April, 1890, under the general laws of this state authorizing appeals from courts of justices of the peace, he executed a bond in regular form, with ample and satisfactory sureties, and so conceded by Hon. Edmund Haug, police justice, aforesaid, and presented the same to him for the purpose of appealing said suit to the recorder's court of the city of Detroit, but said Edmund Haug refused to act upon said bond, and so notified relator, and told him that he should not, for the reason there was no section in the police court act which authorized the taking of an appeal in a case like this.

* * * * *

The relator asks for a *mandamus* to compel the police justice to file his bond and certify the case to the circuit or recorder's court, chiefly upon two grounds: (1) That all persons accused of violation of the criminal laws of the state are of right entitled to the same rights and remedies, regardless of locality or the court in which he is tried. In other words, the administration of the general criminal law must be the same throughout the state. (2) That the constitution having vested the several circuit courts with appellate jurisdiction from all inferior tribunals, it is not competent for the legislature to deprive them of such appellate jurisdiction.

What the constitution guaranties is that the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel for his defense; and that he shall not be deprived of life, liberty, or property without due process of law. All of these have been accorded to relator. But he complains that to allow a large portion of the citizens of this state the right of appeal to a superior tribunal, and deny, under the same circumstances and conditions, that right to the citizens of Detroit, is a plain violation of the fundamental principle of equality which underlies a republican form of government, and recognized and guarantied by the fourteenth amendment of the constitution of the United States. We think the position is fully met and answered in the opinion of Mr. Justice Bradley, in *Missouri v. Lewis*, 101 U. S., at page 30, where, speaking of a similar claim made in that case, he said: "It is the right of every state to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter, and amount, and the finality and effect of their decisions, provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate court for redress. The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amounts, or finally of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right in like cases, and under like circumstances, to resort to them for redress. Each state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities, and another for rural districts; one system for one portion of its territory, and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a state to regulate its internal affairs to deny to

it this right." And see *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. Rep. 350.

Acting upon its own views of expediency, the legislature organized and established the police court of the city of Detroit, and gave it jurisdiction over certain offenses, including the one for which relator was convicted. The legislature deemed it expedient to provide for an appeal to the recorder's court in certain cases, and not in certain others when the punishment inflicted was small. All persons residing or committing offenses in the territorial limits of the city of Detroit are subject to the same law. It operates upon all classes alike, who are within the jurisdiction of the court. Assault and battery is not a new offense, confined to the city of Detroit. The offense is the same in every portion of the state, and the limits to the punishment of fine and imprisonment the same. In this there is no discrimination in the law, either for or against the relator. No person has a constitutional right to a second trial, after having been duly convicted before a court of competent jurisdiction, by an appeal to another tribunal; neither is there an inherent right to appeal from a judgment of an inferior to a court of superior jurisdiction for the purpose of securing a second trial upon the merits. The right to an appeal is and always has been statutory, and does not exist at common law. It is a remedy which the legislature may in its discretion grant or take away, and it may prescribe in what cases, and under what circumstances, and from what courts, appeals may be taken; and, unless the statute expressly or by plain implication provides for an appeal from a judgment of a court of inferior jurisdiction, none can be taken. See *The Constitution v. Woodworth*, 1 Scam. 511; *Ward v. People*, 13 Ill. 635; *Ex parte McCardle*, 7 Wall. 506; *Prout v. Berry*, 2 Gill, 147; *State v. Railroad Co.*, 18 Md. 193; *Kundinger v. Saginaw*, 59 Mich. 355, 26 N. W. Rep. 634; *Weed v. Lyon*, Walk. (Mich.) 77; *Demaray v. Little*, 17 Mich. 386; *Maxfield v. Freeman*, 39 Mich. 64; *Cady v. Manufacturing Co.*, 48 Mich. 133, 11 N. W. Rep. 839; *Insurance Co. v. Whittemore*, 12 Mich. 311; *People v. Police Justice*, 7 Mich. 456; *Clark v. Raymond*, 26 Mich. 415. * * * In *Clark v. Raymond*, 26 Mich. 415, this court held that no appeal lay from proceedings to enforce mechanics' liens, under chapter 215 of the Compiled Laws of 1871, because the legislature had not provided for an appeal in such law. And

this although such proceedings were by petition to the circuit court in chancery, and were to be carried on in analogy to chancery proceedings. In *Cady v. Manufacturing Co.*, 48 Mich. 133, 11 N. W. Rep. 839, Mr. Justice Campbell, in delivering the opinion of the court, states the law as follows: "No appeal lies in any case except when given by statute." That case was a proceeding in chancery for a voluntary dissolution of a corporation. Nothing was said in the statute authorizing such proceedings about the right of appeal, and the court held that no appeal lies under our statute. * * *

* * * It follows that unless the legislature provides a statutory remedy by appeal, redress against judgments of inferior courts must be by *certiorari* or *mandamus*. The relator in this case, if he wished a review and correction of errors committed by the police court, could have resorted to the writ of *certiorari*, but this would not secure for him a retrial of the case in the circuit court upon the merits. * * *

I think the *mandamus* should be denied.

LONG, GRANT, and CAHILL, JJ., concur with CHAMPLIN, C. J.

MORSE, J., (dissenting).

SECTION 2. CERTIORARI.

HAMILTON v. HARWOOD.

Supreme Court of Illinois. 1886.

113 Illinois, 154.

SCHOLFIELD, C. J. This is a petition for a common law writ of *certiorari*. It is assumed by the petition that such a writ may be used as a complete substitute for a writ of error or an appeal, and that, by virtue of it, errors in ruling upon the law and the evidence in the progress of the trial, and in the application of the law to the facts in the rendition of judgment, may be corrected. This is a grave misapprehension. The office of the writ is only to bring before the court

awarding it, the record of the proceedings of the inferior tribunal, and the judgment must either be that the *writ* be quashed and a *procedendo* awarded, or that the *record of the proceedings* be quashed. *Chicago and Rock Island Railroad Co. v. Fell*, 22 Ill. 333; *Com'rs. of Sonora v. Supervisors of Carthage*, 27 id. 140. The rulings of the court upon the law and the evidence in the progress of the trial, and in the application of the law to the facts in the rendition of judgment, can not be reviewed in this manner. We can only inquire, when a return is made to the writ bringing the record before us, whether the inferior court had jurisdiction and proceeded legally,—*i. e.*, followed the form of proceeding legally applicable in such cases,—and not whether it correctly decided the questions arising upon the admission or exclusion of evidence, the giving and refusing of instructions, and other like questions, during the progress of the trial before the court and jury, and in the overruling of motions for new trials and in arrest of judgment, and the rendition of judgment after verdict, etc. The rulings of a court may be erroneous, and yet it may have jurisdiction and proceed legally.

If the position of counsel for the petitioners were correct, the constitutional and statutory limitations would be utterly useless, for in every case it would only be necessary to sue out a *certiorari* to bring all the rulings of the inferior court before the appellate court for review. Where decisions upon questions of law and fact arising during the progress of the trial or in the rendition of judgment, other than such as relate to the question of jurisdiction or the legality of the proceeding, are reviewable upon *certiorari*, it is by virtue of some statute which has no existence in this State.

No ground is shown in the petition for the issuing of the writ. It concedes, tacitly, at least, that the court had jurisdiction, and no attempt is made to point out illegality in the proceeding, in the case sought to be reviewed. *Petition denied*.⁸⁰

⁸⁰ Statutes in some states authorize the use of *certiorari* to review questions other than those going to jurisdiction, making it a means for correcting errors of law arising on questions within the jurisdiction of the court:—*Petition of Landaff*, (1856) 34 N. H. 163; New York Civil Practice Act, 1920, § 1304; Georgia, Code of 1911, § 5201; *Mayor v. Pearl*, (1850) 11 Humph. (Tenn.) 249.

TIMONDS v. HUNTER.

*Supreme Court of Iowa. 1915.**169 Iowa, 598.*

Certiorari proceeding brought in this court to test the legality of the action of the district court of Wapello county (the defendant judge presiding) in the case of *Goudy v. Timonds*, pending in such court. The alleged illegality complained of is that the defendant judge denied the petitioner herein (defendant in that case) the right of trial by jury, and refused to call the jury in such case upon the petitioner's demand therefor, and compelled a hearing of the case before the court without a jury. Writ sustained, and order complained of annulled.

EVANS, J. The case of *Goudy v. Timonds* was a proceeding brought in the Wapello county district court under sections 3219 and 3220, whereby it was sought to have a guardian appointed for the defendant therein on the ground that he was of unsound mind. The petitioner herein is the defendant therein, * * * but before any judgment was entered therein, the defendant sued out the writ herein to test the legality of the action of the court, and obtained a restraining order whereby the district court was restrained from entering judgment until this proceeding could be heard. Because of such restraining order no judgment has been entered in such case.

Two questions are involved in the case as made upon this record: (1) Did the trial court err in denying the defendant jury trial? (2) Is the remedy of *certiorari* available to such defendant to cure such error or illegality if any?

* * * * *

The conclusion is unavoidable, therefore, that the defendant was entitled to demand a jury. * * * This demand being repeated and insisted upon when this case was reached for trial on May 11th, the refusal of the demand was not warranted under the statute.

II. This brings us to the necessary consideration of the more difficult question whether the error of the court was an illegality for which no other plain, speedy and adequate remedy is provided within the meaning of section 4154. We have

held repeatedly that, where there is no excess of jurisdiction, and where the illegality is merely an erroneous conclusion for which an adequate remedy is provided by appeal, a writ of *certiorari* will not lie. The line of demarcation between a merely erroneous conclusion and an illegality for which no other adequate remedy is provided cannot be very exactly defined. In *Butterfield v. Treichler*, 113 Iowa, 328, 85 N. W. 19, a jury trial was erroneously permitted, as was held later in *Porter v. Butterfield*, 116 Iowa, 725, 89 N. W. 199. We held, however, that the remedy by appeal was adequate, and that the writ of *certiorari* would not lie to correct such error. It is urged with force that such holding is decisive of the present question; that is to say, if the writ will not lie to correct an order erroneously granting a jury trial, it cannot lie to correct the converse order erroneously refusing a jury trial. It is urged that in either event a merely erroneous conclusion was involved, and no more. It is generally true that illegality or excess of jurisdiction, if any, is necessarily preceded by an erroneous conclusion. If the erroneous conclusion results in an illegality within the meaning of section 4154, then there is an illegality, and not *merely* an erroneous conclusion. The right to a jury trial in this case was an explicit statutory right. The defendant was deprived of it as effectively as if the refusal had been arbitrary. In *State v. Carman*, 63 Iowa, 131, 18 N. W. 691, 50 Am. Rep. 741, it was held that the district court had no jurisdiction to try a criminal case without a jury. In that case the defendant had expressly waived a jury. This court held, however, that there was no statutory provision authorizing the defendant to waive a jury, and that such waiver was therefore ineffective. The reasoning in that case is not necessarily applicable to a civil case, but it comes close to the general question whether the trial judge has power to try a jury case without a jury in the face of a demand for a jury. It is clear that he has no statutory authority to do so. It is also clear that the statute gives to either litigant the express right to a jury trial. The necessary effect of this provision is to withhold from the trial judge the power or authority to try the issues of fact in the case, except by the consent of the litigants, either express or implied. In a broad sense the court had jurisdiction both of the parties and the subject-matter. This jurisdiction was not defeated by mere errors. In a sense also the trial judge

is the court. He is its head and its hand. In a jury case, however, the jury is also a part of the court. Its function is well defined. Its power to determine issues of fact upon conflicting evidence is the power of the court to that end. That power can be exercised by the trial judge in a jury case only by the consent of the parties either express or implied. To refuse a proper demand for a jury and to exercise the jury power over the objection of the demanding litigant is an exercise of power by the trial judge beyond the provision and contemplation of the statute. If this was not an illegality within the meaning of section 4154, then it would be difficult to apply the term to anything less than a defect of jurisdiction. We reach the conclusion that the action complained of was such illegality.

III. For this illegality had the defendant any other plain speedy and adequate remedy? The only other remedy available to the defendant would have been by appeal. In order to render such remedy available at all, he must first submit to adverse judgment. The effect of such judgment would be to fix his status as a person of unsound mind. * * *

* * * This loss of status is an important consideration, as bearing upon the question of whether the remedy by appeal is adequate. It cannot be superseded by bond or otherwise. It will operate to his immediate disability. * * *

In brief, therefore, we think that the defendant is entitled to maintain his status as presumptively *compos mentis* until the jury which he has demanded shall find otherwise. * * *

We think it must be said, therefore, that an appeal would furnish the defendant no remedy against the immediate disability to which adverse judgment must subject him. It is therefore not adequate. The writ issued herein must be sustained, and the order complained of annulled.

Annulled.

LADD, PRESTON, and GAYNOR, JJ., concur.

DEEMER, C. J. (dissenting). *Certiorari* will not lie unless it be alleged and shown that the tribunal has exceeded its proper jurisdiction or otherwise acted illegally; and it must also appear that there is no other plain, speedy, and adequate remedy. Code, § 4154. It will never lie to correct an error, but is only to test the jurisdiction of the tribunal and the

legality of its acts. *State v. Roney*, 37 Iowa, 30. Where a party has the right of appeal, he cannot, as a rule, proceed by *certiorari*. *Ransom v. Cummins*, 66 Iowa, 137, 23 N. W. 301; *State v. Schmidt*, 65 Iowa, 556, 22 N. W. 673. Therefore, when a court, in the exercise of its jurisdiction, proceeds regularly and according to the usual course of procedure, the action will not lie, no matter how erroneous its decision. In the case now under consideration there is no question regarding the jurisdiction of the court, and it does not appear that it acted irregularly or departed from the usual course of procedure, or that its acts were in any way illegal, save that it came to a wrong conclusion upon the evidence adduced, and made an erroneous ruling. * * *

The only question of doubt in any of these cases as a rule is whether or not the action of the court is "illegal," as that term is used in the statute. Our previous pronouncements upon this question are very clear. For example, in *Eels v. Bailie*, 118 Iowa, 521, 92 N. W. 669, the court said: "It is fundamental that a writ of *certiorari* is never used to correct a mere error, but only to test the jurisdiction of the tribunal and the legality of its action. If the mistake complained of was a mere matter of judgment, the writ will not ordinarily lie, for the tribunal guilty thereof is not acting illegally." * * *

* * * Plaintiff invoked the jurisdiction, or rather the action, of the district court over which defendants preside, asked it to pass upon his motion to dismiss, and is now complaining of the rulings denying his motion. This is all there is to the case as it is presented to us. Manifestly, the court, and the defendants as the presiding officers thereof, had the right, and it was their duty, to pass upon those motions to dismiss; and, if they erred, it was an error of judgment, from which an appeal may be taken in a proper case. But they were not without jurisdiction, nor were they acting illegally in overruling the motions. * * *

In *Finn v. Winneshiek District Court*, 145 Iowa, 157, 123 N. W. 1066, we said: "*Certiorari* is, or may be, an original proceeding in this court, and may be brought in all cases where an inferior tribunal, exercising judicial functions, is alleged to have exceeded its proper jurisdiction, or otherwise acted illegally, and there is no other plain, speedy, and adequate remedy. * * * The distinction between an erroneous

and an illegal order is well pointed out in *Tiedt v. Carstensen*, 61 Iowa, 334 (16 N. W. 214), where it is said: 'We are, therefore, only to inquire, when is a tribunal "acting illegally" in the contemplation of the statute? When the law prescribes proceedings to be had by an officer or tribunal in cases pending before them, the omission of such proceedings is in violation of law, and the court or officer omitting them would therefore act illegally. In a word, if a tribunal, when determining matters before it which are within its jurisdiction, proceeds in a manner contrary to law, it acts illegally. But, if a discretion is conferred upon the inferior tribunal, its exercise cannot be illegal. If it be clothed with authority to decide upon facts submitted to it, the decision is not illegal, whatever it may be, if the subject-matter and the parties are within its jurisdiction; for the law intrusts the decision to the discretion of the tribunal.' "

* * * * *

The rule has been applied in a variety of cases. For instance: In an action where an order on a petition for a removal of the cause to the federal courts was involved, the court having erroneously ordered a transfer to the federal court, it was held that the action could not be reviewed by *certiorari*. In one of the cases it was held that the erroneous dismissal of an appeal from a justice's court to the district court could not be reviewed on *certiorari*.

In several cases it was held that the erroneous exclusion of testimony or an order for the production of books or papers, a motion for a change of place of trial, and various other matters, could not be reviewed, save that the court was without or acted in excess of its jurisdiction.

In a recent case it was held that an erroneous order denying a change of venue could not be reviewed on *certiorari*. *Barry v. Court*, 149 N. W. 449. * * *

It is very clear to my mind that the trial judge in this case had jurisdiction, and that the most that can be said of his order is that he erred in his conclusion either in the finding of facts or in his conclusion of law. He did not act illegally, nor were his proceedings irregular. He had full jurisdiction of both parties and subject-matter, and it will not do, I think, to say that, "if erroneous conclusions result in illegality, then there is illegality," and not merely an erroneous conclusion. This, to my mind, is reasoning in a circle, otherwise all erro-

neous conclusions are illegal; and this is manifestly not true. A case much like this one is *Butterfield v. Treichler*, 113 Iowa, 328, 85 N. W. 19, wherein it was held that the writ of *certiorari* would not lie because the court erroneously directed a jury trial in a case where such was not permissible. I can hardly understand the logic of an opinion which holds that, if a jury trial is denied where the parties are entitled to it, then they are entitled to a writ of *certiorari* to review the ruling; whereas, if granted when they are not entitled to it, such writ will not lie. * * *

* * * I shall not do more at this time than to quote from a learned opinion of the Louisiana court as follows:

"The functions of a *certiorari* are simply to ascertain the validity of proceedings before a court of justice, either on the charge of their invalidity, because the essential forms of the law have not been observed, or on that of the want of jurisdiction in the court entertaining them. They have never been to inquire into the correctness of the judgment rendered where the forms of the law have been followed, and where the court had jurisdiction, and was therefore competent. Hence it has been held that the supervisory jurisdiction of this court, under a *certiorari*, must be restricted to an examination into the external validity of the proceedings had in the lower court. It cannot be exercised to review the judgment as to its intrinsic correctness, either on the law or on the facts of the case. The supervisory powers of the court must not be confounded with its appellate jurisdiction. * * * *State ex rel. Matranga v. Marr*, 42 La. Ann. 1089, 8 South. 277, 10 L. R. A. 248.

There was a resistance to the demand of the defendant for a jury, and the trial court was compelled to pass upon the merits of that resistance, and, as an incident thereto, on whether something had occurred earlier that operated as a waiver of jury trial; and some considerable reasoning is indulged in by the majority opinion as to whether what occurred operated as such waiver. It is admitted here that there is for consideration whether a trial was begun, and thereby objection to trial without jury came too late in view of the statutory provision that a jury may be waived by going to trial without objection and without a demand for a jury, and it is said by the majority that, if a record entry made below discloses a waiver of jury in the trial of the main case, it

was such by implication only. Conceding for the purpose of this dissent that, if a trial court arbitrarily denied a trial by jury where in reason no question could be, and none was, made as to the right to such trial, *certiorari* will lie. But does that meet a case where the original jury trial was fairly in contest, and its contest submitted to the court, and it decides it in a way that we think it should not be decided? If the majority is followed to the logical end, then *certiorari* lies in every case where a trial by jury is denied when it should have been allowed. In some special proceedings such trial is, and in others it is not, granted. Motion to transfer either to law or to equity always involves whether there shall or shall not be a jury trial. Motions to direct verdict present whether the court, rather than the jury, shall decide the cause. Is *certiorari* entertained to test the rulings in such matters as these just referred to?

* * * * *

SALINGER, J., concurs in this dissent.

McCLATCHY v. SUPERIOR COURT.

Supreme Court of California. 1897.

119 California, 413.

VAN FLEET, J. *Certiorari* to review an order of respondent adjudging petitioner guilty of contempt. While the cause of *Talmadge against Talmadge* was on trial in the superior court of Sacramento county an article appeared in the Sacramento Bee, a newspaper published in the city of Sacramento, purporting to be an account of certain testimony given by one of the witnesses; and when, at the opening of court next day, its attention was called to the article by one of the attorneys in the cause, the judge stated from the bench that he had no hesitation in saying that the statement referred to was a grossly false statement, a gross fabrication, and that there was not the slightest ground in the testimony of the witness upon which such a statement could be based. In the afternoon of that day the Bee published in its editorial columns the

following article: "The Bee will not keep in its employ a reporter who garbles or who misstates, but when a news-gatherer does his duty and tells the truth it will not stand silently by while an aggregation of attorneys tries to make him out a liar, and while a prejudiced and vindictive czar upon the bench aids and abets them in such a purpose. The Bee reasserts that in all material details the statement of Talmadge, as given in the Bee of yesterday, was the statement that he made upon the stand at Monday afternoon session. * * * " The petitioner herein is the editor and one of the proprietors of the Bee, and on June 2, 1896, upon an affidavit of Mr. C. T. Jones, setting forth these publications, and that the same was an interference with the proceedings of the court in the trial of the cause, and constituted a contempt of said court, a citation was issued directing him to show cause why he should not be punished for said contempt.

* * * To prove the false character of the matter published by petitioner, the prosecution introduced the court reporter, who testified that the matter published, purporting to be a statement of the evidence as given in the action on trial at the time, did not accord with his notes of such evidence; and, to show that petitioner acted with malicious intent, it was proved by the reporter that before the second publication appeared he had furnished to petitioner what purported to be a correct transcript of his notes of that portion of said evidence to which the publication referred. This was substantially the case of the people, the publications being admitted. The substantive defense was that the publications were in fact true, and not made with any wrongful intent; that the personal references therein to the judge were merely in response to the aspersion of the latter cast upon petitioner in characterizing the statements in his newspaper as false and fabricated, when in fact they were not; and that such personal references were not made for the purpose of interfering with the administration of justice. That this was a complete defense, if sustained by evidence, there can, we think, be no doubt. * * *

When the case of the people rested this occurred: "Mr. Reddy: We want to call witnesses to show that the publication in the Bee was in point of fact true. The Judge: I will not hear testimony further than what has already appeared on that subject, as stated by the reporter. I will not allow

this matter to degenerate into a controversy as to the correctness of the reporter's notes. Mr. Reddy: Then we will not be allowed to introduce any evidence at all,—is that the proposition?—if these notes are to be taken as correct? The Judge: I shall act only on the official notes, as given you by the reporter. I will hear no other testimony. * * *

That the result of this action of the court in thus requiring petitioner, in effect, to submit his defense upon the evidence for the people, was, in substance and effect, to deprive petitioner of the right to be heard in his defense, is, we think, obvious. It is contended by respondent that, even if the action of the court was wrong, it was error merely, which cannot be reviewed on *certiorari*; that, the court having jurisdiction of the person and subject-matter, the mere method in which it exercised such jurisdiction cannot be inquired into in this proceeding, which looks only to the question of jurisdiction. If the premise were correct, the conclusion would undoubtedly follow. But with the view that the action involved no more than mere error we cannot coincide. It was error, certainly, but it was more than that. It was a transgression of a fundamental right guarantied to every citizen charged with an offense, or whose property is sought to be taken, of being heard before he is condemned to suffer injury. Any departure from those recognized and established requirements of law, however close the apparent adherence to mere form in method of procedure, which has the effect to deprive one of a constitutional right, is as much an excess of jurisdiction as where there exists an inceptive lack of power. "The substance and not the shadow determines the validity of the exercise of the power." *Cable Co. v. Adams*, 155 U. S. 689, 698, 15 Sup. Ct. 268, 360.

While the writ of *certiorari* is not a writ of error, "it is nevertheless," as suggested in *Schwarz v. Superior Court*, 111 Cal. 112, 43 Pac. 582, "a means by which the power of the court in the premises can be inquired into; and for this purpose the review extends, not only to the whole of the record of the court below, but even to the evidence itself, when necessary to determine the jurisdictional fact." If, then, by looking at the evidence, we can see that the court exceeded its power, we have a right to examine the evidence for that purpose. The evidence and proceedings in this case disclose clearly to our minds such an excess. * * *

* * * The order convicting him of contempt must be annulled. It is so ordered.

I concur: GAROUTTE, J.

McFARLAND, J. I concur in the judgment annulling the order under review. * * * The weight of authority is to the point that this ruling, being a denial of appellant's right to make a defense, goes to the jurisdiction, and is reviewable on *certiorari*. If petitioner had been allowed to introduce the offered evidence, the case would have presented no difficulties.

BEATTY, C. J. (concurring). * * *

HARRISON, J., dissenting. * * *

TEMPLE and HENSELAW, JJ., concurred in the dissenting opinion.

MILLER v. TRUSTEES OF SCHOOLS.

Supreme Court of Illinois. 1878.

88 Illinois, 26.

CRAIG, J. This was a petition for a common law writ of *certiorari*, to bring before the circuit court the record of the proceedings of the trustees of schools, in order to test the legality of the action of the trustees in uniting certain school districts named in the petition. At the term of court at which the writ was returnable the defendants appeared, and upon motion, the court quashed the writ and dismissed the suit. This decision is assigned for error.

* * * * *

The alleged illegal action of the trustees, here, appears upon the face of the proceedings of the board, which the court could determine by an inspection of the record containing the action of the trustees. The legislature has made no provision for an appeal from the decision of trustees of schools, for the purpose of reviewing their action, where they have created new districts, or consolidated two or more old districts into a new one; hence arises the necessity for the exercise of the common law writ of *certiorari*.

This court has held, in a number of cases, that the common law writ of *certiorari* may issue to all inferior tribunals

and jurisdictions, in cases where they exceed their jurisdiction, and in cases where they proceed illegally, and there is no appeal or other mode of directly reviewing their proceedings. *Doolittle v. Galena and Chicago Union Railroad Co.*, 14 Ill. 381; *Commissioners, etc. v. Supervisor of Carthage*, 27 id. 140; *Commissioner v. Harper*, 38 id. 103.

The rule adopted in the cases cited is in harmony with the law as settled in England, and in this country. Dillon on Municipal Corporations, sec. 739, says: "In this country, the rule has been very generally adopted by the courts, where a new jurisdiction is created by statute, and the inferior court, board, tribunal or officer exercising it proceeds in a summary manner, or in a course different from the common law, that the circuit or district court of the State, or other tribunal exercising general, original, common law jurisdiction, has, in the absence of a specific remedy being given, an inherent authority to revise the proceedings of such inferior jurisdiction, by *certiorari*."

* * * * *

The common law writ of *certiorari* was the appropriate remedy to bring before the circuit court, for review, the proceedings of the trustees of schools in uniting the school districts named in the petition, and we are of opinion it was error to quash the writ and dismiss the suit.

The judgment will be reversed and the cause remanded.³¹

³¹ In some states the courts have enlarged the scope of the writ in such cases. Thus in *Hartz v. Wayne* Circuit Judge, (1910) 164 Mich. 231, the court said:—"The power of reviewing upon common-law *certiorari* even the judicial proceedings of inferior tribunals and bodies, which are not according to the course of the common law, has long been exercised. The right is not limited to an inquiry as to the jurisdiction of the inferior tribunal or body over the particular subject matter, but extends to the manner in which that jurisdiction is exercised. It may reach all errors of law." In *State ex rel. v. Dunn*, (1902) 86 Minn. 301, the court says that this enlarged scope, in the case of "an inferior court, board, or tribunal, or officer exercising judicial powers, whose proceedings were summary and in a cause different from the common law," is sustained "by the great weight of modern authority." Accord,—*Poe v. Machine Works*, (1884) 24 W. Va. 517, 521; *State v. Whitford*, (1882) 54 Wis. 150; *Jackson v. People*, (1860) 9 Mich. 111.

Where such special jurisdiction is conferred "subject to the right of appeal to the Supreme Court according to law," this will be deemed to authorize the use of any appropriate method, and not to be merely declaratory of the common law right to a writ of *certiorari*.—*Township of Ouster v. Dawson*, (1914) 178 Mich. 367.

IN RE PRUDENTIAL INSURANCE CO.

*Court of Errors and Appeals of New Jersey. 1913.**82 New Jersey Equity, 335.*

GARRISON, J. This is a motion by the Prudential Insurance Company of America to dismiss an appeal taken by certain of its stockholders from an order appointing three disinterested persons to appraise the value of its capital stock, made by the Chancellor of this state pursuant to the provisions of an act entitled "An act to permit any stock life insurance corporation of this state to acquire the capital stock thereof for the benefit of its policy holders and to convert such stock life insurance corporation into a mutual life insurance corporation." P. L. 1913, p. 152.

This enactment provides a special statutory proceeding designed to accomplish the object expressed in its title and to that end constitutes the Chancellor of this state as the legislative agent through whose instrumentality such proceeding shall be administered.

* * * * *

The constitutionality of this statutory proceeding is challenged *in limine* by the owners of stock affected thereby; the method of such challenge being the taking of an appeal from the initial order made by the chancellor in the course of such statutory proceeding directly to this court. The propriety of this appeal is now challenged by the corporation at whose instance the legislative machinery was set in motion.

Normally statutory proceedings of this nature are reviewed by the Supreme Court by virtue of its prerogative writ of *certiorari*, and there is nothing in the nature or object of the present proceeding to take it out of this general rule. So that if the legislative agent designated in the present statute had been, let us say, the Commissioner of Banking and Insurance, there would not be the slightest doubt but that *certiorari* was the proper remedy by which to review his action under such statute or to test the validity of the statute under which such action was had.

Such supposititious case would be indistinguishable in principle from the ordinary proceeding to condemn land in which a justice of the Supreme Court as the legislative agent

designated in the statute appoints three disinterested freeholders to appraise the value of the land sought to be taken by compulsory purchase from the owner thereof, who may by the writ of *certiorari* challenge *in limine* the right of the condemning agent to acquire his land or the validity of the statutory authority under which such right is claimed.

If, therefore, a different method of review obtains in the present statutory proceeding, as it actually is, it must be solely because of the official character of the agency selected by the Legislature to administer it, or rather because of the nature of the judicial duties ordinarily performed by such agent in some other capacity, for in no other respect does the actual case differ from the supposititious one.

If such a distinction is valid, it establishes the novel and highly important doctrine that the method by which a statutory proceeding shall be reviewed depends not upon the nature of such proceeding but upon the personnel of the agency selected to administer it, or rather upon the character of the duties that are performed by such legislative agent in some other official capacity, so that, if such legislative agent be also a court of general jurisdiction, the remedy under such doctrine would be by an appeal which, in the case of the common pleas, would go to the Supreme Court, in the case of the circuit court would go either to the Supreme Court or to this court, and in the case of the Court of Chancery would go directly to this court by an appeal in equity. It is apparent that by force of such doctrine the writ of *certiorari* is entirely shorn of its prerogative character since the Legislature may in every case by the selection of one Legislative agent rather than another determine that the method of review shall be other than by *certiorari*.

It is evident, therefore, that the present motion involves considerations of the most important and far-reaching character.

That such doctrine receives no support upon general principle from our existing institutions is shown by the fact that the action of the common pleas in granting or refusing a tavern license is and always has been reviewable by *certiorari*, notwithstanding that such legislative agent is a court of general jurisdiction, and the same is true of proceedings to lay out public roads and other statutory proceedings brought before that court as a legislative agent.

The same is true of the circuit court, and the case of *East Orange v. Hussey*, 70 N. J. Law, 244, 57 Atl. 1086, in which this fact is established, is not only destructive of the supposed doctrine we are considering but is also necessarily dispositive of the motion now before us.

* * * * *

Applying these established rules to the motion now before us, it necessarily follows that the present statutory proceeding is reviewable by *certiorari* only, regardless of the fact that one of the agencies that took part in it is the Court of Chancery, and that that circumstance cannot require the Supreme Court to forego its writ of *certiorari* or to share it with this court, which it would be required to do if an aggrieved party may review such statutory proceeding in this court upon a direct appeal.

The case cited so conclusively settles the principles pertinent to the present motion that their further discussion is neither requisite nor justifiable. The appeal is dismissed.³²

³² "According to the general rule the writ of error is the appropriate remedy, when the proceedings are according to the course of the common law, and the writ of *certiorari* when the proceedings are of a different character. * * * The proceedings before the county court were purely statutory and of a character entirely unknown to the common law, and unless the mode of supervising them by the circuit court is controlled by statute, it would according to this general rule be by writ of *certiorari*."—*Dryden v. Swinburn*, (1879) 15 W. Va. 234, 251.

SWAN v. JUSTICES OF SUPERIOR COURT.

BAYLIES v. SAME.

Supreme Judicial Court of Massachusetts. 1916.

222 Massachusetts, 542.

Petitions for *certiorari* by one Swan and one Baylies to the Justices of the Superior Court, Edward R. Hathaway, as Mayor of the city of New Bedford, intervener. Petitions dismissed.

RUGG, C. J. These are petitions for writs of *certiorari* directed to the justices of the superior court to correct errors of law alleged to be apparent upon its records in proceedings under R. L. c. 100, § 4, as amended by St. 1912, c. 389, relating to review of removals of the petitioners as license commissioners of the city of New Bedford by the intervener, Edward R. Hathaway, as mayor of that city. It is contended that the writ of *certiorari* does not lie. That contention is based upon the sentence in the statute to the effect that "there shall be no appeal from his [the superior court judge's] decision." Doubtless "the word 'appeal' here is used in a broad general sense," so as to cover all the ordinary proceedings for a revision by this court. *Dow v. Casey*, 194 Mass. 48, 50, 79 N. E. 810. But the writ of *certiorari* is of extraordinary nature. It is one of the ancient prerogative writs, whose history stretches far back toward the beginnings of the common law. Its common purpose is the beneficent one of enabling a party who has no remedy by appeal, exceptions, or other mode of correcting errors of law committed against his rights in a proceeding judicial or quasi judicial, to bring the true record, properly extended so as to show the principles of the decision, before a higher court for examination as to material mistakes of law. Its appropriate function is to relieve aggrieved parties from the injustice arising from errors of law committed in proceedings affecting their justiciable rights when no other means of relief are open. It always has been recognized as a highly remedial salutary procedure, founded upon a sense of justice, to relieve against wrongs otherwise irremediable. That wrongs go unredressed because of a want of adequate methods would be a grave reproach to any system of jurisprudence. The writ of *certiorari* not only exists as a part of the common law, but it has been sedulously preserved by express statutes, which confer upon this court a broad jurisdiction and superintendence of all courts of inferior jurisdiction "to correct and prevent errors and abuses therein if no other remedy is expressly provided." R. L. c. 156, § 3; chapter 192, § 4.

It would require words unmistakable in import to express a legislative purpose to deprive parties to any appropriate proceeding from the shelter of this writ. The phrase of the instant statute falls far short of expressing that purpose. It simply indicates that there is to be no "appeal" in the sense

in which that word is used in ordinary legal and equitable procedure, and that the removal of such an officer, which is in large part an administrative measure, is not to be stayed in its effect by the delays necessarily incident to the usual prosecutions of exceptions or appeals. But it does not disclose a purpose to prevent the exercise of the extraordinary power of this court to rectify errors which are so fundamental in character as to warrant the invocation of the writ of *certiorari*. The trend of legislation has been to broaden the powers of this court as to that writ rather than to narrow them. See St. 1902, c. 544, § 27; *Boston & Lowell R. R. v. Co. Commissioners*, 198 Mass. 584, 589, 85 N. E. 108.

* * *

The clause in the governing statute, that "there shall be no appeal" from the decision of the judge of the superior court, does not prohibit an aggrieved party from invoking the writ of *certiorari* in appropriate instances.

The only matter before the court on this petition is the correction of substantial errors of law apparent on the record. Findings of fact are not open to revision. *Hogan v. Collins*, 183 Mass. 43, 46, 66 N. E. 429; *Dunn v. Mayor of Taunton*, 200 Mass. 252, 258, 86 N. E. 313. The issuance of the writ is not a matter of right. It is addressed to sound judicial discretion. It is not granted because of technical errors, nor unless it is apparent that manifest injustice has been done to substantial rights. *Sears v. Worcester*, 180 Mass. 288, 62 N. E. 269. That principle is especially applicable to cases like this.

* * * * *

³³ In *State ex rel. v. Morgan*, (1907) 130 Wis. 293, the court said:—"Since no such appeal or other direct review has been provided, the action of the special tribunal is final, provided, of course, that it acts within and according to its jurisdiction. * * * In all cases, however, the acts of such tribunals as above described [special tribunals not proceeding according to the course of the common law] are subject to review to the extent of ascertaining whether they are within the jurisdiction so conferred." Accord:—*Morris Canal, etc., Co. v. Mitchell*, (1864) 31 N. J. L. 99.

In some states the discretionary character of the writ has caused the courts to develop a practice of hearing the merits of the case upon the petition for the writ and practically deciding the whole case upon that hearing.—*Davidson v. Whitehill*, (1914) 87 Vt. 499; *Farmington River Water Power Co. v. County Commissioners*, (1873) 112 Mass. 206; *Levant v. County Commissioners*, (1877) 67 Me. 434.

Where the right to a review by error or appeal has been lost by a party without his fault, the writ may be used:—*Poe v. Machine Works*, (1884) 24 W. Va. 517.

DAVIDSON v. WHITEHILL.

Supreme Court of Vermont. 1914.

87 Vermont, 499.

TAYLOR, J. This is a petition for writ of *certiorari* to review the judgment and orders of the petitionees, the license commissioners of the town of Groton, granting a second-class license to one James Frost to sell intoxicating liquors in said town. * * *

* * * * *

The petition is challenged upon grounds that raise the questions: (1) Whether a board of license commissioners, in granting licenses, acts in a judicial capacity; and, if so, (2) whether the statute disqualifying certain persons from acting in a judicial capacity (P. S. 1224) relates to officers or boards in the discharge of administrative affairs.

At common law *certiorari* lies only to inferior courts and officers exercising *judicial* powers; not only so, but the act to be reviewed must be judicial in its nature, and not merely ministerial. 4 Dillon, Mun. Corp. § 1593, and note. Practically all the courts of this country follow the common-law rule, and hold that the purpose of the writ is to review none but judicial or quasi judicial acts, and that it can in no case extend to reviewing acts that are ministerial, legislative, or executive. When there is a new or summary jurisdiction created, the proceeding so authorized, whether in court or not, if of a judicial or quasi judicial character, and not subject to review by other means, may be reviewed by this writ. There is room for great difference of opinion, however, whether certain proceedings are judicial or not. Confusion arises in drawing the line between judicial and other acts when the inquiry relates to officers or boards of municipalities, whose functions are primarily of an administrative character, and there is considerable diversity of judicial opinion respecting its exact location.

1. Does a board of license commissioners act in a judicial capacity in granting or refusing applications for license? It must be conceded at the outset that acts of a judicial character are not confined to the courts. It is the quality of the act, and not the official classification of the actor, that determines this question. When considering whether a particular act of a court, or of an officer charged with judicial or quasi-judicial functions, is judicial or ministerial, the exercise of judgment and discretion is deemed the distinguishing test. *Fuller v. Gould et al.*, 20 Vt. 643; *Stearns v. Miller et al.*, 25 Vt. 20; *Davis v. Strong et al.*, 31 Vt. 332; *Universalist Society of Fletcher v. Leach et al.*, 35 Vt., 108; *State v. Howard*, 83 Vt. 6, 74 Atl. 392. But this test fails to distinguish judicial from purely executive or administrative functions. Executive or administrative acts often involve the exercise of discretion and judgment. An official act requiring the exercise of discretion and judgment may be executive or judicial according to the nature of the subject-matter. *State v. Howard*, *supra*. As is said in *People v. Board of Commissioners*, 97 N. Y. 37: "The fact that an act is discretionary, and that in exercising discretion judgment must be employed, does not prove that the act is judicial." Mr. Freeman, in his note to *Wulzen v. Board of Supervisors*, 40 Am. St. Rep. 29, after reviewing many cases, deduces the following as the more approved test: "An action is necessarily judicial if the parties to be affected thereby have a right both to notice of the proceeding and to a hearing in opposition to it before some tribunal which is not otherwise authorized to proceed." He uses the word "tribunal" as embracing, not alone courts, but also boards or individuals whose duty it is to decide.

Reference to a few among the many cases involving this question will show the trend of decision in other jurisdictions: "If the proceeding is one that is ministerial, and in which no person has a right to be heard, it is rarely deemed reviewable on *certiorari*." *Atty. Gen. v. Northampton*, 143 Mass. 589, 10 N. E. 450. To the same effect is *Townsend v. Copeland*, 56 Cal. 612. Where there is no authority to proceed without notice, and it is not given, the writ will lie. *Miller v. School Trustees*, 88 Ill. 26; *State v. Graham*, 60 Wis. 395, 19 N. W. 359. * * *

Applying the test of notice and right to be heard, which seems to us a satisfactory criterion, it would follow that the

local board of license commissioners in disposing of applications for license to sell intoxicating liquor act in a quasi judicial capacity. The statute authorizing such boards to grant licenses provides both for notice and a public hearing before the license can be granted. * * * Public policy demands that any one aware of the applicant's unfitness, or of disqualifying facts, should have an opportunity to be heard in objection, and such is the evident purpose of the statutory requirement for notice to the public and a subsequent hearing. * * *

The action of boards of license commissioners in respect of granting licenses being quasi judicial, by the unanimous decisions of the courts *certiorari* will lie to review questions of law affecting their judgments or orders. While it is held in some states that the revisory court can only inquire as to the jurisdiction of the inferior tribunal, the better opinion seems to be that errors of law affecting the merits of the case occurring in the course of the proceedings may be reviewed. *Donahue v. Will County*, 100 Ill. 94; *State v. Dodge County*, 56 Wis. 79, 13 N. W. 680; *McAilley v. Horton*, 75 Ala. 491; 4 Dillon, Mun. Corp. § 1593. But even when the act is judicial or quasi judicial, if it is also discretionary, it cannot be reviewed or set aside on *certiorari*, unless possibly, to correct a manifest abuse of discretion, for in that case the act complained of is a mere error of judgment, and not a violation of any rule of law. *Ketchum v. Superior Court*, 65 Cal. 494, 4 Pac. 492; *Tiedt v. Carstensen*, 61 Iowa, 334, 16 N. W. 214; *Livingstone v. Rector of Trinity Church*, 45 N. J. Law, 230.

Questions of fact are rarely, if ever, reviewable upon *certiorari*, so the decision of a question of fact upon evidence introduced at the hearing before the inferior tribunal will not be reviewed, unless some question of law relating thereto is raised. *Farmington Co. v. County Commissioners*, 112 Mass. 206. In some states the evidence may be examined to discover whether there is any competent proof to justify the adjudication. *People v. Board of Police*, 69 N. Y. 408; *State v. Whitford*, 54 Wis. 150, 11 N. W. 424; *State v. Duluth*, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595; *Jackson v. People*, 9 Mich. 111, 77 Am. Dec. 491; *Keenan v. Goodwin*, 17 R. I. 649, 24 Atl. 148; *Com. v. Gillespie*, 146 Pa. 546, 23 Atl. 393; *Conover v. Davis*, 48 N. J. Law, 112, 2 Atl. 667; *State v.*

Bill, 35 N. C. 373. In such case, however, the evidence is not reviewed with reference to the credibility of witnesses or the weight to be given conflicting testimony. The inquiry is directed solely to determining whether, from competent evidence before it, the decision of the inferior tribunal is sustainable, a question similar to that raised by a motion for a directed verdict, or a motion to set aside a verdict as unsupported by the evidence.

Thus it is seen that the writ of *certiorari* serves much the same purpose in reviewing the actions of inferior tribunals, whose proceedings are summary, or in a course different from the common law, as exceptions or writ of error in proceedings according to the course of the common law. *State ex rel. Page v. Smith et al.*, 48 Vt. 282. It follows that *certiorari* issues only when there is no other adequate remedy at law (*Sowles v. Bailey*, 69 Vt. 277, 37 Atl. 751), and brings up for review only substantial questions of law affecting the merits of the case involved in the proceedings below (*Stevens v. Hill et al.*, 74 Vt. 164, 52 Atl. 437). It will be observed that, while power is vested in the court by *certiorari* to review the proceedings of all inferior jurisdictions, including officers and boards acting in a judicial or quasi judicial capacity, to correct jurisdictional errors, they will not review their judgments on the merits. The correctional power extends no further than to keep them within the limits of their jurisdiction, and see that they exercise it with regularity. *Board of Aldermen v. Darrow*, 13 Colo. 460, 22 Pac. 784, 16 Am. St. Rep. 215; *Chase v. Miller*, 41 Pac. 410.

2. It remains to be considered whether the objection to the action of the board of license commissioners of the town of Groton, viz., that one of the commissioners was disqualified from acting on the application of Frost by reason of relationship, presents a jurisdictional question, or a material question of law involved in their proceedings, as distinguished from a mere question of discretion. * * *

Does P. S. 1224, apply to administrative boards, like boards, of license commissioners, when acting in a quasi judicial capacity? So far as necessary to the inquiry, that section provides: "No chancellor, judge, justice, master in chancery, juror or other person shall act in a judicial capacity in or as trier of a cause or matter in which he

* * * is related to either party within the fourth degree of consanguinity or affinity."

* * * * *

* * * A moment's reflection as to its effect upon such boards as selectmen, listers, auditors, school directors, civil authority, makes it evident that the statute was not enacted in contemplation of any such application as the petition contends for, and public policy forbids that it should be so construed.

* * * * *

We are constrained to hold that the statute in question does not apply, and that the petition does not show error of law in the proceedings. The writ must be denied.

* * * * *

HOLABIRD v. RAILROAD COMMISSION.

Supreme Court of California. 1916.

171 California, 691.

[Adolph Becker filed a complaint with the Railroad Commission alleging that the California Delevopment Company was a corporation engaged in distributing water for irrigation, that Holabird had been appointed and was acting as receiver for the company, that Becker needed water for irrigating his land and had demanded water from Holabird and that Holabird had refused; and the prayer was that an order be made requiring the receiver to deliver water to Becker on the same terms granted to other persons receiving water under the system. Holabird demurred on the ground that it did not appear that the water system under the receiver's control was a public utility. The Railroad Commission overruled the demurrer and ordered the receiver to answer.]

SHAW, J. * * *

It is this order which the petitioner here seeks to review.
* * * At the close of its opinion, referred to in the above order, the commission says:

"It will be understood, of course, that the present de-

cision deals only with the question of this commission's jurisdiction. If this decision stands, it by no means necessarily follows that complainants in any or all of these cases will ultimately secure the relief for which they ask."

Each case is still pending before the commission for final determination. The orders asked for have not been made and may yet be denied. No final determination of either case has been made. It may be that the receiver will not be injured or the system he controls at all be affected by the final orders. We think this proceeding is premature.

The writ of review lies only when the final determination of an inferior court, tribunal, or board is in excess of its jurisdiction. Code Civ. Proc. § 1068. The language of the section limits it to cases where the tribunal "has exceeded" its jurisdiction. It does not lie to determine the correctness, in point of law, of rulings or decisions made by such court, tribunal, or board, upon objections made or questions arising in the course of the proceeding or cause preliminary and prior to the final determination regarding the action which it is asked to take in the matter. *Wilson v. Sacramento County*, 3 Cal. 386; *People v. County Judge*, 40 Cal. 479; *Aberding v. Macham*, 40 Cal. 656; *Lamb v. Schottler*, 54 Cal. 320; *Sayers v. Superior Court*, 84 Cal. 642, 24 Pac. 296; *Gauld v. Board*, 122 Cal. 18, 54 Pac. 272. In *Wilson v. Sacramento County* the board of supervisors had overruled an objection that it had no jurisdiction over an application for a ferry license, but had not granted or refused such license. In *People v. County Judge* the judge had entertained an application of certain street commissioners asking him to fix the compensation which they should receive, and had set the application for hearing, but had not otherwise acted upon it. In *Lamb v. Schottler* one of the points involved was the right to a review of the action of the board of supervisors upon a proposed resolution, which was still pending before it and had not been adopted. In *Sayers v. Superior Court* the petitioner had been cited to show cause why he should not be punished in contempt for disobeying an order of the superior court, but he had not been adjudged guilty or tried on the charge. In *Gauld v. Board* an application had been made to the board of supervisors for a telephone franchise and certain proceedings had been taken under the statute

toward the granting of such franchise, but none had been granted.

In all these cases it was held that the application for a writ of review was premature, and in each case the proceeding was accordingly dismissed or denied. In *People v. County Judge*, the court said:

"The writ of *certiorari* is a writ of review. Its office is to bring up for review *final* determinations and adjudications of inferior tribunals, boards, or officers exercising judicial functions, when there is no appeal, nor any plain, speedy, and adequate remedy. The writ is necessarily founded on a final determination."

It was further said that, if such writ might issue at any step in the proceedings of the inferior tribunal to annul its rulings:

"This would be the exercise of original jurisdiction by the court issuing the writ, and not a review of the determination of the inferior tribunal. The matter complained of would be, not that the tribunal had exceeded, but that it was about to exceed, its jurisdiction."

In *Sayers v. Superior Court*, the court said:

"The function of a writ of review is not to restrain the proceedings of an inferior tribunal, but to annul proceedings which have been taken without jurisdiction. It cannot be employed to prevent a threatened excess of jurisdiction. It is issued only when an inferior tribunal, board, or officer exercising judicial functions has *exceeded* the jurisdiction of such tribunal, board, or officer."

The present case cannot be distinguished from those above cited. There has been no final adjudication. The order merely overrules a demurrer. It does not decide the case. The decision of the commission that the California Development Company, through the receiver, is conducting a public utility, is preliminary only. Before proceeding to regulate the commission must always ascertain that the person or corporation to be regulated is one over whom it is given authority, else it must refuse to act further. As it is a question affecting the jurisdiction of the commission to act at all, it may revoke its ruling thereon at any time before the action invoked by the complainant has been taken or refused, or at any time before the authority to grant a rehearing has expired. A lack of jurisdiction of the subject-matter is suf-

ficient cause for arresting a proceeding at any stage, whenever it appears or is called to the attention of the tribunal, and it is not bound by a preliminary decision thereon that it has jurisdiction.

* * * * *

[Petition dismissed, without prejudice to any subsequent proceeding.]³⁴

³⁴ In *Wallace v. Jameson*, (1897) 179 Pa. St. 94, the court said:—"The suit was a common law action for libel. During its progress, before its actual call for trial by jury, various dilatory motions were made, for change of venue, to quash the array of jurors, a plea in abatement to the jurisdiction of the court as then constituted, etc. These matters are not ordinary subjects of *certiorari*. It is true they are regulated by statute, and that *certiorari* is the proper writ to review proceedings out of the course of the common law, but these matters were not statutory proceedings in that sense, but mere interlocutory steps in the course of common law action. It has never been held that a party can bring his case to this court piecemeal in this way, merely because some of the preliminaries to the trial have been regulated by statute somewhat at variance with ancient common law forms."

Two writs of *certiorari* were known at common law, one to take up a record or proceeding at any interlocutory stage and remove it into a superior court to be there proceeded with to final judgment, the other to review a record or proceeding after final determination. In the United States, in the absence of statutory regulation, it has been the general practice to use the writ only for review. *State ex rel. v. Walbridge*, (1894) 123 Mo. 524; *Holmes v. Cole*, (1908) 51 Ore. 483.

ST. JOHN v. RICHTER.

Supreme Court of Alabama. 1910.

167 Alabama, 656.

MAYFIELD, J. Appellant was one of a great number of resident citizens of Cullman county who signed and filed with the probate judge of that county a petition praying that the probate judge call an election, in said county, to determine whether the sale of intoxicating liquors should be prohibited in that county, under the provisions of the local option statute of February 26, 1907, now embraced in sections 492-511 of the Code of Alabama. The election was accordingly ordered by the probate judge, and was held in accordance with such order and the statute authorizing it, and resulted in

a majority against the sale of intoxicants. The returns of the election were duly and properly made, and canvassed, and the result was declared and certified as required by the statute. On the 1st of January, 1908, the appellee, who was a resident citizen of said county, and who owned and operated a saloon in said county, filed with the probate judge a petition praying that the former order of the judge, calling the election, and all subsequent proceedings had thereunder, be set aside and held for naught, on the grounds: (1) That the local option law under which the election was ordered to be held was void; and (2) that it had been repealed by the subsequent statute known as the state-wide prohibition act. The probate judge granted the petition of Richter, and set aside his former orders, declaring the election and all the proceedings held thereunder void and of no effect. This appellant then applied to the judge of the Eighth judicial circuit (which circuit includes Cullman county) for a common-law *certiorari* to quash the proceedings of the probate judge in setting aside the election as prayed in the petition of Richter. The circuit judge ordered the writ to issue, in accordance with appellant's petition, directing the probate judge to send up to the circuit court, for the consideration of that court, a full and complete record of the proceedings had before such probate judge. "The probate judge, though served with the writ of *certiorari*, made no return thereto. The petitioner (appellant) then made several unsuccessful attempts to have the circuit court compel the probate judge to make his return of the proceedings as directed by the writ. Before any return was ever made by the probate judge to the writ, the appellee and the probate judge moved the court to dismiss and quash the proceedings for *certiorari*, assigning many grounds in support of the motion. The circuit court granted the motion and dismissed the petition for *certiorari*, and quashed the writ theretofore issued by the circuit judge, taxing the appellant with the costs of the proceedings, and from that judgment this appeal is prosecuted.

A return to the writ of *certiorari* issued should have been made or required, or an adequate reason shown why it was not made, before dismissing the petition or quashing the writ. The proper rule and practice in such cases has been thus stated: "The return is a prerequisite to any review to

be undertaken by the court out of which the writ issues; and, until it is made, the court will not render any judgment or make any order except for the purpose of enforcing obedience to the writ and compelling the making of a return." 4 Ency. Pl. & Pr. p. 212, par. 2; *People v. McCraney*, 21 How. Prac. (N. Y.) 149. "Although it is the duty of the officers to whom the writ is directed to prepare their return, and although they may be compelled summarily to make a return, yet it is incumbent upon the prosecutor of the writ, rather than the adverse party to him, to see that the return is made, and to invoke the aid of the court to compel the compliance with the mandate of the writ." 4 Ency. Pl. & Pr. p. 213, par. 4; *Derton v. Boyd*, 21 Ark. 264; *Bannister v. Allen*, 1 Blackf. (Ind.) 414; *State v. Gibbons*, 4 N. J. Law, 45; *State v. Trenton*, 36 N. J. Law, 499; *Dean v. Wade*, 5 N. J. Law, 719. "The return should be made not later than the day on which the writ is returnable, though it may be made at any time during such day, in the absence of statutory provisions to the contrary." 4 Ency. Pl. & Pr. 213, par. 5; *Hill v. Young*, 3 Mo. 337.

The return of the writ to the court is essential to the court's jurisdiction to review. The application for the writ is often made (as in this case) to the judge in vacation, and not to the court, and the writ in such case is issued by the judge, and not by the court, though it is made returnable to the court; and, until a return is made, the court—as distinguished from the judge as such—acquires no jurisdiction of the subject-matter or controversy.

* * * * *

*Reversed.*³⁵

³⁵ In a few states it is the practice to hear the whole case on the petition, before issuing the writ, and an answer then takes the place of the return, but such answer is substantially the same as a return.—*Davidson v. Whitehill*, (1914) 87 Vt. 499; *Levant v. Penobscot County*, (1877) 67 Me. 429; *Tewksbury v. Middlesex County*, (1875) 117 Mass. 563. See note 33, *supra*.

WASKEY v. HAMMER.

EADIE v. CHAMBERS.

Circuit Court of Appeals, Ninth Circuit. 1910.

102 Circuit Court of Appeals, 629; 179 Federal Rep. 273.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The mandate of this court was issued to the District Court for Alaska in the first of the above-entitled cases on June 18, 1909, and in the second case on October 11, 1909. The petitioners now ask this court to recall both mandates, on the ground that in each case the Supreme Court on April 6, 1910, issued its writ of *certiorari* directing this court to certify its record to that court for its action thereon.

It is a conclusive answer to the petition in the first case to point to the fact that the term at which our mandate issued has long since expired. This court has no power to entertain a motion to recall its mandate after the expiration of the term at which its judgment was rendered and its mandate was issued. * * *

But aside from the want of power in this court to recall its mandate in the case first mentioned, it is an insuperable obstacle to the relief here sought in both cases that the Supreme Court has issued to this court its writs of *certiorari*. A *certiorari* to a subordinate court or tribunal operates as a stay of proceedings from the time of its service or of formal notice of its issuance, and if the court to which the writ is directed thereafter proceeds, it is a contempt, and its subsequent proceedings are void. 6 Cyc. 800, and cases there cited. The proceedings of this court are not reversed by the issuance of the writ and the stay resulting therefrom, but are merely suspended until the further action of the reviewing court. *Ewing v. Thompson*, 43 Pa. 372. In that case Judge Strong, afterwards a justice of the Supreme Court, said of the effect of a writ of *certiorari*:

"Very many English as well as American authorities are quoted in *Patchin v. Mayo, etc.*, 13 Wend. [N. Y.] 664. There are very many others, all holding a common-law writ of

certiorari, whether issued before or after judgment, to be in effect a *supersedeas*. There are none to the contrary. In some of them it is ruled that action by the inferior court after the service of the writ is erroneous; in others it is stated to be void and punishable as a contempt. They all, however, assert no more than that the power of the tribunal to which the writ is directed is suspended by it, that the judicial proceeding can proceed no farther in the lower court."

In *State ex rel. Chicago & N. D. Ry. Co. v. Burnell*, 102 Wis. 232, 78 N. W. 425, the court said:

"A writ of *certiorari* suspends the execution of the judgment or order challenged thereby. It does not vacate such judgment or order. Pending the hearing of such an order or judgment, it remains in full force, the same as in the case of an appeal, where the statute regarding a stay of proceedings has been complied with."

And the court added that the sole effect of the writ of *certiorari* "is to prevent any act being done to enforce the judgment or order affected by the stay."

In *McWilliams v. King*, 32 N. J. Law, 23 the court said:

"But it is to be remembered that the writ of *certiorari* is of itself and *propria vigore a supersedeas*."

* * * It would seem upon principle, in view of the effect of the writ and the consequent stay, that all proceedings in this court, as well as in the District Court of Alaska to which the mandates of this court were issued, are stayed until the decision of the Supreme Court shall be rendered upon its review of the judgment of this court, and that notice of the issuance of the writ should be brought to the attention of the District Court, in order that it may direct a stay of further proceedings, and that this court is powerless to act in the premises.

The petitions are denied.

MOREFIELD v. KOEHN.

*Supreme Court of Colorado. 1912.**53 Colorado, 367.*

MUSSER, J. In a proceeding in *certiorari*, the district court of Montezuma county annulled a judgment of the county court that had been rendered in favor of Guillet Brothers against Laura H. C. Koehn. In response to the writ from the district court, the judge and *ex officio* clerk of the county court certified the county court record in the case to the district court. It was then the duty of the district court to try the matter upon the record so certified, and not upon the allegations of the petition for the writ, nor upon facts outside the record.⁸⁶ *People v. County Com'rs*, 27 Colo. 86, 59 Pac. 733. Instead of doing this, the district court apparently tried the matter on the allegations of the petition, and, because certain of those allegations were not denied, took them as true and annulled the judgment. The procedure to be followed in such cases becomes perfectly plain from a reading of chapter 29 of the Revised Code, which relates to *certiorari*. The application for the writ shall be made on affidavit. The parties to this case and lawyers generally denominate this application a petition. When the writ is granted and the inferior tribunal has certified the record, the petition has served its purpose; for, as this court has said, the matter then proceeds on the record returned. The Code does not require an answer of any kind to the petition. Section 332 says that the court to whom application is made for the writ may require a notice to be given to the adverse party, or may grant an order to show cause why the writ should not be allowed, or may grant the writ without notice.⁸⁷

If notice is given, or an order to show cause is granted, the application may be resisted upon the ground that the petition is insufficient, or that the court is without jurisdiction to issue the writ, or that there is an appeal, or a plain, speedy, and adequate remedy, or any other ground, if there be one, showing that it is not a proper case for the writ. The petition is inspected and taken to be true at this hear-

ing. Counter affidavits, parol evidence, or even the records of the inferior tribunal, are not considered.

If the writ is granted without notice, the question whether the case is a proper one for the issuance of the writ may be tried in the same way on a motion to quash, made before the return.³⁸ 4 Ency. Pl. & Pr. 195-197. This sufficiently demonstrates the functions of the petition. If this was a proper case for the issuance of the writ, which we do not determine, the extent of the review upon the writ by the district court should have been to ascertain from the record whether the county court regularly pursued its authority. Section 337, Rev. Code. It is to be taken from section 331 that if the county court exceeded its jurisdiction, or the judge thereof greatly abused his discretion, the authority was not regularly pursued.

An inspection of the record of the county court, as returned, reveals the following conditions: On the 7th day of June Guillet Brothers filed their complaint against Laura H. C. Koehn on a cause of action within the jurisdiction of the county court. On the 3d day of July the defendant Koehn answered the complaint with a general denial. * * * On September 24th, after the case had been set for trial, the defendant filed a motion for leave to amend her answer. No affidavit was filed to support this motion. On the 30th day of September the case was continued to the 5th day of October. On October 2d the plaintiffs served notice on the defendant, calling up her motion to amend for October 5th. On October 5th the case was continued until the 17th of October. On the 17th of October the motion to amend was denied; the order denying the same reciting that the defendant had been duly notified that the hearing of the motion was set for that day, and that she did not appear, either in person or by attorney. And thereafter, on the 17th day of October, the case came on regularly for trial, and judgment was rendered against the defendant. On the 5th day of December a motion was made to vacate the judgment, on the alleged grounds that the defendant had no notice that the cause would be tried on the 17th of October, and that it had never been regularly set for trial on that date. * * *

From this record it appears that the case was regularly set for trial, and thereafter continued until the day the judgment was rendered, * * *

The record recites that the defendant had due notice that her motion to amend would be taken up on the 17th of October. That recital is not contradicted in any way in the record, or otherwise, and under such circumstances, of course, must be taken as true; for such a presumption must be indulged in favor of the record of such a court as a county court. The matter most seriously complained of does not appear in the record of the county court, but only in the petition for the writ; therefore it cannot be considered. It thus appears that the county court had jurisdiction of the subject-matter of the action and the person of the defendant; that the cause was regularly set for trial and regularly continued; that due notice of every step taken was given to the defendant; and that it was her business to attend to her case.

Under these circumstances, the judgment of the district court must be and is reversed, and the cause remanded, with instructions to affirm the judgment of the county court.

*Reversed and remanded with instructions.*³⁶

³⁶ The record of a court, unless enlarged by statute, consists of the summons, return, pleadings, verdict and judgment.—State ex rel. v. Goodrich, (1913) 257 Mo. 40; Prindle v. Anderson, (1838) 19 Wend. (N. Y.) 391. Records of boards consist of such documents and orders as remain on file with them, together with such written accounts of proceedings and evidence as they may make. Central Pacific RR. Co. v. Board of Equalization, (1867) 34 Cal. 352.

While ordinarily there is no hearing on the application for the writ, and no opportunity is given to resist its issuance, in a few states such a hearing is provided and the court is permitted to look beyond the petition and the record to determine the propriety of issuing the writ.—White v. County Commissioners, (1879) 70 Me. 317; 11 O. J. 157; Fairbanks v. Fitchburg, (1881) 132 Mass. 42; In re Landaff, (1856) 34 N. H. 163; Sumerow v. Johnson, (1892) 56 Ark. 85; District of Columbia v. Brooks, (1907) 29 App. D. C. 563.

³⁷ This is the ordinary provision in states having the "code" procedure.—4 Encyc. Pl. & Pr. 196.

³⁸ Strictly speaking, the writ may be quashed only after the return, but may be superseded before the return. The effect is much the same and the distinction is not closely observed.—Hauser v. State, (1873) 33 Wis. 678; Ferguson v. Jones, (1834) 12 Wend. (N. Y.) 241.

³⁹ *Rule stated.* In Birdsall v. Phillips, (1837) 17 Wend. (N. Y.) 464, 470, the court said: "Wherever, were the suit at common law, the matter alleged for error is of such a nature that a bill of exceptions would be essential to its review by writ of error, a *certiorari* will not reach it, unless some statute has enlarged the effect of that writ in the particular case."

The petition, affidavit or complaint, upon which the writ is sought, is drawn according to the general rules of pleading. It should allege the existence or nonexistence of any facts necessary to make out a *prima facie* case, and allege that these facts appear of record, and

it should contain a specific statement of the errors complained of.—
2 Spelling on Inj. and other Extraordinary Rem. § 1992.

Where, as is not uncommon, statutes have enlarged the scope of *certiorari*, giving it the force and effect of an appeal, the petition may set out not only errors of law but erroneous conclusions of fact; in which cases the petition is often voluminous, assuming the form and dimensions of a transcript or bill of exceptions, covering not only the record proper but the evidence and papers in the cause. Spelling on Inj. and other Extra. Rem. § 1995. In such cases the return should show the rulings made in the course of the trial or hearing and so much of the evidence as may be necessary to show the bearing of such rulings. Id. § 2006.

CITY OF LOS ANGELES v. YOUNG.

Supreme Court of California. 1897.

118 California, 295.

HENSHAW, J. This is an appeal from the judgment of the superior court upon a writ of review vacating and annulling a judgment rendered in a justice's court. One McCombs, in the justice's court of the township of Los Angeles, had instituted a suit against the city of Los Angeles and C. Compton. The defendants appeared in said action by their attorney, W. E. Dunn, and interposed demurrers to the complaint. Thereafter the justice of the peace heard and passed upon the demurrers, overruled them, and granted defendants two days' time in which to answer. Defendants failed to answer, and judgment by default was entered for plaintiff. The statutory period of 30 days during which an appeal could have been taken to the superior court passed, and afterwards the defendants in that action obtained from the superior court of the county a writ of review. After hearing upon this writ, the superior court annulled the judgment of the justice's court, and this appeal followed.

The contention of petitioners in the superior court was that neither they nor their attorney had been served with notice of the time set for the trial; that service of such notice upon them is, under section 850 of the Code of Civil Procedure, an imperative prerequisite to the jurisdiction of the justice of the peace to try the cause; and that under the writ they were entitled to show, and did show, to the satis-

faction of the superior court, by legal and competent evidence, that no notice had in fact been served.

* * * * *

* * * Here the justice returned, as by the writ he was commanded to do—First, a transcript of his docket entries, by which it appeared that on May 22d notice was issued, and, upon May 25th notice was returned and filed; and, second, the papers and files in the case, among which is a written notice of the date set for the hearing of demurrer, addressed to W. E. Dunn, attorney for defendants, dated May 22d, and notifying defendants' attorney that the demurrer had been set for hearing upon the 25th day of May, 1896, at 1:30 o'clock p. m. This notice bears the indorsement: "Received copy of the within notice —, 1896. W. E. Dunn, Attorney for Defendant. Served H. H. Y." Upon the hearing it was permitted to be shown that "H. H. Y." are the initials of H. H. Yonken, a constable, and that he served the notice in question upon the 23d day of May, 1896, by leaving a copy thereof with a man in the office of W. E. Dunn, which man acknowledged service of the notice as above set forth in the name of Dunn. This testimony, introduced by petitioners, was followed under objection of appellants by the testimony of the attorney Dunn, who swore that he did not know who signed his name to the notice; that it was not signed by any one authorized so to do; and that, in fact, he had never received notice of the time set for the hearing of the demurrer.

Upon *certiorari*, if it becomes necessary for the court of review to be put in possession of the facts upon which the court below acted, and which are not technically of record, it is competent for that court to require the lower court to certify such facts in its return to the writ, and this statement of facts would then be a part of the record. 2 Spell. Exr. Relief, § 2020. Under this principle, it was not perhaps improper for the trial court to admit the evidence of Yonken, not as contradicting the record of the justice, but as supplemental thereto. *People v. San Francisco Fire Dept.*, 14 Cal. 479.

But it may be set down as a universal rule that as the province of the writ of *certiorari* is to review a record of an inferior court, board, or tribunal, and to determine from the record whether such court, board, or tribunal has exceeded

its jurisdiction, evidence *dehors* the record, and contradicting it, is never permitted. The common-law writ of *certiorari* tried nothing but the jurisdiction, and incidentally the regularity of the proceedings upon which the jurisdiction depends. In many cases, therefore, under such writs, the evidence upon which the court acted in determining its jurisdiction was made a part of the record, and reviewed under the writ; but the inquiry was always limited to the evidence before the tribunal whose determination was under review. If the jurisdiction of the inferior tribunal depended upon a question of fact, that fact was never tried *de novo* upon its merits, but the inquiry thereupon was limited strictly to the evidence upon which the inferior tribunal acted. *People v. San Francisco Fire Dept., supra.* * * * In this case the court reaches its conclusion by admitting and considering the parol testimony of the attorney Dunn to impeach and contradict the record of the justice, which in itself was legally sufficient to show jurisdiction. This may not be done. The evidence of Dunn was inadmissible, and should not have been admitted. Therefore the judgment is reversed, and the cause remanded.⁴⁰

⁴⁰ "The general rule undoubtedly is that the return to a *certiorari* must show everything on which the plaintiff relies for relief, and that, if the return is insufficient, he must cause it to be supplemented by amendment. He cannot rely upon the affidavit for *certiorari* to supply the deficiencies of the return."—*Whitbeck v. Common Council*, (1883) 50 Mich. 86, quoted in *McGurrin v. Township Board*, (1915) 186 Mich. 475, 480.

PEOPLE EX REL. ROBINSON v. FERRIS.

Court of Appeals of New York. 1867.

36 New York, 218.

BOCKES, J. This is an appeal from an order of the General Term of the Supreme Court, in the fourth district, made in a case brought before that court by common law *certiorari*.

Proceedings were taken, under the statute, to lay out a public highway through the enclosed lands of the relator,

Gilbert Robinson and one Stephen Timmerman, in the town of Argyle, Washington county, which resulted in an order by the commissioners of highways of the town laying out the proposed road. An appeal from this order was taken, as provided by law, whereupon the county judge appointed three referees to hear and determine the appeal. The referees having notified the parties entitled to notice, proceeded in the execution of their duties, and finally (January 26th 1858) made an order, concurred in and signed by two of their number, by which they affirmed the order of the commissioners laying out the road. The relator sued out a common law *certiorari*, directed to the referees, to which they made return of their proceedings, and on which return the case was heard and decided by the Supreme Court. That court made an order as follows: "*Decision of the referees vacated; order appointing them set aside, the appeal to stand, to be determined by a new board of referees, to be appointed by the county judge.*"

The case is here on an appeal from the latter portion of the order above italicized. It will be observed that the part of the order vacating the decision of the referees is not appealed from, and, of course, is not under review. That was equivalent to a reversal, by the Supreme Court, of the proceedings and order of the referees, and to that extent the order stands unchallenged before this court. The propriety or validity of the remaining portion of the order, is the subject of the present examination.

The *certiorari* was directed to the referees and brought up for review only the proceedings and determination of those officers, and the only duty devolving on the Supreme Court was to affirm or reverse their proceedings and decision. This was the extent of the authority resting in that court. (10 Wend., 167; 3 Hill. 426; 5 id., 413; 7 id., 577.) It did not bring up the proceedings prior to their appointment, or present any question in regard to the regularity or correctness of the order appointing them; and it must necessarily follow that it was erroneous in that court to set aside such order, and prescribe future action in the case. As above suggested, the authority of the Supreme Court was limited to a reversal or affirmance of the order and proceedings of the referees.

* * * * *

41 "The only office of the common law writ of *certiorari* is to bring

before the court the record of the proceedings of an inferior tribunal for inspection, and the only judgment to be rendered is, that the writ be quashed or that the record of the proceedings be quashed."—*Cass v. Duncan*, (1913) 260 Ill. 228.

"On a writ of error returnable in this court, which in judgment of law removes the record, we may, on a reversal, award a *venire de novo* returnable either in the court below or at the circuit. But there is no such practice upon *certiorari*. There the only judgment is affirmance or reversal, leaving the parties in the latter case to begin *de novo*."—*Luff v. Pope*, (1843) 5 Hill (N. Y.) 413, 416. "The trial is not *de novo*, but on the record; and the only matter to be determined is the quashing or the affirmation of the proceedings brought up for review."—*Benedict v. Board of Revenue*, (1912) 177 Ala. 52. Statutes sometimes authorize the court to make such order, judgment or decree in the premises as justice may require, or otherwise enlarge the common law power of the court.—*Farmington River Water Power Co. v. County Commissioners*, (1873) 112 Mass. 206; *Hopple v. Best*, (1879) 4 Colo. 555; *Dryden v. Swinburn*, (1879) 15 W. Va. 234; *Bringold v. Spokane*, (1898) 19 Wash. 333; *Barclay v. Cameron*, (1860) 25 Tex. 232.

In *Dryden v. Swinburn*, *supra*, the court said:—"So far as I have been able to ascertain, the State Supreme Courts generally, who upon the reversal of a final judgment of an inferior court on a writ of *certiorari* by a superior court have decided that the case should be tried *de novo* in the superior court, have so held, not because this was common law, but because by the statutes of these States such a trial in the superior court was in such case authorized,"—citing cases from Alabama, Indiana, Tennessee, Texas and Massachusetts.

SECTION 3. MANDAMUS.

CROCKER v. JUSTICES OF SUPERIOR COURT.

Supreme Judicial Court of Massachusetts. 1911.

208 Massachusetts, 162.

RUGG, J. The petitioners were indicted for a felony. Seasonably they presented motions, suggesting that because of "local prejudice and other causes" they could not have an impartial trial in the county of Suffolk, and asking that the proceeding be removed to another county for trial. Thereafter, an order was entered by a justice of the superior court, which as amended was as follows: "I refuse to hear the parties on the several motions of the defendants that the court order a trial of these indictments in some county other than the county of Suffolk, believing that I have no jurisdiction to entertain or to grant such motions." This is a petition for

a writ of *mandamus* to compel the superior court to entertain and decide the motions.

The first question presented is whether *mandamus* lies in a case of this sort. It becomes necessary to determine the meaning of the indorsement made in the superior court upon the motions filed by the defendants there, who are petitioners here. It is perhaps susceptible of two constructions, one that the court has considered the subject-matter, and ruled as matter of law that it has no jurisdiction of such motions, the other that the court has abdicated its province and refused to exercise its judicial function, adding by way of parenthesis that its excuse is a belief that it has no jurisdiction in the premises. We should ordinarily be loath to adopt the latter construction. But the language appears to be strongly phrased with an evident intent to convey that thought, and an examination of the papers discloses that, as originally entered, an unequivocal ruling of law was made disposing of the motion. If that had stood as the final action of the Superior Court, the only remedy of the defendants would have been by exception or appeal under Rev. Laws, c. 219, §§ 32, 34, and 35. But it did not so stand and the action of that court was changed to a statement of declination even to hear the parties. We are constrained therefore to interpret the order as a refusal to act at all upon the motions.

The writ of *mandamus* is an extraordinary remedy and is usually granted only when no other adequate relief can be afforded. It cannot be employed to supersede an appeal or exceptions in ordinary cases, and does not lie to review a final judgment. Proceedings of inferior tribunals within their jurisdiction in the exercise of the power confided in them cannot be revised in this way. It does not lie to correct errors committed in the course of trial, even though there be no remedy by exception or appeal. *Selectmen of Gardner v. Templeton St. Ry. Co.*, 184 Mass. 294, 297, 68 N. E. 340; *Finlay v. Boston*, 196 Mass. 267, 270, 82 N. E. 5; *McCarty v. St. Comm'rs*, 188 Mass. 338, 74 N. E. 659; *In re Key*, 189 U. S. 84, 23 Sup. Ct. 624, 47 L. Ed. 720. But one of the ancient functions of this writ was to compel action by lower judicial tribunals respecting matters properly before them and within their jurisdiction. If such courts refuse to exercise their judicial functions for any reason or decline to decide matters pending before them *mandamus* has always been regarded as

the appropriate means by which to set in motion their jurisdictional power. It lies to compel the performance of whatever appertains to the duty of lower courts, where there has been for any reason a refusal to act. Its agency in cases of this class is confined to setting in motion the judicial activities so that a decision will be reached, but it does not extend to any direction as to what that decision ought to be. *Chase v. Blackstone Canal Co.*, 10 Pick. 244; *Rice v. Commissioners*, 13 Pick. 225; *Morse, Pet'r*, 18 Pick. 443; *Carpenter v. County Com'rs*, 21 Pick. 258; *Smith v. Boston*, 1 Gray, 72. See, also, *In re Winn*, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873. *In re Parker, Pet'r*, 131 U. S. 221, 9 Sup. Ct. 708, 33 L. Ed. 123; *Rex v. Stepney Corporation*, (1902) 11 K. B. 317, 321. It was the plain duty of the justices of the superior court to consider and exercise their judicial faculty upon the subject-matter presented by the motions filed in that court, and either overrule them as matter of law or in the exercise of a sound judicial discretion determine whether they ought to be granted. *French v. Jones*, 191 Mass. 522, 78 N. E. 118, 9 L. R. A. (N. S.) 1096, 114 Am. St. Rep. 619; *Cheney v. Barker*, 198 Mass. 356, 84 N. E. 492, 16 L. R. A. (N. S.) 436. As we construe the indorsement of the superior court upon the motions to be a mere refusal to act, and not the expression in pursuance of judicial authority of any opinion or ruling, Rev. Laws, c. 219, §§ 32 and 35, authorizing an aggrieved defendant in a criminal case to appeal from a judgment of the superior court founded upon matter of law apparent upon the record and to allege exceptions to an opinion, ruling, direction or judgment upon any question of law, does not apply, and there appears to be no other adequate remedy open to the petitioners except this petition.

The issuance of the writ of *mandamus* is rarely, if ever, matter of right, and commonly rests in the sound judicial discretion of the court. It becomes necessary to determine whether the superior court in fact does have jurisdiction to entertain and decide the motions, for the reason that the writ ought not to issue when it can subserve no useful purpose to the petitioners.

* * * * *

Considerations based upon historical research, authority and sound principle lead to the conclusion that it was within the jurisdiction of the superior court to consider and grant

the motions filed by the several petitioners here, defendants in that court, if upon investigation it was found that a trial before an indifferent jury could not be had in Suffolk county.

* * *

Writ to issue. * * *

STATE EX REL. PUMP WORKS v. HOMER.

Supreme Court of Missouri. 1912.

249 Missouri, 58.

GRAVES, J. A short statement will suffice in this case. In November, 1909, the Texas Portland Cement Company, a corporation of West Virginia, sued the International Steam Pump Company, a corporation of New Jersey, and the Snow Steam Pump Works, a corporation of New York, in the circuit court of the city of St. Louis. *State ex rel. v. Sale*, 232 Mo. loc. cit. 169, 132 S. W. 1119.

In this case pending in the said court the defendants specially appeared and moved to quash the service. These motions were sustained May 26, 1910, and on the next day the plaintiff in that case filed a motion to compel the defendants in that case to plead to its petition. This motion the court overruled, and upon June 28, 1910, the plaintiff in the circuit court case as relator in this court applied for a writ of *mandamus* to compel the honorable Moses Sale, then judge of the circuit court, to proceed with the case. Our alternative writ issued to which Judge Sale made his return. * * *

* * * The mere fact that there might be another remedy is not sufficient to preclude the use of the writ of *mandamus*. The other remedy must be adequate, and whether it is adequate is one appealing to the judgment and discretion of this court when the circumstances of each case are laid before us. * * *

There is much respectable authority to the effect that *mandamus* is the only proper remedy where a circuit court refuses to proceed with a case, because the court was of opinion that it did not have jurisdiction of the cause, or of the parties to the cause. In the circuit court case the trial court refused

to entertain jurisdiction and proceed with the case upon a preliminary objection to the return of service to the process. In the very early case of *Castello v. St. Louis Circuit Court*, 28 Mo. loc. cit. 274, we had up a very similar question. The question there was whether a notice of contest in a contest election case was sufficient to give the circuit court jurisdiction to hear and determine the case upon its merits. The circuit court held the notice insufficient and refused to proceed further with the case. This court issued its alternative writ and then proceeded to determine whether or not the trial court was right or wrong in refusing to proceed further. We held that the trial court was right and that the notice was insufficient, and denied the peremptory writ for that reason; but in the course of the opinion we thus spoke upon the question in issue here: "Upon the facts disclosed in the petition in this case for a *mandamus* upon the circuit court, a majority of this court determined that a conditional *mandamus* should be awarded, and it was accordingly so ordered. This determination was based upon the principle that where an inferior judicial tribunal declines to hear a case upon what is termed a preliminary objection, and that objection is purely a matter of law, a *mandamus* will go, if the inferior court has misconstrued the law. The cases of *The King v. The Justices of the First Riding of Yorkshire*, 5 Barn. & Adol. 667, and *Rex v. The Justices of Middlesex*, 5 B. & Ad. 1113, *The King v. Hewer*, 3 Ad. & Ellis, 715, and *Regina v. The Recorder of Liverpool*, 1 Eng. Law & Eq. R. 291, are believed to be conclusive upon this point so far as the English authorities go; and our attention had not been directed to any American cases conflicting with this view of the law. If the circuit court declines to go into the merits of the case because the party complaining has not given the notice required by the statute, that was a preliminary objection upon a point of law which this court can review upon a writ of *mandamus*; and if this circuit court called for a notice which the statute did not require, the *mandamus* ought to be made peremptory. It is not deemed important to go into any extended examination of this question, since, upon the return of the conditional *mandamus* by the circuit court, we were satisfied that the construction which that court gave to the statute was correct."

So in the case at bar. The trial court entertained an ob-

jection to a preliminary matter and then refused to proceed further. The return was before the court and was therefore an undisputed fact, and it was thus a pure question of law as to whether the court should hear the case upon its merits.
* * *

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⁴² The court, in the course of a long opinion, cites the following cases as sustaining the views which it expresses:—King v. The Justices, 5 Barn. & Adol. 667; Rex v. The Justices, 5 Barn. & Adol. 1113; King v. Hewes, 3 Ad. & Ellis 725; Regina v. The Recorder, 1 Eng. L. & Eq. R. 291; Bayha v. Phillips, 97 Mo. 347; Hill v. Superior Court, 15 Cal. App. 307; In re Hohorst, 150 U. S. 663; People v. Judge, 22 Mich. 493; Ex parte Hill, 165 Ala. 365; State v. Judge, 49 Fla. 380; Ex parte Schollenberger, 96 U. S. 369.

STATE EX REL. REYNOLDS v. GRAVES.

Supreme Court of Nebraska. 1902.

66 Nebraska, 17.

SULLIVAN, C. J. This action, brought for the purpose of compelling respondent, as judge of the eighth judicial district, to vacate two provisional injunctions allowed by him at the instance of Oran B. Phillips, grows out of a controversy over the right of possession of a quarter section of farming land in Thurston county. One 80 of the land is owned by Blanche R. Phillips, a minor, and the other 80 is part of the estate of Mary V. Phillips, deceased. On August 28th, this year, Oran B. Phillips instituted two actions, one as guardian of Blanche R. Phillips and the other as administrator of the estate of Mary V. Phillips, to enjoin the relator from going upon the real estate in question and from interfering in any way with the crops growing thereon. * * *

The case now before us was brought on the theory that the respondent exceeded his authority in granting the provisional injunctions and that this court should by writ of *mandamus* compel him to rescind his action. The submission of the case was somewhat irregular, but from the pleadings and admissions made by counsel at the trial it is, we think, entirely clear that relator was, and has been ever since March 1, 1901,

in exclusive possession of the land under and by virtue of a written lease executed to him by Oran B. Phillips, the husband of Mary and the father of Blanche. It further appears that the land is within the limits of the Omaha Indian reservation, and that it had been allotted to Mary and Blanche, as members of the Omaha tribe of Indians, in accordance with the acts of congress providing for the allotment in severalty of tribal lands. The ground upon which Phillips proceeds in the actions brought by him against the relator is that the relator's lease is invalid, and his possession, therefore, unlawful. Whether this position is tenable we need not determine. It may be that the lease is void. Conceding that it is, the fact still remains that relator entered under it, and was in actual, exclusive, and peaceable possession of the land, and of the crops growing thereon, at the time the injunctions were allowed. This being so, the necessary effect of the order made by respondent, if heeded or enforced, would be to dispossess the relator, exclude him from the property, and transfer his possessory right to Phillips, who was left free to enter and reap where he had not sown. Phillips was, it is true, claiming the land; but he did not occupy it; and the injunctions were, therefore, not granted for the purpose of preventing a threatened invasion of a present actual possession. Clearly the action of respondent in attempting to take from relator, without a hearing or an opportunity to be heard, the possession of real and personal property which he claimed, and still claims, was rightfully his cannot be justified as an exercise of judicial power. The provisional injunction was never designed to transfer the possession of property from one litigant to another. A court or judge cannot thus dispossess a party, and then compel him to produce evidence and establish his title in order to obtain restitution. "It has been decided repeatedly," says Mr. Justice Campbell in *Railroad Co. v. Iosco Circuit Judge*, 44 Mich. 479, 7 N. W. 65, "that any decree or order divesting possession or rights on a preliminary inquiry is illegal and void so that no one need respect or obey it." In *Calvert v. State*, 34 Neb. 616, 52 N. W. 687, a case which is in no material feature distinguishable from the one at bar, it was held that the provisional injunction allowed by the district judge was absolutely null. In the opinion, written by Maxwell, C. J., it is said: "A temporary injunction merely prevents action until a hearing can be had. If it goes

further, and divests a party of his possession or rights in property, it is simply void." This statement seems to be fully sustained by the adjudged cases in other jurisdictions, and we have found no decision giving color or countenance to a contrary view. But whether the action of respondent be regarded as absolutely void or only voidable, as his counsel contends, it is manifestly an abuse and perversion of process that ought to be speedily corrected.

We have, of course, authority to review and reverse it in an appellate proceeding; but, under the circumstances here disclosed, that remedy is not, in our judgment, an adequate one. The rights of the relator can be adequately protected only by the prompt rescission of the orders of which he complains; and the power to grant this relief by *mandamus* is certainly vested in this court. The superintendent authority of the king's bench over inferior tribunals is, to the extent that it may be exercised by the use of the writ of *mandamus*, included in and part of the original jurisdiction given by the constitution to the supreme court. In *State v. Beall*, 48 Neb. 817, 67 N. W. 868, this court issued a *mandamus* requiring the judge of the Tenth district to receive and enter of record a verdict which was, in his judgment, defective both in form and substance. Although no reference is made in the opinion to the source of the authority under which the court acted, what it did was undoubtedly an exercise of the revisory jurisdiction or superintending control by which the king's bench from the earliest times kept inferior courts within their legitimate bounds. Whether the verdict responded to the issues made by the pleadings and was sufficient in form was a question which the trial court was bound to decide. It was a judicial question, and the decision of it was, after final judgment, subject to revision by this court in the exercise of its appellate jurisdiction. The allowance of the writ of *mandamus* was, therefore, justifiable only on the ground that the decision of the trial court was erroneous and the ordinary remedy for its correction inadequate. While the writ of *mandamus* cannot be made to perform the functions of an appeal or proceeding in error, it may be, and commonly is, employed to coerce judicial action in cases where courts or magistrates have exceeded their jurisdiction; and, according to some authorities, its use is warranted even in cases where jurisdiction was not wanting, but power and discretion were flag-

rantly abused. Some of the cases dealing with this question are *People v. Judge of St. Clair Circuit*, 31 Mich. 456; *People v. State Treasurer*, 24 Mich. 468; *Railroad Co. v. Iosco Circuit Judge*, 44 Mich. 479, 7 N. W. 65; *Ex parte Bradley*, 7 Wall. 364, 19 L. Ed. 214; *Ex parte Pile*, 9 Ark. 336; *Wood v. Strother*, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249; *Havemeyer v. Superior Court* (Cal.) 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; *City of Huron v. Campbell*, 3 S. D. 1309, 53 N. W. 182; *State v. Johnson*, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33; *State v. Laughlin*, 75 Mo. 358.

In disposing of this case it is not necessary to determine whether *mandamus* will ever issue to correct an error made by an inferior court in the exercise of jurisdiction. That question is not now before us, and we therefore go only to the extent of holding that upon the facts in the present record the writ should be allowed.

*Writ allowed.*⁴³

⁴³ *Accord*:—*Bishop v. Fischer*, (1915) 94 Kan. 105.

WOOD v. STROTHER.

Supreme Court of California. 1888.

76 California, 545.

HAYNE, C. This is an appeal from a judgment awarding a writ of *mandamus* to the auditor of San Francisco to countersign a street assessment warrant under the act of 1872. That act provides that the warrant shall be countersigned by the auditor, "who, before countersigning it, shall examine the contract, the steps taken previous thereto, and the record of assessments, and must be satisfied that the proceedings have been legal and fair." Laws 1871-72, p. 813, § 10. The word "fair" seems very loosely used in the above provision. In common usage it would convey some idea of justice or equity. But it is not possible that it could have been intended that in a case where the proceedings are legal—that is to say, in accordance with the requirements of the act—the auditor could refuse to sign upon the ground that the law was not just, or

upon his own undefined notions of fairness. The word, therefore, adds nothing to the force of the word "legal," but is one of those expressions which are put in for the sake of the sound, and which convey no definite meaning. * * *

The proceedings being "legal," the auditor was wrong in his refusal to countersign the warrant; and the remaining question is whether he can be compelled to sign by the writ of *mandamus*; in other words, whether *mandamus* is the proper remedy. The learned counsel for the appellant has directed most of his argument to this question. The argument against the writ is, in substance, that the statute requires the auditor to examine the proceedings, and satisfy himself that they are legal before signing; and that if he has examined them, and become satisfied that they are not legal, the most that can be said is that he has committed an error in a matter confided to his discretion; and that the function of the writ is not to review such exercise of discretion.

It must be acknowledged that this argument is exceedingly plausible. There are innumerable cases in which it has been laid down that *mandamus* cannot issue to control discretion. The rule—which is undoubtedly correct, when properly understood—has been expressed in various forms. It has been repeatedly said that the writ cannot perform the functions of a writ of error; that it cannot issue to revise judicial action, but can only compel the performance of ministerial functions; and that it will issue to compel a tribunal to act in some way, but not in any particular way. These formulas undoubtedly express a truth; but they express it in an inaccurate and misleading manner. And by reasoning from them, as if literally and in all cases true, courts have sometimes been led into error, and have frequently been forced to call acts "ministerial" which are plainly not so. An examination of the authorities will demonstrate the inaccuracy of the above phrases.

Thus it is not accurate to say that the writ will not issue to control discretion; for it is well settled that it may issue to correct an abuse of discretion, if the case is otherwise proper. *Ex parte Bradley*, 7 Wall. 377; *State v. Lafayette Co.*, 41 Mo. 226; *Village of Glencoe v. People*, 78 Ill. 339; *People v. Superior Court*, 10 Wend. 285; *Railroad Co. v. Stockton*, 51 Cal. 339; *Tapp. Mand.* 14.

So while, in one sense, it is correct to say that the writ can-

not be made to perform the functions of a writ of error, in another sense it is not; for as was said by Chief Justice Marshall in *Ex parte Crane*, 5 Pet. 193: "A *mandamus* to an inferior court of the United States is in the nature of appellate jurisdiction." See, also, *People v. Bacon*, 18 Mich. 253.

So it is not universally true that the writ will not issue to control judicial action, or to compel a tribunal, to whom the examination of a matter is intrusted, to act in a particular way. The cases in our own state show this. Thus in *Russell v. Elliott*, 2 Cal. 245, the writ issued to compel a judge to enter judgment upon the report of a referee. Here the judge had examined the matter, and had arrived at the conclusion that it was not proper that the judgment should be entered upon the report. But the higher court differed with him, and commanded him to do what as a judge he had refused to do. So in *Mining Co. v. Fremont*, 7 Cal. 130, the writ was issued to compel the judge of a district court to issue an attachment for contempt in disobeying an injunction. A motion had been made to the judge to commit the offender, but the judge had decided that he could not do so. Here the matter was certainly to be determined by the judge in the first instance. He erred in his conclusion. And to say that a correction of such error by *mandamus* is not revising judicial action, or not compelling the judge to act in a particular way, is a misuse of language.

So it is well settled that a *mandamus* may issue to compel a judge to sign a bill of exceptions. *People v. Lee*, 14 Cal. 510; *People v. Rosborough*, 29 Cal. 416; *People v. Keyser*, 53 Cal. 184; *Lin Tai v. Hewill*, 56 Cal. 118; *People v. Crane*, 60 Cal. 279. Whether the party has a right to have a bill, or whether it is in time, are certainly judicial questions, and they are to be decided in the first instance by the judge, who, if he decide them correctly, will not be compelled by the writ to take back his decision. *Clark v. Crane*, 57 Cal. 629. Is anything gained by calling such decision a "ministerial" act?

* * * * *

* * * In New York, where the formulas as to discretion, judicial action, etc., have often been repeated, it has been held that the writ may issue to compel a judge to vacate an order granting a new trial upon the ground of newly-discovered evidence, which order was in violation of the established rules that there must be no laches, and that the newly-discovered

evidence must not be cumulative merely; there being no other adequate remedy. *People v. Superior Court*, 10 Wend. 285, 5 Wend. 114. So where the court of common pleas set aside the report of referees upon the merits, and erred in doing so, the writ issued to correct the error. *People v. Court of Common Pleas*, 12 Wend. 246. So where the court of common pleas granted the plaintiff leave to amend his declaration, but, under an erroneous view of the law, refused to grant leave to the defendant to plead, a higher court (per Bronson, J.) awarded a *mandamus* commanding the inferior court, either to allow the defendant to plead or refuse to allow the declaration to be amended. *People v. Court of Common Pleas*, 18 Wend. 534.

In Michigan, the rule as to discretion, etc., prevails. See *Houghton Co. v. Auditor General*, 36 Mich. 273; *Parks v. Circuit Judge*, 38 Mich. 244; *Wells v. Circuit Judge*, 39 Mich. 21; *Railroad Co. v. Circuit Judge*, 40 Mich. 168; *Stork v. Superior Court*, 41 Mich. 5. Yet in that state the writ has issued in the following cases: To compel a judge to set aside a judgment rendered against the relator, because of an illegal notice of trial, (*People v. Bacon*, 18 Mich. 247;) to compel a court to vacate an order overruling a motion for relator's discharge from arrest, (*Watson v. Superior Court*, 40 Mich. 730;) to compel a judge to vacate an injunction, (*Van Norman v. Circuit Judge*, 45 Mich. 205, 7 N. W. Rep. 796;) to compel a judge to vacate an order denying a motion to amend a record, (*Frederick v. Circuit Judge*, 52 Mich. 529, 18 N. W. Rep. 343.)

In Alabama the rule as to discretion prevails. See *Ex parte Railroad Co.*, 44 Ala. 655, 656. But in that state the writ has issued in the following cases: In *Ex parte Lowe*, 20 Ala. 330, the court had granted a new trial upon condition that costs were paid within a certain time. The costs were paid, but not, as was claimed, within the time prescribed by the order. The court took this view, and made the judgment absolute. The higher court considered that the view of the lower court was erroneous, and awarded a *mandamus* to compel a new trial. * * * And decisions similar in principle have been made in other states. In *Ex parte Pile*, 9 Ark. 336, a judge was compelled by the writ to issue an injunction which he had refused to issue. In *State v. McArthur*, 13 Wis. 407, the writ issued to compel a change of venue. In *Com. v. Sessions*

of *Norfolk*, 5 Mass. 435, it issued to compel a justice to accept a verdict and render judgment thereon.

In view of the foregoing cases, it seems a mere perversion of language to say that the writ will never issue to control judicial action, or to compel a tribunal to act in a particular way. It is by no means intended to assert that the writ could issue in this state in all the cases above referred to. The propriety of the issuance of the writ in any case must depend upon whether, under the law of the state where the litigation arises, the determination was intended to be final; and, if not, upon whether the system of practice furnishes any other adequate remedy. These things might be different in different states. But the cases cited serve to show that the formulas above mentioned are not universally and literally true, and that it is dangerous to reason from them as if they were so. In every case the tribunal that is to act must determine in the first instance whether the case is a proper one for its action. And in our opinion the true tests are whether its determination is intended by law to be final, and, if not, whether there is any other "plain, speedy, and adequate remedy." If the determination of the tribunal was intended to be final, it is plain that it cannot be disturbed, either on *mandamus* or in any other way. If it was not intended to be final, but there is another "plain, speedy, and adequate remedy," the writ cannot issue; for it was not designed to usurp the place of other remedies. But if the determination was not intended to be final, and there is no other adequate remedy, the writ must issue. Otherwise there would be an admitted wrong without a remedy. The writ issues in such case to prevent a failure of justice. And this is its ancient office. * * *

It will generally happen that where discretion is committed to an officer, or where a judicial tribunal is called upon to act, its determination is either final, or only subject to review in certain prescribed ways. But, as above shown, this is not universally true, and it is dangerous to reason as if it were so. The ultimate test is, in our opinion, as we have stated. In the present case there can be no doubt that the auditor was to examine the proceedings, and satisfy himself that they were legal, for the statute expressly says so; and if they were found by the court to be illegal the writ could not issue. But, being perfectly legal, the question is whether the determination of the auditor was intended to be final; and we can see no

ground for saying that it was. There is nothing in the language of the act which shows that it was intended to be final. It certainly would not be final in favor of the contractor. In the numerous cases in which street assessments have been before the court we have never seen it suggested that the signature of the auditor cured previous illegality, and it seems clear that it would not do so. Why, then, should it be final against the contractor, and be conclusive that the proceedings are illegal, when it is apparent that they are not so? If the auditor's determination of this purely legal question were intended to be final, it would have been natural for the charter to have given the parties interested a hearing. Nothing of the kind is provided. The proposition, therefore, must go to this extent: that the auditor is clothed with absolute and despotic authority over the rights of the contractor. We are not prepared to go so far. If the determination of the auditor be not final, then, upon the principles above stated, the writ must issue; for under the street law the failure to sign the warrant brings the proceedings to a complete stop, and there is no other remedy in law or equity. We advise, therefore, that the judgment be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

PER CURIAM: For the reasons given in the foregoing opinion the judgment is affirmed.⁴⁴

⁴⁴ In some states *mandamus* has become a rather common means of taking a summary appeal in cases where the ordinary means of review by appeal, error or *certiorari* are not available or are too slow or too indirect to be satisfactory.

Thus, in Michigan the writ has been very liberally allowed. In *People v. Swift*, (1886) 59 Mich. 529, it was issued to review an order quashing an indictment, the court saying that a writ of error, although available, involves delay, and does not lead as readily as a *mandamus* to a trial on the merits, which public policy requires should not be unduly delayed." In *Townsend v. Circuit Judge*, (1909) 157 Mich. 231, the court declares its intention to follow its practice of reviewing by *mandamus* the action of circuit courts on retaxation of costs, notwithstanding that "the practice is anomalous." In many cases, such as *Siegel v. Circuit Judge*, (1909) 155 Mich. 459, it is held that *mandamus* is a proper remedy to get relief from temporary injunctions which would operate oppressively if left until they could be reviewed by appeal; and the writ will regularly be allowed when the authority to issue the injunctions turns solely upon a question of law,—*B. Siegel Co. v. Circuit Judge*, (1914) 183 Mich. 145. *Mandamus* is a proper means to compel a judge to set aside a service of summons improperly made,—

Jacobson v. Circuit Judge, (1889) 76 Mich. 234; Mitchell v. Circuit Judge, (1881) 53 Mich. 541; to correct the action of the trial court in ordering an unwarranted bill of particulars,—Van Vranken v. Circuit Judge, (1891) 85 Mich. 140; to compel the vacation of an order dismissing a bill in chancery,—Brown v. Pontiac Min. Co., (1895) 105 Mich. 653; to compel the setting aside of a verdict and granting a new trial because of misconduct of the jury,—Churchill v. Circuit Judge, (1885) 56 Mich. 536; to compel the quashing of a *capias ad respondendum* improperly issued,—Gardiner v. Circuit Judge, (1909) 155 Mich. 414; to review the regularity of proceedings for change of venue,—County of Montmorency v. Wiltse, (1900) 125 Mich. 47; Glinnan v. Recorder's Court, (1913) 173 Mich. 674; to vacate an improper order for production of business books,—People v. Circuit Judge, (1878) 38 Mich. 351; to compel the dismissal of a bill for divorce which lacked the required affidavit,—Ayres v. Circuit Judge, (1892) 90 Mich. 380; to set aside a default prematurely taken,—Reid, Murdock & Co. v. Circuit Judge, (1897) 115 Mich. 418; to compel the court to grant a motion to extend the time for settling a bill of exceptions,—Harper v. Circuit Judge, (1909) 155 Mich. 543; to vacate an order closing proofs in a chancery case,—Lansing Lumber Co. v. Circuit Judge, (1896) 108 Mich. 305, in which the court says, "It is with great hesitation that this court acts in a matter involving the discretion of a circuit judge," and it did so in this case largely "because of the importance of the issues involved in the case, which ought not to be disposed of without the proofs on both sides being taken." It has been said, however, that the court will not grant a writ of *mandamus* where the ruling can be reviewed by a writ of error, Cosgrove v. Wayne Circuit Judge, (1906) 144 Mich. 682, although it has been done inadvertently where the impropriety of the remedy was not called to the court's attention (Stock v. Wayne Circuit Judge, (1906) 143 Mich. 489.

So in Alabama, the writ of *mandamus* has become a common method of review where other methods are unavailable or are for any reason unsatisfactory. See *Ex parte Hill*, (1910) 165 Ala. 365; *Brickman v. Wilson*, (1910) 123 Ala. 259; *State v. Miller*, (1920) 204 Ala. 232; *Ingram v. Alabama Power Co.*, (1917) 201 Ala. 13; *Ex parte Watters*, (1913) 180 Ala. 523; *Ex parte Jones*, (1901) 133 Ala. 212; *Wilson v. Duncan*, (1896) 114 Ala. 659.

WINFREY v. BENTON.

Supreme Court of Oklahoma. 1910.

25 Oklahoma, 445.

DUNN, J. This case presents error from the district court of Carter county, and submits for our consideration and determination the question of whether or not *mandamus* is the proper remedy to be applied where a justice of the peace

wrongfully denies a change of venue, where a party in his court makes proper application for the same.

The general rule obtaining in such cases is stated by Mr. Spelling in his work on Extraordinary Relief, at section 1390, as follows: "*Mandamus* being an extraordinary remedial process should never be employed where the party seeking it may obtain redress in the ordinary course of judicial proceedings, in the one case by original action, and in the other by employing the means afforded by law for the correction of errors after a suit has been already instituted. In the latter case this common reason is reinforced by the additional one of the inconvenience and confusion which would result from allowing litigants to resort to the appellate courts for correction of errors in advance of opportunity on the part of the lower court to correct its errors before final judgment and upon motion for new trial, and of the appellate court to review the entire record in the regular way, when it can enjoy the advantage of having the whole case before it. It is unimportant that the decision made was erroneous; the superior court will not interfere, but leave the relator to pursue whatever ordinary methods the law has provided for a review and correction of errors." The foregoing states the general rule applicable to the use of this extraordinary writ wherever it is invoked, and a number of courts have had occasion to pass on the question where it involved the identical proposition which we now have before us. Although there is some little conflict among the authorities, the great weight holds that *mandamus* is not the proper remedy, but that in such a case the ruling is merely error, subject to be corrected, like all other errors, on appeal, that the justice does not lose jurisdiction, and that the judgment rendered at the conclusion of the case is not a nullity or void for the want of jurisdiction. This conclusion is sustained by the following authorities: *Barnhart & Bro. v. Davis et al.*, 30 Kan. 520, 2 Pac. 633; *Ellis v. Whitaker et al.*, 62 Kan. 582, 64 Pac. 62; *State ex rel. Proctor et al. v. Cotton*, 33 Neb. 560, 50 N. W. 688; *City of Ottumwa v. Schaub*, 52 Iowa, 515, 3 N. W. 529; *County of San Joaquin v. Superior Court of San Joaquin County*, 98 Cal. 602, 33 Pac. 482; *State ex rel. Johnson v. Washburn*, 22 Wis. 99; *People ex rel. Kindiel v. Clerk of the District Court of Arapahoe County*, 22 Colo. 280, 44 Pac. 506; *Galbraith v. Williams*, 106 Ky. 431; 50 S. W. 686; *People ex rel. Clark et al. v. McRoberts*,

100 Ill. 458; *People ex rel. Flagley v. Hubbard*, 22 Cal. 35; *Ex parte Chambers*, 10 Mo. App. 240; *Hamilton v. Smart*, 78 Kan. 218, 95 Pac. 836.

It follows, therefore, that the petition of plaintiff in error in this court is sustained, and the judgment of the trial court is reversed, and the cause dismissed.⁴⁵

KANE, C. J., and TURNER and HAYES, JJ., concur.
WILLIAMS, J. dissents.

⁴⁵ *Contra*: *Ex parte Reeves*, (1874) 51 Ala. 55; *State v. Williams*, (1906) 127 Wis. 236; *State v. District Court*, (1899) 77 Minn. 302.

STATE EX REL. NASH v. SUPERIOR COURT.

Supreme Court of Washington. 1914.

82 Washington, 614.

Application filed in the supreme court January 30, 1914, to compel the superior court for Pacific county, Wright, J., to vacate an order for change of venue, and proceed with the trial of the cause. Writ granted.

CROW, C. J. * * *

* * * The plaintiff filed her motion for a change of venue from Pacific county to Clarke county upon the ground of convenience of witnesses and for the promotion of the ends of justice. This motion was resisted by the defendant upon the ground that the plaintiff's showing was not sufficient, * * * Affidavits were filed supporting and resisting the application. The trial court granted plaintiff's motion, and transferred the cause to Clarke county. Thereupon the defendant Joseph H. Nash, as relator, applied to this court for a writ of mandate to compel the Honorable Edward H. Wright, as judge of the superior court in and for Pacific county, to vacate his order granting the * * * change of venue, and to proceed with the trial of the cause in Pacific county.

The respondent contends that the relator has no remedy by writ of mandate, but that his remedy, if any, is by writ of *certiorari*, evidently meaning an appeal. This contention can-

not be sustained. *State ex rel. Howell v. Superior Court*, 144 Pac. 291. In *State ex rel. Scougale v. Superior Court*, 55 Wash. 328, 104 Pac. 607, 133 Am. St. Rep. 1030, the superior court entered an order granting a change of venue. Thereupon the plaintiff, as relator, applied to this court for a writ of mandate directing the lower court to proceed with the trial. The respondent, by demurrer, interposed in this court, contended that the relator had an adequate remedy by appeal. Disposing of this contention, we said:

"This view is not sustainable. If the change of venue was erroneously made, we cannot presume that the superior court of Snohomish county will assume to exercise jurisdiction; nor could we, upon an appeal from that court, direct the superior court of Pierce county to proceed with the trial. The remedy by appeal is therefore inadequate. *State ex rel. Wyman, etc., Co. v. Superior Court*, 40 Wash. 443, 82 Pac. 875, 2 L. R. A. (N. S.) 568, 111 Am. St. Rep. 915 (5 Ann. Cas. 775); *State ex rel. Miller v. Superior Court*, 40 Wash. 555, 82 Pac. 875, 2 L. R. A. (N. S.) 395, 111 Am. St. Rep. 925."

No sufficient showing has been made that a change of venue is necessary for the convenience of witnesses residing in this state. The action should be retained for trial in Pacific county. Let the writ issue.⁴⁶

⁴⁶ *Accord*:—*Glinnan v. Judge of Recorder's Court*, (1913) 173 Mich. 674.

See *Ex parte Harding*, (1910) 219 U. S. 363, where the court discusses two inconsistent lines of cases in which it had granted or refused to grant the writ to compel federal courts to remand cases to state courts, showing the difficulty in drawing the line between the proper and improper use of the writ.

SECTION 4. PROHIBITION.

QUIMBO APPO v. PEOPLE.

Court of Appeals of New York. 1860.

20 New York, 531.

Writ of error to the Supreme Court. Quimbo Appo was tried and convicted of murder, and sentenced to be executed therefor, by a Court of Oyer and Terminer held in and for

the city and county of New York, in April, 1859. The court adjourned *sine die* on the 16th of June following.

On the first Monday of October, in the same year, a court of Oyer and Terminer was held in and for the same city and county, before Mr. Justice Roosevelt, and on the 17th of October Appo made an application to the last mentioned court to set aside his conviction and sentence, and grant him a new trial. The application was founded on the minutes of Mr. Justice Davies, before whom the conviction took place, and on affidavits alleging injustice done him on his trial, newly discovered evidence, &c.

The district attorney denied the power of the court to entertain or grant such a motion and declined to answer it on the merits. The court affirmed its power and announced its intention to grant the motion. The district attorney thereupon sued out an alternative writ of prohibition, addressed to Appo and the court, forbidding the exercise of this jurisdiction. The writ was returnable at the general term of the Supreme Court on the first Monday of December, 1859. On the return day the court, on argument, rendered judgment, awarding a prohibition absolute, from which judgment Appo brought error to this court.

The opinion of the court was delivered by

SELDEN, J. The first question to be considered is, whether the writ of prohibition was a proper remedy, assuming that the Court of Oyer and Terminer had no authority to grant a new trial upon the merits after conviction and sentence for the crime of murder.

The office of this writ is, to restrain subordinate courts and inferior judicial tribunals of every kind from exceeding their jurisdiction. It is an ancient and valuable writ, and one the use of which in all proper cases should be upheld and encouraged, as it is important to the due and regular administration of justice that each tribunal should confine itself to the exercise of those powers with which, under the Constitution and laws of the State, it has been intrusted.

But it is said, that when the inferior court or tribunal has jurisdiction of the action, or of the subject-matter before it, any error in the exercise of that jurisdiction can neither be corrected nor prevented by a writ of prohibition.

It is true that the most frequent occasions for the use of the writ are where a subordinate tribunal assumes to enter-

tain some cause or proceeding over which it has no control. But the necessity for the writ is the same where, in a matter of which such tribunal has jurisdiction, it goes beyond its legitimate powers; and the authorities show that the writ is equally applicable to such a case. Mr. Jacob, in treating of this writ, after saying that it may issue to inferior courts of every description, whether ecclesiastical, temporal, military or maritime, whenever they attempt to take cognizance of causes over which they have no jurisdiction, adds: "or if, in handling of matters clearly within their cognizance, they *transgress the bounds* prescribed to them by the laws of England, as where they require two witnesses to prove the payment of a legacy." (*Jac. Law Dic., title, Prohibition.*)

* * * * *

These cases prove that the writ lies to prevent the exercise of any unauthorized power, in a cause or proceeding of which the subordinate tribunal has jurisdiction, no less than when the entire cause is without its jurisdiction. The broad remedial nature of this writ is shown by the brief statement of a case by Fitzherbert. In stating the various cases in which the writ will lie, he says: "And if a man be sued in the Spiritual Court, and the judges there will not grant unto the defendant the copy of the libel, then he shall have a prohibition, directed unto them for a surcease," &c., until they have delivered the copy of the libel, according to the statute made in Anno 2 H., 5. (*F. N. B., title Prohibition.*)

This shows that the writ was never governed by any narrow technical rules, but was resorted to as a convenient mode of exercising a wholesome control over inferior tribunals. The scope of this remedy ought not, I think, to be abridged, as it is far better to prevent the exercise of an unauthorized power than to be driven to the necessity of correcting the error after it is committed. I have no hesitation, therefore, in holding that this is a proper case for the use of the writ, if the Supreme Court was right in the conclusion to which it arrived at general term.

Had, then, the Court of Oyer and Terminer authority to make the order granting to the defendant, Quimbo Appo, a new trial? * * *

The whole course of judicial as well as legislative action in this State, until the decision in *The People v. Stone*, 5 Wend. 39, indicates very clearly, I think, a general understanding

that Courts of Oyer and Terminer could not grant new trials in such cases. * * *

The judgment should, I think, be affirmed.⁴⁷

⁴⁷ "Lack of jurisdiction may exist with reference to subject-matter generally (e. g., the class to which the case belongs) or it may exist with reference to the parties to the suit, or it may exist with reference to excess of jurisdiction in the concrete case itself."—State ex rel. v. McQuillin, (1914) 262 Mo. 256, 266.

"We find it stated by some judicial writers, following the old English cases, that the writ may also be issued to prohibit the court, judge or other tribunal from proceeding contrary to 'the general laws of the land.' This doubtless means nothing more than passing upon personal or property rights without a hearing. It embraces cases where a petition, pleading or objection is duly served or filed in accordance with the settled law or practice, and a court, judge or other tribunal having jurisdiction and whose duty it is to hear and determine the matter is proceeding to a determination without a hearing. * * * That I take it, would be an excess of jurisdiction."—People ex rel. v. Fitzgerald, (1902) 73 N. Y. App. Div. 339.

In *Mooney v. Superior Court*, (1920) 183 Cal. 705, 192 Pac. 542, it was held that where a judgment has become final and beyond the power of the court to vacate, the court may be restrained from threatened action by a writ of prohibition.

STATE EX REL. TERMINAL RAILROAD ASS'N v.
TRACY.

Supreme Court of Missouri. 1911.

237 Missouri, 109.

[Original proceeding in prohibition. The petition alleged that the relator was a terminal railroad company operating in St. Louis, and that the respondent was acting justice of the First District Police Court of that city; that there were pending before respondent about 200 separate cases against relator for alleged violation of a certain city ordinance; that 17 such cases had been prosecuted to final judgment and fines imposed aggregating \$7,050; that new informations were continually being filed, and relator was obliged to keep its attorneys constantly employed in defending same, filing bonds and perfecting appeals; that the said ordinance did not apply to any of the cases brought under it, and the relator had vainly

tried to obtain the consent of the city to stop bringing suits until an appeal in one of the cases could be finally determined in this court; and that the said police court was "proceeding in grievous abuse of its powers." The respondents return substantially admitted the facts alleged in the petition.]

KENNISH, J. * * *

The remedy by writ of prohibition is of ancient origin in our system of jurisprudence. The principles of law governing its issuance and the facts necessary to warrant relief by that extraordinary writ have frequently been the subject of adjudication in this and other courts of last resort, as well as the theme of much learning by the text-writers. It has been likened to the equitable remedy by injunction against proceedings at law. The object in each case is the restraining of legal proceedings; but, as has been said: "This vital difference, however, is to be observed between them: An injunction against proceedings at law is directed only to the parties litigant, without in any manner interfering with the court, while a prohibition is directed to the court itself, commanding it to cease from the exercise of a jurisdiction to which it has no legal claim." High's Extraordinary Legal Remedies (3d Ed.) § 763. There is this further similarity between the two remedies thus compared, which is of importance in the consideration of the case in hand, namely, that, as the right to the remedy by injunction implies a wrong threatened by the parties litigant against whom the relief is sought, so the right to the writ of prohibition implies that a wrong is about to be committed, not by the parties litigant as in the case of injunction, but by the person or court assuming the exercise of judicial power and against whom the writ is asked. Indeed, it may be said generally of all procedure in courts of justice for the enforcement of civil rights that the existence of a remedy on the one hand implies actionable wrong on the other. It follows that, to entitle a relator to a writ of prohibition, it should be made to appear that it is within the power, and that it is the duty, of the person or court proceeded against, to refrain from taking the threatened judicial action which is made the basis of the complaint. The judicial wrong or fault which calls for the writ of prohibition does not mean an infraction of personal rights only, but rather an offending of the court by an assumption of judicial power and jurisdiction not authorized by law.

Relator states in its brief that the writ of prohibition will be ordered by a superior court to curb and restrain an inferior court in the following instances: "First, when the lower court has no jurisdiction. Second, when the lower court is proceeding in excess of its jurisdiction. Third, when the instrumentalities of the lower court are being used for the purposes of oppression, and the jurisdiction of the court abused."

The first two grounds thus stated are recognized as settled law in the adjudged cases, and if the facts of a given case show either want of jurisdiction or excess thereof, together with an absence of an adequate remedy at law or in equity, a case is made warranting the issuance of the writ. It should be observed that, although want of jurisdiction and excess of jurisdiction are commonly referred to and considered as separate grounds for the issuance of the writ, there is in principle little distinction between them, as each means an attempt by a court or person to take judicial action without judicial power or authority for such action.

The third ground, as stated by relator, is rather vague and indefinite and seems to assert the proposition that there exists a basis for the issuance of the writ independent of and not comprehended within either of the first two grounds. This contention is the main question before us for decision, and a consideration of the admitted facts of this case makes obvious the importance and necessity to relator of its ability to maintain that proposition.

An examination of the authorities upon the law governing the issuance of this extraordinary writ has brought to our attention, among others, the following:

"The sole question for determination upon an application for the writ of prohibition is whether or not the inferior court has usurped jurisdiction or exceeded its lawful powers, and the writ is always refused where it appears that the court has jurisdiction over the matter complained of." 16 Am. & Eng. Enc. Pl. & Pr. 1125.

"Upon an application for a writ of prohibition to stay the action of an inferior court, the sole question to be determined is the jurisdiction of that court." High's Extraordinary Legal Remedies (3d Ed.) § 767b.

"* * * In all cases, therefore, where the inferior court has jurisdiction of the matter in controversy, the superior

court will refuse to interfere by prohibition, and will leave the party aggrieved to pursue the ordinary remedies for the correction of errors, such as the writ of error or *certiorari*. In the application of the principle it matters not whether the court below has decided correctly or erroneously; its jurisdiction being conceded, prohibition will not go to prevent an erroneous exercise of that jurisdiction. * * *” High’s Extraordinary Legal Remedies (3d Ed.) § 772.

* * * * *

Upon the foregoing authorities it may be safely asserted, as settled law and without exception, that unless the court sought to be prohibited is wanting in jurisdiction over the class of cases to which the pending case belongs, or is attempting to act in excess of its jurisdiction in a case of which it rightfully has cognizance, the writ will be denied.

It is contended by relator that the information fails to state a cause of action, and therefore that the court is without jurisdiction and the writ should be issued for that reason, especially in view of the number of informations pending and about to be filed. This position is clearly untenable, and no authority is cited in its support. If the lower court has jurisdiction of the class of cases to which the said prosecutions belong, then there can be no doubt of its jurisdiction to determine the sufficiency of the information, leaving the losing party the right to have such judgment reviewed on appeal. It stands admitted in this record that the police court has exclusive jurisdiction of all cases for the violation of city ordinances, and that the prosecutions complained of are for the alleged violations of said ordinances. It follows that said court must have the right to determine whether the informations coming before it charge or fail to charge a violation of said ordinances, and the writ of prohibition “cannot be rightly employed to compel a judicial officer, having full jurisdiction over the parties and a cause, to steer his official course by the judgment of some other judge, or to substitute the opinion of another court for his own in dealing with the topics committed by the law to his decision.”

“Where jurisdiction over the parties and the subject of the cause is (as in this instance) clear, any error of the trial court in ruling on the sufficiency of the pleading forming the basis of the suit cannot be corrected by resort to a writ of

prohibition." *State ex rel. v. Scarritt*, 128 Mo., loc. cit. 338, 340, 30 S. W. 1028.

* * * * *

Relator states in its brief: "An example of the third ground of prohibition is when a court permits multitudinous and innumerable prosecutions to be urged for purposes of coercion and embarrassment, as in *State ex rel. v. Eby*, 170 Mo., loc. cit. 526 (71 S. W. 62), wherein the court said: 'It has, however, been urged by counsel for respondent that inasmuch as relators have a remedy by appeal, etc., in consequence of this, prohibition cannot be granted. But this is an erroneous view because in a case like this, where relators, if they could not have the relief prayed, would be compelled to go to trial in 1,203 cases; then, if defeated, would have to give bond in each case, take an appeal in each case, pay for transcript fee in each case, pay docket fee in each case of \$10, such fees amounting in the aggregate to \$12,030, as well as counsel fees in each court. Consequently, it must be conspicuously obvious that such appeals would be, although available, "inadequate to meet the emergencies of the case, or afford the redress to which the injured party is entitled." 2 Spelling, Inj. & Extr. Rem. (2d Ed.) § 1725, and cases cited.'

Relator has misinterpreted the language quoted from the *Eby* Case. It is apparent that the court was not there dealing with the question as to the grounds upon which the writ should be issued, but the question whether (one of the necessary grounds existing) the court should deny the writ for the reason that the relator had an adequate remedy by appeal. In the preceding part of the opinion the court had held that the law upon which the prosecution in the trial court was based was unconstitutional and had been repealed, and the court (170 Mo., loc. cit. 522, 71 S. W. 60) said: "Under the foregoing authorities, does this record present on its face the posture of there being an absolute want of jurisdiction in the lower court to try the 1,203 informations filed against relators in the Pike circuit court? That it does, we entertain no doubt." And again (170 Mo., loc. cit. 526, 71 S. W. 62): "Of course, if the law is unconstitutional which is made the basis of the proceedings, the case is one where it is obvious on the face of such proceedings that the trial court has no jurisdiction, and prohibition will consequently lie."

Respondents in that case had urged that, even if the trial

court was without jurisdiction, the writ should not be granted for the reason that the trial court had power to pass upon the question of its own jurisdiction; that that was a proper matter of defense, and there was an adequate remedy by appeal. Responding to that contention, in the language quoted by the relator, this court held that the remedy by appeal was not adequate, and that, as the trial court was without jurisdiction, the facts of the case warranted the issuance of the writ. In so holding this court was within the general law, as shown by the foregoing authorities, and as applied to the facts of the case before it.

The case of *State ex rel. v. Ross*, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534, is also cited and relied upon to sustain the contention that the writ may properly be granted when want of jurisdiction or excess of jurisdiction is not shown as a basis therefor. In the *Ross* Case it was held that when a circuit court had acquired jurisdiction and appointed a receiver in a proceeding pending therein, another court of concurrent jurisdiction would be prohibited by this court from entertaining jurisdiction in a suit subsequently brought for the same purpose. A construction has been placed upon that case as holding that, since the court in which the second proceeding was instituted had jurisdiction of the subject-matter and of the person, it follows that this court countenanced the issuance of the writ where neither want nor excess of jurisdiction was shown in the court prohibited. An examination of the decision in that case will disclose that this court based its action in issuing the writ upon the ground of want of jurisdiction in the lower court, for, as stated in the syllabus, "where, in the foregoing action, a receiver had been appointed, the petitioner is entitled to a writ of prohibition against interference by another court and by its receiver appointed without jurisdiction." But the exclusive character of the jurisdiction of the court in which the receivership action is first brought, and which also shows the ground upon which the writ was issued in the *Ross* Case, *supra*, has been clearly stated in a recent decision of this court. * * *

In the case before us it appears from the admitted facts that the respondent Tracy, as judge of the police court, possessed not only jurisdiction, but exclusive jurisdiction, of the prosecutions pending and threatened against relator in that court. There is no fact alleged tending to show the exercise

or threatened exercise of jurisdiction in excess of his judicial power and authority, or that he has assumed or is about to assume any power other than that conferred upon him by the charter of the city and required of him by his oath of office. While so acting in the line of his duty and within the scope of his judicial power as prescribed by the charter, it cannot be maintained, in the light of the authorities heretofore cited, that he should be restrained and prohibited by the extraordinary writ of prohibition which issues only to prevent the usurpation of judicial power. The prosecutions complained of by relator may be vexatious because of their multiplicity, but it is not alleged that respondent, as judge of said police court, is in any manner responsible for the number of cases so instituted by the prosecuting officers of the city, or that he has any authority to prevent the filing of such cases. If the police court was possessed of jurisdiction to hear and determine one of said prosecutions against relator, it could not be guilty of an abuse of judicial power or excess of jurisdiction solely because it entertained jurisdiction of a larger number. And it does not appear what respondent as such judge could have done in the premises, other than what he has done, to have avoided being visited by the extraordinary writ of this court.

In the earlier part of this opinion it is suggested that if relator is entitled to relief against the respondent, as judge of the police court, it must be because he has taken, or is about to take, some action which would be in violation of relator's rights. And the wrong which would warrant the issuance of this writ can be only such a wrong or fault as amounts to usurpation of judicial power. In the case of *State ex rel. v. Stobie*, 194 Mo. 14, loc. cit. 62, 92 S. W. 203, it was contended that the prosecution pending before the justice of the peace against whom the writ was asked was instituted in bad faith by the prosecuting witness and that the writ should be issued to prohibit the respondent justice of the peace from entertaining further jurisdiction in the cause. Answering that contention, this court said: "It is immaterial, so far as conferring jurisdiction upon the justice, what the objects and purposes of the prosecution were. William Matthews was the complainant in said cause before the justice, and filed the charge against the relators, and must be treated, so far as the disclosures of the petition are concerned, as the prosecut-

ing witness; hence the allegations upon which this contention is predicated are directed solely to the respondent Matthews. He made the charge, and the petition avers the improper object and purpose in making it. The said allegations apply to the prosecution of the charge, and Matthews is the complainant and prosecuting witness; hence these allegations are exclusively directed to Matthews. There is an entire absence of any charge in the petition that the justice of the peace acquired and assumed jurisdiction of said cause for the objects and purposes attributed to Matthews in making the charge, and in his prosecution of it, or that the justice had any knowledge of such objects and purposes. The objects and purposes of Matthews or any one else in making a charge and prosecuting it against relators for the commission of a misdemeanor absolutely have nothing to do with the jurisdiction acquired by the justice, and can in no way affect such jurisdiction. Even though the justice entertained the purposes attributed to Matthews, while it would be reprehensible in him as an officer, and would furnish a sufficient reason to the relators to invoke the aid of the provisions of the statute providing for changes of venue, it does not go to the jurisdiction of the justice and furnish a basis for the issuance of the writ of prohibition."

After a full and careful consideration of this cause, we are convinced that this court would not be warranted in issuing its extraordinary writ of prohibition against the respondents, and we hold that the preliminary rule should be quashed and the writ denied. It is so ordered. All concur, except GRAVES and LAMM, JJ., who dissent.⁴⁸

⁴⁸ In *People's United Tel. System v. Filtner*, (1920) 87 W. Va. 71, 104 S. E. 406, prohibition to a justice's court was held proper where a defendant had filed a false and fictitious counterclaim for the purpose of obtaining a jury and of giving jurisdiction by appeal in case of an adverse judgment.

STATE EX REL. CLEVELAND TELEPHONE CO. v.
COURT OF COMMON PLEAS.*Supreme Court of Ohio. 1918.**98 Ohio State, 164.*

DONAHUE, J. The petition of the relator asks that a writ issue prohibiting the common pleas court of Cuyahoga county from exercising jurisdiction in a cause pending in that court, in which cause it is sought to enjoin the relator from charging or collecting within the city of Cleveland any other or different rate for telephone service than that fixed by an ordinance of that city.

The common pleas courts of this state are courts of general jurisdiction. Under the provisions of section 4, art. 4, of the Constitution of Ohio, they are capable of receiving and exercising to final judgment all judicial powers conferred upon them by the General Assembly of this state.

Sections 11876 and 11877, General Code, vest in the common pleas courts authority to grant or refuse an injunction in an action in which an injunction is the proper remedy, or where it is necessary or incident to the relief sought. The only limitation on this authority is found in section 549, General Code (103 O. L. p. 816), which section provides that no court other than the Supreme Court of this state shall have authority to "review, suspend or delay any order made by the [public utilities] commission, or enjoin, restrain or interfere with the commission or any member thereof in the performance of official duties."

It appears from the petition of relator that the public utilities commission of Ohio has made no order fixing telephone rates to be charged in Cleveland; that that commission and no member thereof is a party to cause No. 160905 on the docket of the common pleas court of Cuyahoga county; and that the public utilities commission is proceeding to hear and determine the questions arising upon the schedule of rates filed by the relator and the protests and complaints against the reasonableness of such rates. It follows, therefore, that under the provisions of sections 11876 and 11877, General Code, the common pleas court of Cuyahoga county has jurisdiction of the cause of action pending before it, and

is entitled to exercise that jurisdiction to final judgment. The relator, if aggrieved by such final judgment, has a full and adequate remedy at law. * * *

In the case of *State ex rel. Garrison v. Brough*, 94 Ohio St. 115, 113 N. E. 683, it was declared by this court, in the first paragraph of the syllabus, that: "The writ of prohibition is an extraordinary legal remedy, whose object is to prevent a court or tribunal of peculiar, limited, or inferior power from assuming jurisdiction of a matter beyond its cognizance. The writ cannot be made to serve the purpose of a writ of error to correct mistakes of the lower court in deciding questions of law within its jurisdiction."

In the opinion it is said (94 Ohio St. on page 123, 113 N. E. 685) that a writ of prohibition "does not lie to prevent a subordinate court from deciding erroneously or from enforcing an erroneous judgment in a case in which it has a right to adjudicate. In all such cases the aggrieved party must pursue the ordinary remedies for the correction of errors."

* * * * *

It is clear, therefore, that, no matter what may be the rule in other jurisdictions, this court has consistently held that a writ of prohibition will not issue against a court having jurisdiction of the subject-matter of an action pending before it, or to deprive such court of the authority vested in it by the laws of this state to determine its own jurisdiction, or to prevent a possible erroneous judgment, nor will it be made to serve the purpose of a writ of error. It is equally well settled that where a writ of prohibition is refused this court will not presume to determine the issues joined by the pleadings in the cause pending in the court against which the writ of prohibition is sought. Nor will it offer any gratuitous advice as to the judgment that court should enter upon such issues.

* * * * *

NICHOLS, C. J., and JOHNSON, J., concur.

WANAMAKER, J. (concurring.) I concur in the judgment. I do not concur in the grounds of the judgment.

On January 11, 1918, the Cleveland Telephone Company filed an original action in this court asking for a writ of prohibition against the common pleas court of Cuyahoga county, to prohibit it from hearing and determining a case theretofore filed in that court, in which it was sought to en-

join the Cleveland Telephone Company from operating in the city of Cleveland under a rate different and higher than the rate theretofore fixed, or attempted to be fixed by an ordinance of the Cleveland city council.

The pleadings in the case in this court were drawn by both sides with the direct view and purpose of placing before this court the one big, vital question, to wit: Does the statute creating the state public utilities commission prevail over the charter of the city of Cleveland in the fixing of telephone rates for the people of Cleveland?

The pleadings were not only prepared by able and eminent counsel upon both sides for this single paramount purpose, but the written briefs were likewise so prepared. The great importance of the case to public utility corporations, as well as to the millions of people residing in the municipalities of Ohio, brought an early hearing, supposedly upon the merits of the case. On January 23d of this year the case was orally argued before this court and submitted all with a view of obtaining a decision of this court upon this controlling question.

The only question that this court here and now decides is the following: Is a writ of prohibition the proper remedy against the court of common pleas?

Remedy, of course, has a keen professional interest, but relief has a much greater public interest. Both parties to this cause, and those for whom they speak, are intensely and justifiably concerned about this main question, and it should be now and here decided.

The effect of this judgment, by its refusal to determine and decide this question, remands the whole matter back to the court of common pleas of Cuyahoga county, simply to pass upon the question, in the first instance, as to whether or not that court has jurisdiction. After final determination by that court the defeated party may go to the court of appeals, and there the case be prepared, heard, and determined with considerable labor and no little expense. After the adjudication of this question in the court of appeals, the defeated party may come, as a matter of right, it being a constitutional question, to this court, and then this court will have again before it the identical question that the parties sought to raise, believed they had raised, and which they confidently submitted to this court. So that the decision of

this main question in this case at this time would avoid three separate hearings, or trials, in three separate courts to say nothing of the delays, the labor, and expense.

This I conceive to be a violation of both letter and spirit of the obligations placed upon this court by the new Constitution of 1912, as to its original jurisdiction. The people of Ohio had, for years, grown weary of the numerous trials in the numerous courts—the footbaling of a case back and forth from one court to another until the parties were almost exhausted in patience and purse, with decisions oftentimes based upon minor, immaterial questions, purely technical, or upon matters of practice that did not go to the vital merits of the case.

In order to provide some direct and summary remedy for many of these evils, which resulted not only in delays of justice, but oftentimes in the denial of justice, the people of Ohio made some radical changes in the judicial article of their Constitution, among others increasing the original jurisdiction of the Supreme Court by the addition of two writs, prohibition and *procedendo*.

In plain phrase, by prohibition they intended to prohibit, to stop, litigation in courts and quasi judicial bodies which had no jurisdiction over the matter to be determined or in which the relief sought was in excess of their jurisdiction. By the second writ, *procedendo*, it was proposed to give the Supreme Court of Ohio the right and power to order said bodies to proceed to judgment without further delay. In short, it was self-evident that the great cardinal purpose of the Constitutional Convention in this behalf was to get quick action, final action, economically and equitably administered, through one fair trial and one review.

* * * * *

This court now holds, in effect, that this writ of prohibition cannot be allowed against a common pleas court upon the ground that that court has an inherent right to pass upon its own jurisdiction, and that that question has to be tested out according to the oldtime method of prosecuting error through the various courts. * * *

In short, it simply holds that the court of common pleas may guess at what this court will finally hold; that then the court of appeals may guess at what this court will finally hold; and that then later, this court shall ultimately deter-

mine the identical question that is submitted in this case, and is now before this court, as I understand it.

* * * * *

I concur in this judgment, however, because I hold that the city of Cleveland, through its council, duly authorized by its charter framed pursuant to the "home-rule" amendment to the Constitution of 1912, has clear and complete power to fix the rates, tolls, and charges between such company and the inhabitants of the city of Cleveland, limiting the same to service within the city of Cleveland.

* * * * *

JONES, J. (dissenting). Whether prohibition can be invoked in this case depends upon the decisive question, Which of these contending tribunals has jurisdiction over the rates of this public utility, the common pleas court of Cuyahoga county or the public utilities commission of the state?

* * *

But it is stated that the courts of common pleas of this state are courts of general jurisdiction and competent to decide upon their own jurisdiction. No one questions this established principle, but the complete answer to that proposition is that if the court of common pleas either lacks jurisdiction, or usurps it, the writ will lie; otherwise we can have no writ of prohibition against any court of general jurisdiction in this state. Of course if the jurisdiction of the court depends upon a controverted fact necessary to give it jurisdiction, the establishment of that fact by a court which is competent to decide it precludes a superior court from issuing the writ, but, as stated in *State ex rel. Barbee v. Allen, Probate Judge*, 96 Ohio St. 10, 15, 117 N. E. 13, in such cases the subject-matter "was one properly before the court and within its constitutional jurisdiction." * * *

To deny the writ of prohibition against a usurping court of general jurisdiction for the reason that such court is competent to pass upon its own jurisdiction would result in the adoption of a novel principle in the law relating to the issuance of this writ. * * * An inspection of the syllabi of the Ohio cases clearly discloses that this writ is always available where these courts usurp jurisdiction, although they are competent to pass upon their own jurisdiction.

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⁴⁹ See comment on this case in 17 Mich. Law Rev. 165, showing, among

other matters, that there is no general rule forbidding the use of the writ of prohibition against courts of general jurisdiction.

HAVEMEYER v. SUPERIOR COURT.

Supreme Court of California. 1890.

84 California, 327.

[The people of the state of California commenced an action against the American Sugar Refining Co. for the purpose of forfeiting its charter, and a forfeiture was decreed. An application was then made by the state for the appointment of a receiver, and after the matter had been heard and held under advisement for some weeks, an order was made appointing a receiver for all the property of the company including a certain refinery in San Francisco. The receiver instantly demanded possession of the refinery, which the petitioners contested on the ground that they had previously purchased, and were now the owners of the same. But the court overruled their application for a modification of the order appointing the receiver, and ordered the sheriff to place the receiver in exclusive, full and complete possession of the refinery. The petitioners then applied to the Supreme Court for a writ of prohibition.]

BEATTY, C. J. * * *

* * * * *

We come now to the questions as to the remedy. Prohibition arrests the proceedings of an inferior judicial tribunal or officer when such proceedings are without or in excess of the jurisdiction of such tribunal or officer, and the writ issues in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. Code Civ. Proc. §§ 1102, 1103. We have shown that the superior court, in appointing the receiver, exceeded its jurisdiction, and there is no question that the petitioners are seriously injured by the enforcement of the order. If, then, they have no plain, speedy, and adequate remedy in ordinary course of law, they are clearly entitled to the benefit of the writ of prohibition to arrest the proceedings under the void order.

It is claimed, however, that, so far as the superior court

is concerned, there is nothing to arrest, that its order was made and executed before the alternative writ was issued, that the receiver alone is now acting, and that the writ does not run against him.

It is true the writ does not run against ministerial officers, and it is also true that its operation is preventive, rather than remedial. But property in the hands of a receiver is in the hands of the court. The receiver is the mere instrument of the court, and what he does the court does. It is the court, therefore, and not the receiver which holds, administers, and disposes of the property in his hands; and, so long as the property remains undisposed of, action by the court is necessary. In such case there is judicial action to be arrested, injury to be prevented, and a writ of prohibition is appropriate for that purpose. The writ runs to the court, and operates directly upon the court, but indirectly upon the receiver. If it is served upon the receiver, it is only that he may have timely notice that the proceedings of the court are arrested, and may stay his hand, as he is bound to do, having no power to act independently of the court, from which he derives all his authority.

In this case, when the petition was filed, and our alternative writ directed to issue, the receiver, as we shall see, was still striving to gain complete possession of the refinery and other property claimed by the petitioners; and, even if he had been in complete control, that would have been but the first of a series of steps to be taken in carrying out the purpose of his appointment. The keeping of the property in such a case is a continuous wrong. The closing down of the works is an independent wrong. The use of a portion of the property to preserve the rest is an unlawful interference with the rights of those lawfully in possession. Besides all this, there remained to be carried out the sale and final distribution of the property.

By the very terms of the order appointing the receiver, he is to hold the property subject to the further orders of the court concerning it; and the necessity of such further orders would be implied if it had not been expressly indicated.

As we understand the authorities on this point, the operation of the writ of prohibition is excluded only in cases where the action of the inferior tribunal is completed, and

nothing remains to be done in pursuance of its void order. If its action is not completed and ended, its further proceedings may be stayed; and, if it is necessary for the purpose of affording complete and adequate relief, what has been done will be undone.

If this were not so, the inferior court, by proceeding expeditiously and arbitrarily, could defeat the remedy. Great reliance is placed by counsel for respondent upon the decisions of this court, such as *Chester v. Colby*, 52 Cal. 517, and *Railroad Co. v. Superior Court*, 59 Cal. 476, to the effect that, when an inferior court or tribunal is proceeding, or threatening to proceed, in excess of its jurisdiction, the objection to its want of jurisdiction must be first submitted to such inferior court or tribunal, and by it overruled, before resort is had to a higher court for a writ of prohibition; and, undoubtedly, such is the established rule of practice in this state. But, if this is the law, it must inevitably happen in every case, as it would probably happen in many cases under any rule, that the lower court will make its ruling on the question of jurisdiction before any prohibition can be sued out; and, if it holds that it has jurisdiction, and makes orders in consonance with that view, the writ of prohibition will be of no avail unless it affords the means, not only of arresting future action, but of undoing past action. In other words, the two positions contended for would practically abolish the remedy.

No better illustration of the working of this theory can be found than is afforded by the present case. When the order to show cause why a receiver should not be appointed was served, neither these petitioners, nor the defendant corporation, nor its stockholders, could have got a writ to prohibit the appointment of a receiver without first objecting in the superior court to its want of jurisdiction. Such objection, as we have seen, was made. It would have been sufficient to have objected that there was no application by a creditor or stockholder for a receiver, and no grounds alleged for such appointment; but the defendant corporation, or its stockholders, went further. They showed affirmatively that there were no creditors, and that all the stockholders desired the statutory trustees to settle the business of the corporation. They showed everything, in short, necessary to sustain their objection to the jurisdiction; and the opinion of the su-

perior judge, *supra*, shows that their objections were strenuously argued and maturely considered. But what happened? After holding the matter under advisement for nearly a month, the respondent filed an opinion overruling the objections to his jurisdiction, and on the same day appointed a receiver, who on the same day qualified by taking the oath and filing his bond, procured an order approving his bond and confirming his powers, and actually, according to his own views, had possession of the vast property in controversy, before the agent of the petitioners or their attorneys had any notice that their objections to the jurisdiction had been overruled. If such proceedings, conducted with such precipitate haste, can deprive the injured party of a remedy to which he is clearly entitled, then our law must be lame and impotent indeed. But happily there is no foundation for the claim that an inferior court can, by mere haste and precipitancy, defeat the appropriate remedy for excesses of jurisdiction, at least in a case where it may be intercepted before its action is fully completed.

* * * * *

Where the proceeding in the lower court has ended, and the court has nothing further to do in pursuance or in completion of its order, or where it has dismissed the proceeding, prohibition is no remedy; but, where anything remains to be done by the court, prohibition not only prevents what remains to be done, but gives complete relief by undoing what has been done. See forms of writs cited, 2 Chit. Pr. 354, 355. *Ex parte Morgan Smith*, 23 Ala. 94; *Jones v. Owen*, 5 Dowl. & L. 669; *Marsden v. Wardle*, 3 El. & Bl. 695, and cases therein cited; *Serjeant v. Dale*, L. R. 2 Q. B. 558. In *White v. Field*, 12 C. B. (N. S.) 383, the court says (page 412:) "The writs in the register and elsewhere which conclude with a *mandamus* to the Court Christian to recall an excommunication already erroneously fulminated, or a sequestration wrongly issued, are all, as to the prohibitory part, peremptory, and the *mandamus* to revoke the unauthorized proceeding *only accessory to the peremptory prohibition, and necessary to give it effect.*"

Here is a clear indication of the extent of the remedial office of the writ. It is primarily and principally preventive. Its office is to arrest proceedings; but, when a case arises in which there are proceedings to be stayed or prevented, it

will also annul such prior proceedings as may be necessary to make the remedy complete. The principle is that which prevails in equity. When there is jurisdiction the court will afford complete relief. A party will not be compelled to resort to more than one proceeding, or more than one court, for redress of one injury. See, also, *French v. Noel*, 22 Grat. 454. Many other cases are cited in the brief of counsel for petitioners to this point, and might be cited here, but it is unnecessary.

* * * * *

But it is said that the order appointing the receiver was appealable, and therefore prohibition will not lie. The statute does not say that the writ will not issue in any case where there is an appeal. There must not only be a right of appeal, but the appeal must furnish an adequate remedy, in order to prevent the issuance of the writ. A number of cases have been decided in this court in which writs of prohibition have been refused because there was a right of appeal, but in all of those cases the appeal afforded a complete and adequate remedy for the threatened excess of jurisdiction.

* * * * *

The difference between this case and all those referred to is that here an appeal would have afforded no remedy for the wrong with which the petitioners were threatened. By means of an appeal, at the end of about a year and a half, in the ordinary course, they could have procured a reversal of the order,—if, indeed, as strangers to the action in which it was made they had any right to appeal; but in the mean time they would have been irreparably damaged. * * *

For in the mean time the receiver would have gained complete possession of the refinery and other property, the refinery would have been closed, stock injured, contracts broken, employes discharged or kept in idleness, and every possible damage inflicted, without any security for the loss. In such a case, there was no adequate remedy except by a proceeding which would prevent the receiver from taking possession of the property; and the writ of prohibition was, as has been shown, the appropriate remedy for that purpose.

* * * * *

It is next suggested that the writ of prohibition does not issue *ex debito justitiæ*, but is to be granted or withheld in

the sound discretion of the court, and that in this case it ought not to be allowed in favor of these petitioners, because they are members of the sugar trust, monopolists, and are the tempters who seduced the American Sugar Refinery into the combination.

There is no competent proof before us of these facts; but, assuming them to be so, the law is not such as counsel claim it to be. A decision may be found here and there saying in a loose way that the issuance of the writ is in the discretion of the court, and a statement in general terms to the same effect may be cited from text-writers who merely echo the decisions; but it never was the law that a court having jurisdiction to issue the writ had any discretion to refuse it when demanded by the real party in interest bringing himself clearly within the law. If such an idea has obtained anywhere, it has been in consequence of a misunderstanding of the English cases.

In England the practice in prohibition was analagous to the practice in other actions at law. An original writ (of prohibition) issued for the purpose of securing an appearance, and after appearance the pleadings followed; that is, the plaintiff declared, the defendant pleaded or demurred, and so on. But there was this difference between the writ of prohibition and other original writs; that, whereas the writs in ordinary actions issued of course on application of the plaintiff, the writ of prohibition did not issue of course, but only upon affidavits showing grounds for its issuance.

Another difference was that not only the party injuriously affected by the proceedings of the inferior court, but any subject of the king, was allowed to interfere to prevent an excess of jurisdiction; and, in case of suit by a *stranger to the proceeding to be stayed*, the superior courts exercised a discretion in granting or withholding the writ, but never when the party affected was the plaintiff. This whole subject is reviewed exhaustively in the case of *Mayor v. Cox*, L. R. 2 H. L. 278, 280. The following quotation from an opinion of Lord Chief Justice Cockburn therein cited (page 280) shows what the law on this point is:

"I entirely concur in the proposition that, although the court will listen to a person who is a stranger, and who interferes to point out that some other court has exceeded its jurisdiction, whereby some wrong or grievance has been sus-

tained, yet that it is not *ex debito justitiæ*, but a matter upon which the court may properly exercise its discretion, *as distinguished from the case of a party aggrieved*, who is entitled to relief *ex debito justitiæ* if he suffers from the usurpation of jurisdiction by another court." *In re Foster*, 4 B. & S. 187.

In this state, it is always the party aggrieved who sues; and, if he shows a case for the issuance of the writ, the court cannot refuse it on the ground that he is a bad man, and deserves the punishment he is threatened with, or upon any other consideration which appeals to the mere discretion of the judge.⁵⁰

We come finally to the proposition upon which counsel for respondent insists most strenuously, viz., that the jurisdiction of the court to grant a peremptory writ of prohibition depends absolutely upon the allegation and proof by petitioners that, before filing their petition here, they had pleaded to the jurisdiction of the superior court, and that their plea had been overruled. To sustain this proposition, they cite the decisions of this court above referred to, (*Chester v. Colby*, 52 Cal. 517, and *Railroad Co. v. Superior Court*, 59 Cal. 476,) and they cite a number of decisions from the courts of other states. * * *

When a party has an opportunity of objecting in the lower court that it is proceeding, or is asked to proceed, in a matter without, or in a manner exceeding, its jurisdiction, he ought to make the objection there. It is only fair to the court that the objection should be brought to its attention in some proper form. If no objection is made, the party having every opportunity to object, the court may reasonably infer that no ground of objection exists; and not only is the court entitled to the advice and suggestions of the party with reference to objections apparent on the record, —there are many cases in which the ground of objection would not appear unless set forth by plea in some form, and it is to be presumed that any valid objection, properly brought to the attention of the court, would generally prevail, and that all necessity for a writ of prohibition would be obviated; therefore the interest of the public in preventing unnecessary litigation, as well as consideration for the judge of the lower court demand that the objection should be made at the first opportunity.

These are the reasons of the rule, and they indicate its scope and the extent of its application, as the authorities very fully show. We have not time to review the cases, other than those cited from the reports of the state; but we refer to the case of *Mayor v. Cox, supra*, in which the learning of the subject is exhausted. That was a case appealed from the court of exchequer to the exchequer chamber, and finally to the house of lords. Before deciding it, the lords requested the opinion of the justices of the queen's bench on two questions; the second being as follows: "Whether the garnishees in the lord mayor's court could maintain an action for a prohibition without having pleaded in the lord mayor's court;" to which the justices unanimously responded *that they could*. This was in accordance with the unanimous decision both of the court of exchequer and exchequer chamber, which was accordingly affirmed in the house of lords. The answer of the justices, prepared by Justice Willes, contains a full review of all the cases, showing that even in England the subject had not been clearly understood, and that some inconsistent and erroneous decisions had been made. It is not surprising, therefore, that in some of the United States the same confusion has arisen, and that some cases have been erroneously decided, to the effect, for instance, that the issuance of the writ is in the discretion of the court, and that a formal plea to the jurisdiction of the lower court is an essential prerequisite to its issuance. Fortunately, no such decisions have been made in this court, though, in deciding *Chester v. Colby, supra*, an Arkansas case (*Ex parte City of Little Rock*, 26 Ark. 52) is cited with approval which apparently does go to the extent claimed by respondent. But we are fully at liberty, without questioning the authority of any case decided in this court, to adopt the correct rule and doctrine as expounded and laid down in the case of *Mayor v. Cox*.⁵¹ Without going into the niceties of the subject, it may be said that the following propositions applicable to this case are fully supported by the decision in that case:

(1) If a want of jurisdiction is apparent on the face of the proceeding in the lower court, no plea or preliminary objection is *necessary* before suing out the writ of prohibition.

(2) If the proceeding in the lower court is not on its face

without the jurisdiction of such court, but is so in fact by reason of the existence of some matter not disclosed, such matter ought to be averred in some proper form in order to make the want of jurisdiction appear.

(3) But this is not essential to the jurisdiction of the superior court to grant prohibition. It is only laches, which may or may not be excused, according to circumstances.

Accordingly, we find that frequently a failure to plead in the lower court was excused for the reason that it appeared that the plea would have been rejected if made. The whole question, in fact, was one of practice merely, not of jurisdiction; and the objection which most frequently prevailed to the granting of the writ was not that the application came too early, but that it came too late. * * *

* * * * *

* * * An absolute and peremptory writ of prohibition will issue, in accordance with the views herein expressed.

THROCKMORTON, J., being absent from the state, did not participate in the decision.

⁵⁰ In *In re Rice*, (1894) 155 U. S. 396, 402, the court says:—"Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary."

⁵¹ *Accord*:—*State ex rel. v. Missouri Pac. Ry. Co.*, (1909) 221 Mo. 227; *State ex rel. v. Bright*, (1909) 224 Mo. 514; *State v. Kelley*, (1913) 32 S. D. 526; *City of St. Marys v. Woods*, (1910) 67 W. Va. 110; *People v. District Court*, (1901) 29 Colo. 182; *State v. White*, (1898) 40 Fla. 297; *State v. Smith*, (Wash. 1921) 200 Pac. 92. As a general rule of practice, however, the writ will not be granted unless the jurisdictional objection has been raised below:—*Adams County Court v. People*, (1910) 48 Colo. 539; *State ex rel. v. Breckenridge*, (1914) 43 Okl. 711; *State v. District Court*, (1904) 12 Wyo. 547. *Contra*:—*State v. Rose*, (1909) 124 La. 526; *Reese v. Steel*, (1904) 73 Ark. 66; *Hill v. Tarver*, (1900) 130 Ala. 592. But see *Nissen v. Elliott*, (1920) 145 Ark. 540, where the appearance of the respondent and assertion of jurisdiction was held to waive the presentation of the objection below.

PEOPLE EX REL. BALLIN v. SMITH.

*Court of Appeals of New York. 1906.**184 New York, 96.*

HISCOCK, J. The writ of prohibition granted herein in effect restrained the prosecution of a civil action brought before the appellant Smith as a justice of the peace by the appellant Williams as plaintiff against the relator as defendant. We think that it was error to grant this writ, and that the order appealed from must be reversed.

The facts upon which the writ was based are briefly as follows: The defendant justice of the peace held office in the town of Montgomery, Orange county, while the relator resided in the county of New York. The latter was brought into the town of Montgomery under subpoena as a witness in supplementary proceedings. Just as his examination was completed he was served with a summons in the action in justice's court of which prosecution has been prohibited. Two days before the return day fixed in the summons he secured an alternative writ of prohibition, staying further proceedings in said action, which was subsequently made absolute. * * *

It is substantially conceded, as it must be, that advantage could not be taken of relator's presence in the town of Montgomery under the circumstances to secure service of the summons upon him. * * *

The only question is whether his rights should be protected in the manner adopted by him, or by some other course, and in our judgment the answer to this question must be in favor of the latter alternative.

The writ of prohibition is an extraordinary remedy and should be issued only in cases of unusual necessity. Without attempting generally to define the cases wherein it may or may not be granted, it is certainly well within the authorities and principles of a wise judicial policy to state that it will not be allowed in a case like this to guard against a future apprehended error by an inferior tribunal, when, as matter of fact, such tribunal upon due objection may not commit such error, and when, if it does commit it, the aggrieved party may be fully and adequately protected by ordinary

process of appeal from or review of its action. We shall sufficiently indicate the reasons for reversing relator's method of procedure in this instance, if we point out how he might have asserted his rights before the justice and by appeal might have corrected the latter's action, if he erroneously overruled those rights.

Relator's privilege from service of a summons was one to be asserted upon an application to get rid of the service rather than by any plea or defense in connection with the merits of the action. *Matthews v. Tufts*, 87 N. Y. 568; *Waring v. McKinley*, 62 Barb. 612, 621.

While a justice of the peace is an officer of limited jurisdiction, and while that authority by express terms may not be conferred upon him, we have no doubt that the defendant justice had the power upon the return of the summons to entertain an application by relator to set aside its service upon the grounds already stated. The right upon objection to ascertain whether a summons has properly been served so as to confer jurisdiction is so necessarily incidental to the discharge of his duties by a justice that no violation of any principle of law will be committed by regarding him as invested therewith. This being so, it would have been the proper, natural, and adequate course for relator, upon the return day, to have specially appeared before the justice, and upon affidavits setting forth the facts upon which he based his claim of privilege to have asked that the service of the summons be set aside, and to have objected to further proceedings in and with said action. Such special appearance would not have worked any waiver of his rights, and it would have acquainted the justice in a lawful and official way with the fact that relator not only had a privilege, but insisted upon and did not waive it. * * *

If, upon proper proof of the facts and due objection, the justice persisted in continuing the action, the proceedings would have been part of the return upon appeal and subject to review and any proper correction. Code Civ. Proc. § 3053, and cases last cited. * * * As we have stated at the commencement, the demonstration of this affords a clear and sufficient reason why the relator should not be allowed to prosecute the unusual and more burdensome form of remedy which he has attempted. * * *

Order reversed, etc.⁵²

⁵² In New York a defendant may save an exception to an adverse ruling on a special appearance and plead to the merits without a waiver of the jurisdictional point. *Avery v. Slack*, (1837) 17 Wend. 85; *Jones v. Jones*, (1888) 108 N. Y. 415. See PRESERVING A SPECIAL APPEARANCE, by Edson R. Sunderland, 9 Mich. Law Rev. 396, 403.

"Where other convenient and effective modes of reaching the same result are open to the complaining party, the court may decline to award the extraordinary remedy. But it is not bound to decline because there may be some concurrent remedy. Whether other modes of relief are equally effective is a question to be determined in *each particular exigency*."—*State ex rel. v. Elkin*, (1895) 130 Mo. 90, 109. The entire want of appellate jurisdiction in a particular class of cases will not prevent the supreme court from using the writ of prohibition to confine the lower court within its jurisdictional limits in such cases.—*State ex rel. v. Fort*, (1903) 178 Mo. 518. But if, as in the case of the Supreme Court of Illinois, the constitution gives the court no original jurisdiction in prohibition, but appellate power only, it can employ the writ of prohibition only in aid of its appellate power, but not to perform the functions of an appeal or writ of error.—*People ex rel. v. Cook Circuit Court*, (1897) 169 Ill. 201.

Where the jurisdiction is dependent upon the amount in controversy, prohibition will issue to restrain a court from entertaining actions in excess of, or below, the jurisdictional amount,—*James v. Stokes*, (1883) 77 Va. 225; *State ex rel. v. Boone*, (1890) 42 La. Ann. 982; *Bullard v. Thorpe*, (1894) 66 Vt. 599. "It will lie to prohibit actions entertained under unconstitutional grants of judicial authority,—*Pennington v. Woolfolk*, (1880) 79 Ky. 13; or to restrain proceedings based upon void acts or ordinances,—*Hughes v. Recorder's Court*, (1889) 75 Mich. 574; *State ex rel. v. Eby*, (1902) 170 Mo. 497. It will be employed to prevent unauthorized or disqualified individuals from usurping judicial power.—*Ex parte Roundtree*, (1874) 51 Ala. 42; *North Bloomfield Gravel Min. Co. v. Keyser*, (1881) 58 Cal. 315; *State ex rel. v. Board of Education*, (1898) 19 Wash. 8; *Forest Coal Co. v. Doolittle*, (1903) 54 W. Va. 210.

The writ is available even though facts aliunde may be necessary to show want of jurisdiction,—*Bullard v. Thorp*, (1894) 66 Vt. 599; but if the determination of such facts can best be made in the court whose jurisdiction is assailed, the writ will be withheld,—*People v. District Court*, (1900) 28 Colo. 161, 165-6.

Where a court without jurisdiction is about to pronounce sentence or final judgment resulting in immediate imprisonment, prohibition will issue on the ground that appeal or error is inadequate,—*People v. District Court*, (1883) 6 Colo. 534; *McInerney v. Denner*, (1892) 17 Colo. 302; *Terrill v. Superior Court*, (Cal. 1899) 60 Pac. 38.

IN RE INLAND STEEL CO.

KEATING v. INLAND STEEL CO.

HALEY v. SAME.

*Supreme Court of Wisconsin. 1921.**174 Wisconsin, 140.*

Petitions for writs of prohibition to restrain the further prosecution of two suits in the circuit court for Douglas county on the ground that the summons had not been properly served on the petitioner, which is a foreign corporation. Writs allowed.

* * * * *

The validity of such service is sought to be sustained by an affidavit of C. R. Fridley, one of the attorneys for plaintiffs, made upon information and belief to the effect that defendant has property in this state consisting of office furniture, and fixtures, a lease of the office occupied by its agent C. M. Easterly in Milwaukee; that it also has credits for manufactured products sold to residents of this state who are solvent, and has manufactured products sold but undelivered in this state, and upon personal knowledge it is stated that the name of the defendant appears upon the outside door of the offices occupied by its agent C. M. Easterly at Milwaukee.

The opposing affidavits are made by D. P. Thompson, assistant to the president of the defendant, and by C. M. Easterly, its agent at Milwaukee. They are made upon personal knowledge, and deny that defendant has any property in Wisconsin—

“save such office stationery and supplies necessarily used by C. M. Easterly as its soliciting agent in connection with his duties * * * and which stationery and supplies are of no value to any person or corporation than to the defendant, save and except such intrinsic value as they may have, separate and apart from their uses as the property of the defendant.”

* * * * *

VINJE, J. The conditions upon which this court will ex-

ercise its superintending control in questions now before us were thoroughly discussed in *Re Petition of Pierce Arrow Motor Car Co.*, 143 Wis. 282, 127 N. W. 998, and will not now be restated. The court there restricted its power to its minimum sphere, and while there is no intent to overrule the decision in that case upon the facts there present, it is the opinion of the court that jurisdiction may properly be exercised though the duty of the court below may not be so plain as to permit of but one conclusion, if a careful consideration of all the facts shows that a valid service has not been made. In cases involving the validity of the service of summons, extraordinary hardship is inherent when such service is held valid by the trial court because the defendant has to suffer a default judgment in order to test the question of the validity of the service. (*Rix v. Sprague C. M. Co.*, 157 Wis. 572, 147 N. W. 1001, 52 L. R. A. [N. S.] 583), or else apply for a writ of prohibition, there being no appeal from an order holding the service valid, and the rule of this state being that if appearance is made on the merits the question of jurisdiction is waived (*Corbett v. Physicians' Casualty Ass'n*, 135 Wis. 505, 115 N. W. 365, 16 L. R. A. [N. S.] 177). In one of these cases judgment in the sum of \$212,500 is demanded, and in the other in the sum of \$157,916.67, so the situation of defendant is quite serious. It has to wager those amounts on the validity of the service or else waive that question.

Coming now to the merits, it will be seen from the statement of facts that the allegations of the plaintiffs as to the defendant's possession of property in this state are upon information and belief, and that those of the defendant are upon personal knowledge. It appears that the only property that the defendant has in this state consists in some office supplies. Is this sufficient to give the court jurisdiction? * * * The mere ownership of some office supplies is not enough to give the court jurisdiction. *Strom v. Montana Cent. Ry. Co.*, 81 Minn. 346, 84 N. W. 46; *Barnes v. Mobile & N. W. R. Co.*, 12 Hun, 126. We concur in such view, and hold for that reason that no valid service was made upon the defendant in either case. * * *

Let writs of prohibition issue, as prayed for in the petition.

DOERFLER, J., took no part.

SECTION 5. HABEAS CORPUS.

IN RE FREDERICK.

Supreme Court of the United States. 1892.

149 United States, 70.

[Appeal from an order denying a writ of *habeas corpus*. Petitioner was tried for murder in a state court in Washington, and was found guilty of murder in the first degree. The Supreme Court of the state reversed the judgment and remanded the case with directions to enter a new judgment for murder in the second degree. This was done and petitioner was sentenced under the new judgment. Claiming that the Supreme Court of Washington had no authority under the statute or otherwise, to modify the judgment, but should have simply reversed it, petitioner asked for a federal writ of *habeas corpus* on the ground that he was being deprived of liberty without due process of law. The United States Circuit Court refused the writ on the ground that the proper remedy was a writ of error.]

JACKSON, J. * * *

While the writ of *habeas corpus* is one of the remedies for the enforcement of the right to personal freedom, it will not issue as a matter of course, and it should be cautiously used by the federal courts in reference to state prisoners. Being a civil process, it cannot be converted into a remedy for the correction of mere errors of judgment or of procedure in the court having cognizance of the criminal offense. Under the writ of *habeas corpus* this court can exercise no appellate jurisdiction over the proceedings of the trial court or courts of the state, nor review their conclusions of law or fact, and pronounce them erroneous. The writ of *habeas corpus* is not a proceeding for the correction of errors. *Ex parte Lange*, 18 Wall. 163; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Curtis*, 106 U. S. 371, 1 Sup. Ct. Rep. 381; *Ex parte Carll*, 106 U. S. 521, 1 Sup. Ct. Rep. 535; *Ex parte Bigelow*, 113 U. S. 328, 5 Sup. Ct. Rep. 542; *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. Rep. 152; *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. Rep. 935; *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. Rep. 734; *In re Snow*, 120 U. S. 274, 7 Sup. Ct. 556;

In re Coy, 127 U. S. 731, 8 Sup. Ct. Rep. 1263; *In re Wight*, 134 U. S. 136, 10 Sup. Ct. Rep. 487; *Stevens v. Fuller*, 136 U. S. 468, 10 Sup. Ct. Rep. 911.

As was said by this court, speaking by Mr. Justice Harlan, in *Ex parte Royall*, 117 U. S. 241, 252, 253, 6 Sup. Ct. Rep. 734, 741, "where a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such state, and it is claimed that he is restrained of his liberty in violation of the constitution of the United States, the circuit court has a discretion whether it will discharge him, upon *habeas corpus*, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed by writ of *habeas corpus* summarily to determine whether the petitioner is restrained of his liberty in violation of the constitution of the United States."

The office of a writ of *habeas corpus*, and the cases in which it will generally be awarded, was clearly stated by Mr. Justice Bradley, speaking for the court in *Ex parte Siebold*, 100 U. S. 371, 375, as follows: "The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court, is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void. This distinction between an erroneous judgment, and one that is illegal or void, is well illustrated by the two cases of *Ex parte Lange*, 18 Wall. 163, and *Ex parte Parks*, 93 U. S. 18. In the former case we held that the judgment was void, and released the prisoner accordingly; in the latter, we held that the judgment, whether erroneous or not, was not void, because the court had jurisdiction of the cause, and we refused to interfere." The reason of this rule lies in the fact that a *habeas corpus* proceeding is a collateral attack, of a civil nature, to impeach the validity of a judgment or sentence of another court in a criminal proceeding, and it should therefore be limited to cases in which the judgment or sentence

attacked is clearly void, by reason of its having been rendered without jurisdiction, or by reason of the court's having exceeded its jurisdiction in the premises.

It is said in *Ex parte Royall*, *supra*, that after a prisoner is convicted of a crime in the highest court of the state in which a conviction could be had, if such conviction was obtained in disregard or in violation of rights secured to him by the constitution and laws of the United States, two remedies are open to him for relief in the federal courts: He may either take his writ of error from this court, under section 709 of the Revised Statutes, and have his case re-examined in that way on the question of whether the state court has denied him any right, privilege, or immunity guaranteed him by the constitution and laws of the United States, or he may apply for a writ of *habeas corpus* to be discharged from custody under such conviction, on the ground that the state court had no jurisdiction of either his person or the offense charged against him, or had for some reason lost or exceeded its jurisdiction, so as to render its judgment a nullity, in which latter proceeding the federal courts could not review the action or rulings of the state court, which could be reviewed by this court upon a writ of error. But, as already stated, the circuit court has a discretion as to which of these remedies it will require the petitioner to adopt. This was expressly ruled in *Ex parte Royall*, *supra*, and has been repeatedly followed since that case. In the recent case of *In re Wood*, 140 U. S. 278, 290, 11 Sup. Ct. Rep. 738, after reaffirming the rule laid down in *Ex parte Royall*, the court added: "After the final disposition of the case by the highest court of the state, the circuit court, in its discretion, may put the party who has been denied a right, privilege, or immunity claimed under the constitution or laws of the United States to his writ of error from this court, rather than interfere by writ of *habeas corpus*."

We adhere to the views expressed in that case. It is certainly the better practice, in cases of this kind, to put the prisoner to his remedy by writ of error from this court, under section 709 of the Revised Statutes, than to award him a writ of *habeas corpus*; for, under proceedings by writ of error, the validity of the judgment against him can be called in question, and the federal court left in a position to correct the wrong, if any, done the petitioner, and at the

same time leave the state authorities in a position to deal with him thereafter, within the limits of proper authority, instead of discharging him by *habeas corpus* proceedings, and thereby depriving the state of the opportunity of asserting further jurisdiction over his person in respect to the crime with which he is charged.

In some instances, as in *Medley, Petitioner*, 134 U. S. 160, 10 Sup. Ct. Rep. 384, the proceeding by *habeas corpus* has been entertained, although a writ of error could be prosecuted; but the general rule, and better practice, in the absence of special facts and circumstances, is to require a prisoner who claims that the judgment of a state court violates his rights under the constitution or laws of the United States to seek a review thereof by writ of error, instead of resorting to the writ of *habeas corpus*.

In the present case we agree with the court below that the petitioner had open to him the remedy by writ of error from this court for the correction of whatever injury may have been done to him by the action of the state courts, and that he should have been put to that remedy, rather than given the remedy by writ of *habeas corpus*. The circuit court had authority to exercise its discretion in the premises, and we do not see that there was any improper exercise of that discretion, under the facts and circumstances.

Without passing, therefore, upon the merits of the question as to the constitutionality of the provision of the Code under which the supreme court proceeded in disposing of the case when it was before it, or upon the question of the validity of the judgments rendered by the state courts in the case, we are of opinion, for the reasons stated, that the order of the circuit court refusing the application for the writ of *habeas corpus* was correct, and it is accordingly
*Affirmed.*⁵³

⁵³ The full statement of facts in this case will be found in Chapter X, sec. 3(e). *infra*.

See comprehensive note on the use of Habeas Corpus to review errors in 11 Am. & Eng. Ann. Cas. 1051.

SECTION 6. CERTIFICATE.

CITY OF WATERVILLE v. VAN SLYKE.

*Supreme Court of the United States. 1886.**116 United States, 699.*

MILLER, J. This is a writ of error to the circuit court for the district of Kansas. In that court there was a judgment against the plaintiff in error for the sum of \$1,282.06. The amount is too small to give this court jurisdiction on a writ of error to a circuit court. There is, however, a certificate of division of opinion between the circuit judge and the district judge sitting at the trial without a jury. We have decided that under the act of 1872 a case may be brought to this court on a certificate of division, without regard to the amount in controversy. *Dow v. Johnson*, 100 U. S. 158. But that decision was based upon a valid certificate which presented *properly* questions material to the decision of the case. If this were not necessary to our jurisdiction, a form of certificate which might present no question that this court can consider might be used to require of it a review of other matters than those on which the court divided, though the amount in controversy is insignificant. It is therefore only where the certificate does present, in accordance with the statute, a division of opinion in such a manner and on such a question as to give this court jurisdiction that the amount in controversy can be disregarded as an element of jurisdiction.

As to the character of the certificate on which this court will act, the statute of 1872 and the Revised Statutes have made no change, and the decisions of this court are full on that subject. The substance of these decisions, as applicable to the case before us, is that each question so certified must contain a distinct proposition of law which this court can answer negatively or affirmatively, and that the whole case cannot be presented by a recital of the evidence and interrogatories so framed as to require this court to decide the whole case on mixed propositions of law and fact. In short, while such a statement of facts must accompany the certificate as to show that the question of law is applicable to

the case, the *point* on which the judges differed must be a distinct question of law, clearly stated.

* * * * *

In the case of *U. S. v. Briggs*, 5 How. 208, on a demurrer to indictment, the judges certified a division of opinion as to whether the demurrer was well taken; and, though the record showed the grounds of demurrer, the court said: "The question upon which the disagreement took place is not certified. The difference of opinion is, indeed, stated to have been upon the point whether the demurrer should be sustained. But such a question can hardly be called a point in the case, within the meaning of the act of congress, for it does not show whether the difficulty arose upon the construction of the act of congress on which the indictment is founded, or upon the form of proceeding adopted to inflict the punishment, or upon any supposed defects in the indictment. On the contrary, the whole case is ordered to be certified upon the indictment, demurrer, and joinder, leaving this court to look into the record, and determine for itself whether any sufficient objection can be made in bar of the prosecution, and without informing us what questions had been raised in the circuit court upon which they differed." Having said that the causes of demurrer could not inform the court on that subject, the chief justice added: "But we are bound to look to the certificate alone for the question which occurred and for the point on which they differed, and as this does not appear, we have no jurisdiction in the case." * * *

Applying these principles to the case before us, we think it must be dismissed. The record shows a finding of facts upon the whole case, as it was submitted to the court without a jury. This finding is stated to be made under the laws of Kansas in such cases, and not under the act of congress concerning a review when a jury is waived, nor under the act concerning differences of opinion between the judges to be certified to this court. The finding is in fact nothing but a recital of the evidence on which the presiding justice rendered judgment in favor of plaintiff. They number 11 separate findings of fact, and were excepted to by counsel, and exception was taken to the evidence received to support them.

This is accompanied by the following certificate:

"Be it remembered, that upon the trial of this action, upon

issue joined upon petition of plaintiff, answer of defendant, and reply of plaintiff, the cause having been duly heard and taken under advisement by the court, was considered by said two judges, and thereupon the said two judges were divided in opinion upon questions of interest and importance arising upon the conclusions of fact found and stated by the court upon the said trial, viz.: (1) Had the defendant, as such city, power to issue such bonds for the said purpose in the original issue thereof, 1872, and did such want of power or such power appear upon the face thereof? (2) Did defendant issue the said bonds sued on? (3) If issued by defendant, had defendant power, as such city, to issue such bonds sued on for the said purpose therein expressed, and did such want of power, if not existing, appear upon the face of such bonds? (4) If such bonds sued on were issued by defendant, and disposed of in open market for value, without other notice to purchasers than such as all persons were bound to take from the public character thereof, is the defendant estopped from denying its liability thereon to plaintiff? (5) Upon the conclusions of fact so found and stated upon the trial of this action, is the plaintiff entitled to judgment for said amount stated, the said circuit judge being of opinion that such questions should be determined in favor of the plaintiff and judgment rendered in his favor for the said amount stated, and the said district judge differing therefrom?

“And judgment having been ordered in favor of plaintiff, and defendant having duly excepted thereto, it is now here ordered that the said questions as above stated, and upon which the said judges were divided in opinion as aforesaid, that same shall be forthwith stated under the direction of said judges, and certified and entered of record in said cause for writ of error to the supreme court of the United States, and which is now accordingly done in open court at said term thereof, and writ of error from such judgment is now allowed to said defendant, and bond fixed therefor to operate as *supersedeas* in the sum of \$2,000.

“Done and certified this third day of March, A. D. 1885, in open court.”

We do not see that any distinct question of law is stated on which the judges differed. In every instance it is what inference should be drawn from the facts found in the case,

or rather from the evidence. Take the first question. Does it refer to want of legislative action in regard to the power, or to want of constitutional power, in the legislature? Or does it refer to the want of proper action by the town authorities, or to want of the recital of their action on the face of the bond? As to the second question, it appears to present a simple question of fact as to the actual issue of the bonds by the defendants. The third is very much like the first. The fourth and fifth are still less presentations of any distinct propositions of law, but are mixed propositions of law and fact, in regard to which the court cannot know precisely where the division of opinion arose on a question of law alone. And, finally, it is very clear that the whole case has been sent here for us to decide, with the aid of a few suggestions from the circuit judges of the difficulties they have found in doing so. It presents nothing like as clear a case as that of a demurrer to an indictment, which demurrer recited the grounds on which it was made, but which this court held presented no statement of the question of *law* on which the judges differed. *U. S. v. Briggs*, 5 How. 208.

We repeat that this procedure is not intended to enable the parties in the circuit court to bring up the entire case to be retried here. It is meant to meet a case where, two judges sitting, a clear and distinct proposition of law, material to the decision of the case, arises, on which, differing, they may make such a certificate as will enable this court to decide that question. If in reality more than one such question occurs, they may be embraced in the certificate; but where it is apparent that the whole case is presented to this court for decision, with all its propositions of fact and of law, the case will not be entertained. Such a case is this, and it is accordingly dismissed.⁵⁴

⁵⁴ "In a number of jurisdictions, provision is made by the constitution or statutes for reservation, certification or report of cases or questions for or to an appellate court, under specified circumstances, by courts of original jurisdiction or intermediate appellate courts."—3 C. J. 989, where the practice is shown in Alabama (certification of constitutional questions from the court of appeals to the supreme court), Connecticut (reservation of any question of law), Georgia (certification of constitutional and other questions from the court of appeals to the supreme court), Illinois (certification of important questions from appellate court to supreme court), Indiana (reservation of questions of law), Iowa, Kansas and Wisconsin (certification of questions of law in cases not otherwise appealable), Louisiana (certification of questions of law from

courts of appeal to supreme court), Maine (certification of cases involving controlling questions of law from the equity court to the law court), Massachusetts (reservation of questions of law for the full court), Missouri (certification of entire case from court of appeals to supreme court), New Jersey (certification of any case of doubt or difficulty from the circuit to the supreme court), New York (certification of questions of law from appellate division to court of appeals), North Dakota (certification of questions of law in tax cases), Pennsylvania (reservation of questions of law for the full court or certification of important questions of law from superior to supreme court), Texas (certification of questions of law from court of civil appeals to supreme court), and Vermont (certification of exceptions to supreme court).

SECTION 7. SUPERINTENDING CONTROL.

STATE EX REL. FOURTH NAT. BANK v. JOHNSON.

Supreme Court of Wisconsin. 1899.

103 Wisconsin, 591.

Proceeding in *mandamus* and *certiorari* on relation of the Fourth National Bank of Philadelphia and others against Daniel H. Johnson, judge of the circuit court of Milwaukee county, and G. Ringenoldus, clerk of said court. Peremptory writ of *mandamus* awarded.

WINSLOW, J. The constitution of this state (section 3, art. 7) provides: "The supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state; but in no case removed to the supreme court shall a trial by jury be allowed. The supreme court shall have a *general superintending control over all inferior courts*; it shall have power to issue writs of *habeas corpus*, *mandamus*, injunction, *quo warranto*, *certiorari*, and other original and remedial writs, and to hear and determine the same." Very early in the history of this court and of the state the question of the construction and meaning of the section was presented to this court, and learnedly discussed by Justice Smith in the opinion in the case of *Attorney General v. Blossom*, 1 Wis. 317. That case was an information filed in this court by the attorney general in the nature of a *quo warranto* against Blossom and others, and motion was made to dismiss the cause for lack of

jurisdiction, on the ground that the granting of the writs in the third clause of the constitutional provision above quoted gave no additional jurisdiction, but that those writs were simply named as instrumentalities by which the appellate power and the superintending control were to be exercised. This contention was repudiated by the court, and the conclusion distinctly reached and clearly stated that the constitutional provision contained three separate grants of jurisdiction to this court, namely, (1) the appellate jurisdiction; (2) the superintending control over inferior courts; and (3) the original jurisdiction to be exercised by means of the writs named in the third clause to protect the sovereignty of the state, preserve the liberty of the people, and secure the rights of its citizens. In discussing the second clause of the section, namely, "the supreme court shall have a general superintending control over all inferior courts," it was said: "This sentence contains a clear grant of power. We will not undertake to say that without this grant the power would not be in the court. It is not necessary to discuss that question. We are endeavoring to arrive at the proper construction of the law. It is a grant of power. It is unlimited in extent. It is indefinite in character. It is unsupplied with means and instrumentalities. The constitution leaves us wholly in the dark as to the means of exercising this clear, unequivocal grant of power. It gives, indeed, the jurisdiction, but does not pretend to intimate its instruments or agencies." Again, in discussing the third clause of the section, it was said: "Here, also, is a distinct grant of power. The first of the section is restrictive,—one of limitation merely. The two last are clear grants of the power, the one of which gives the power of a superintending control over inferior courts; the other giving the power to issue certain writs in appropriate cases, and to hear and determine the same." The section came before this court again in the great case of *Atty. Gen. v. Railroad Cos.*, 35 Wis. 425, and the exhaustive discussion by Chief Justice Ryan in that case of the original jurisdiction of this court under the third clause of the section will ever stand as a monument to the legal learning and ability of that distinguished justice. In that discussion the conclusion reached in the *Blossom* Case to the effect that there were three separate and independent grants of jurisdiction in the section quoted was fully approved, and the court said (page

515 *et seq.*) : "The framers of the constitution appear to have well understood that with appellate jurisdiction the court took all common-law writs applicable to it, and with superintending control all common-law writs applicable to that; and that failing adequate common-law writs, the court might well devise new ones, as Lord Coke tells us, as 'a secret in law.' Hence the constitution names no writ for the exercise of the appellate or superintending jurisdiction of the court." * * *

It is very apparent that when the makers of the constitution used the words "superintending control over all inferior courts" they definitely referred to that well-known superintending jurisdiction of the court of king's bench. In England it was a branch of the king's power lodged with the king's court; in this country it is a branch of the sovereign power of the people, committed by them as a sacred charge to this court, not to be exercised upon light occasion, or when other and ordinary remedies are sufficient, but to be wisely used for the benefit of any citizen when an inferior court either refuses to act within its jurisdiction, or acts beyond its jurisdiction to the serious prejudice of the citizen. 2 Spell. Extr. Relief, § 1388. The two great writs by which this superintending jurisdiction was principally exercised by the court of King's bench were the writs of *mandamus* and prohibition; the one directing action by the inferior court, and the other forbidding action. Of these writs and their peculiar office, when directed to an inferior court, Blackstone says (Comm. bk. 3, c. 7, p. 110) : "For it is the peculiar business of the court of king's bench to superintend all inferior tribunals, and therein enforce the due exercise of those judicial or ministerial powers with which the crown or legislature have invested them, and this not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice." In addition to these two prerogative writs, the superintending control over inferior courts was at common law sometimes exercised by means of the writs of *certiorari* and *procedendo*, the first of which issued either from the king's bench or from chancery, and the second from the court of chancery alone, which court was also invested with a part of the superintending power. Harris, *Certiorari*, § 3, p. 4; Bl. Comm. bk. 3, c. 7, p. 109. As to the writ of *certiorari*, it is used so frequently, and its ordinary functions are so well

known, that discussion of it is unnecessary; and as to the writ of *procedendo* it may be said that it has practically fallen into disuse, its functions being fully performed by the writ of *mandamus*. High, Extr. Rem. (3d Ed.) §§ 147, 148. It would hardly be helpful to enter into any extended investigation as to whether there were other writs at common law by which the superintending power was exercised. The writs already named form a veritable arsenal of legal weapons by means of which all ordinary excesses or defaults on the part of inferior courts which call for the exercise of such power can be corrected and controlled. Nor, for the same reason, is it necessary to consider the suggestion of Chief Justice Ryan in the *Railroad Cases* to the effect that the court may devise new writs in case of the inadequacy of the common-law writs to meet the case in hand. The conclusion is inevitable that with the constitutional grant of superintending control this court took at the same time all the ancient writs necessary to enable it to exercise that high power including certainly the writs of *mandamus*, prohibition, *certiorari*, and *procedendo*.

* * *

There seems to have been no extended discussion of the general character and limits of the superintending jurisdiction of supreme courts in the decisions of other states, although the constitutions of Missouri, Michigan, and Colorado contain provisions very similar to our provision granting to the supreme court superintending control over all inferior courts; while in Alabama, Arkansas, Iowa, North and South Carolina the superintending control is given in somewhat different phraseology. However, we have found no decisions nor intimations contradictory to the views hereinbefore expressed, while we find the writs of *mandamus* and prohibition to have been frequently used in the exercise of this jurisdiction. * * *

Having thus demonstrated that the constitutional grant of superintending control over all inferior courts vested in this court an independent and separate jurisdiction enabling and requiring it, upon sufficient occasion, by the use of all proper and necessary writs to promptly restrain the excesses and quicken the neglects of inferior courts in the absence of other adequate remedy, the question arises whether the case presented is one within that jurisdiction, and, if so, whether *mandamus* is an appropriate and efficient remedy. The present

controversy arises out of the administration of the affairs of an insolvent bank with nominal assets of over a million and a half, and debts nearly as large. By the deed of assignment these assets became substantially the property of the creditors to the amount of their just claims held in trust for their benefit by the assignee, to be converted into money, under the direction of the court, and applied in liquidation of their claims. The creditors were the real owners, the assignee their trustee, and, in a sense, their mere agent. * * *

It seems to us manifest that there has been in this court a denial of several absolute and valuable rights which the law guaranties to the creditors of an insolvent estate. They had a statutory right to have an account rendered by the assignee in substantial conformity with the terms of the statute; they had a statutory right to file objections to such an account after examination thereof (section 1701, Rev. St.); they had a statutory right to inspect the books of the assignor, and examine the officers of the assignor and other witnesses prior to the final adjustment and approval of such account (section 1693b, Id.; *Berles v. Comstock*, 104 Mich. 129, 62 N. W. 148); and they had a common-law right, arising from their relations to the property and to the assignee, to examine the books of the assignee, and the assignee himself, prior to the final approval of such account. All these rights were valuable and absolute rights, to be exercised within reasonable limits, but which, in the present case, were wholly denied to the creditors; and, unless there be adequate remedy for such denial in the regular exercise of the appellate jurisdiction of this court, it is difficult to see why the superintending jurisdiction should not be exercised to quash the neglect or refusal of the circuit court, and compel it to act within its jurisdiction. Merrill, Mand. § 204. * * *

* * * Appeals from such orders could not, in the ordinary course of appellate proceedings, be heard and decided before late in the autumn or in the winter of 1899. It is very plain that, if the creditors are to exercise their rights with any prospect of benefit, they must exercise them promptly. The delay attending upon the presentation and consideration of an appeal would be fatal to any effective relief.

* * * * *

Judgment is ordered that a peremptory writ of *mandamus* issue in accordance with this opinion, and that the record

transmitted to this court in response to the writ of *certiorari* be at once remitted to the trial court.⁵⁵

⁵⁵ This case is very exhaustively annotated in 51 L. R. A. 33, with quotation of constitutional provisions in the various states and full citation of cases in which they have been construed. See also *State ex rel. Lemke v. District Court*, (1921) — N. D. —, 186 N. W. 381; *State ex rel. Shafer v. District Court*, (1923) — N. D. —, 194 N. W. 745. In Montana a "writ of supervisory control" is provided, which is used when no adequate remedy by appeal or other constitutional writ is appropriate.—*State ex rel. Peel v. District Court*, (1921) 59 Mont. 505, 197 Pac. 741.

CHAPTER VI.

PARTIES TO PROCEEDINGS FOR REVIEW.

SECTION 1. WHO ENTITLED TO REVIEW.

WHITE BRASS CASTINGS CO. v. UNION METAL MFG. CO.

Supreme Court of Illinois. 1908.

232 Illinois, 165.

DUNN, J. The White Brass Castings Company filed its bill in the superior court of Cook county against the Union Metal Manufacturing Company and others, by which it sought to have canceled a certain agreement between the two corporations so far as it related to the issue of 600 shares of the capital stock of the complainant, and also sought to have said 600 shares canceled unless the holders of the certificates therefor would pay for them. Answers were filed, and, after a reference to the master, a hearing was had upon his report, and a decree was entered dismissing the bill. The complainant appealed, and the Appellate Court for the First District affirmed the decree. The appellant in that court, complainant below, prayed a further appeal to this court, but did not file any bond. Subsequently a writ of error was issued out of this court to the Appellate Court for the First District at the suit of the White Brass Castings Company, John H. Winterburn, and Nicholas E. Murray against the Union Metal Manufacturing Company and others. As a return to that writ there has been filed the record in the case of the White Brass Castings Company against the Union Metal Manufacturing Company and others.

Neither John H. Winterburn nor Nicholas E. Murray was a party to the bill of the White Brass Castings Company against the Union Metal Manufacturing Company and others.

(903)

They were the owners of 210 of the 1,000 shares of the stock of the complainant, 600 shares of which stock, being the shares in controversy herein, were held by the defendants; the remaining 190 shares never having been issued. On the first day of the last term a motion was made on behalf of the White Brass Castings Company to dismiss the writ of error as to it, and it was made to appear that neither Winterburn and Murray nor their attorneys were authorized by that company to sue out the writ of error. It was inadvertently overlooked that Winterburn and Murray were not parties to the proceedings in the superior court or the Appellate Court, and the motion was overruled on the ground that, having a right to sue out the writ of error themselves, they might join the White Brass Castings Company as plaintiff in error. But the White Brass Castings Company alone had the right to sue out a writ of error. It was the only complainant—the only party against whom the decree and the judgment of affirmance were rendered. Winterburn and Murray could not sue out a writ of error in their own names, and they could not, without the authority of the White Brass Castings Company, use its name for that purpose. Their only interest in the decree was as stockholders. Stockholders cannot in their own names prosecute a writ of error to reverse a judgment against the corporation. They do not represent the corporation, though to a certain extent the corporation represents them. No person is entitled to sue out a writ of error who is not a party or privy to the record, or who is not shown by the record to be prejudiced by the judgment. *Granat v. Kruse*, 213 Ill. 328, 72 N. E. 744; *Hauger v. Gage*, 168 Ill. 365, 48 N. E. 142; *Anderson v. Steger*, 173 Ill. 112, 50 N. E. 665; *McIntyre v. Sholty*, 139 Ill. 171, 29 N. E. 43. Winterburn and Murray were not parties to the record. Nor can they be said to be privies to the record. “By ‘privies,’ within the meaning of the rule, are meant heirs, executors, administrators, tenants, or those having an interest in remainder or reversion, or one who is made a party by the law.” 7 Ency. of Pl. & Pr. 857; *Anderson v. Steger*, *supra*.

Nor can it be said that Winterburn and Murray are shown by the record to be prejudiced by the decree. The prejudice which will authorize the suing out of a writ of error must be such that the person suing out the writ takes or loses something directly by the judgment or decree. Bail cannot have a

writ of error to reverse a judgment against his principal nor the principal to reverse a judgment against his bail, nor can they join in the writ; nor has a creditor of any one, whether a corporation or an individual, against whom a judgment has been pronounced, a right to prosecute a writ of error in the name of such corporation or individual. *McIntyre v. Sholty, supra*. The indirect interest arising from the fact that the value of their stock may be increased or diminished by a judgment or decree against the corporation does not authorize each one, or a majority, or all of the stockholders, in their own names, to prosecute a writ of error to reverse such judgment or decree.

The plaintiffs in error Winterburn and Murray had no right to sue out the writ of error, and the White Brass Castings Company, the only proper plaintiff in error, should have been permitted to dismiss the writ as to it. It will therefore be ordered that the order made at the October term denying the motion of the White Brass Castings Company to dismiss the writ as to it be set aside, and that the writ of error be dismissed as to all the plaintiffs in error.

*Writ dismissed.*⁵⁶

⁵⁶ In some states it is held that no one can be "aggrieved" by an order except a party to the record, and hence only a party can appeal.—*Turner v. Williamson*, (1906) 77 Ark. 586; *Elliott v. Superior Court*, (1904) 144 Cal. 501.

In any event, only those persons who are so related to the controversy that they might properly become parties, can be deemed to be aggrieved by the order or judgment of the court.—*Chandler v. Railroad Commissioners*, (1886) 141 Mass. 208.

The common law rule. "No person can bring a writ of error, unless he is a party, or privy to the record, or is prejudiced by the judgment; the rule upon the subject being, that a writ of error can only be brought by him who would have had the thing, if the erroneous judgment had not been given."—Note to *William v. Gwyn*, 2 Saund. a 46.

PROVOST v. PICHE.

*Supreme Judicial Court of Maine. 1900.**93 Maine, 455.*

[Assumpsit with trustee process. In the municipal court the trustee was charged upon a disclosure admitting an indebtedness of \$13.37 to the principal defendant. On appeal to the supreme court sitting at *nisi prius* the defendant insisted upon the right to relitigate the question of the trustee's liability, the plaintiff contending that there was no such right. The court allowed the defendant to have a hearing anew upon the liability of the trustee, and the trustee was discharged. Exceptions by the plaintiff.]

WISWELL, J. This is an action of assumpsit to recover one installment due upon a nonnegotiable note given by the defendant to the plaintiffs for the purchase of a sewing machine. The suit was commenced in the Auburn municipal court, and, the exceptions state, "was there tried, and appealed to this court by the principal defendant."

In the lower court the alleged trustee filed a disclosure showing that, at the time of the service of the writ upon him, there was due from him to the principal defendant the sum of \$13.37 as wages for her personal labor performed within 30 days next before such service. In that court the trustee was adjudged trustee, and charged for the above amount.

In this court at *nisi prius*, where the case was taken by the defendant on appeal, she was defaulted by consent for the sum of \$10, and the alleged trustee was discharged for the reason that the amount due from the trustee to the principal defendant was due her as wages for her personal labor for a time not exceeding one month next preceding the service of the process, and because the suit was not to recover for necessities furnished her. Two questions are raised by the plaintiffs' exceptions relative to the liability of the trustee.

1. It is claimed on the part of the plaintiffs that the adjudication of the lower court charging the trustee was not vacated by the defendant's appeal; that, therefore, the question was not opened for a rehearing and decision in the appellate court, and that in fact a principal defendant has no such legal interest in the adjudication of the question whether the al-

leged trustee should be charged or not as to give him a right of appeal; that he cannot be aggrieved by any adjudication of this question.

In support of this position various cases are cited by the plaintiff's counsel, some of which go fully to the extent claimed by him. For instance, in *Kellogg v. Waite*, 99 Mass. 501, this is said in the opinion of the court: "The defendant in a trustee process has no legal interest in the question whether the trustee shall be charged or discharged. It does not bind him in any subsequent suit as an adjudication either of the fact or the amount of the indebtedness of the trustee to him. Nor is the pendency of the trustee process any defense to a suit by the defendant therein against the trustee."

This is not the law in this state, under our statutes relating to trustee process. Under our statutes a principal defendant has a legal interest in the adjudication of the alleged trustee's liability to be charged, and, in a subsequent suit brought by such defendant, he is estopped by the previous judgment, followed by a delivery or payment by the trustee of the goods, effects, and credits for which he was charged.

By Rev. St. c. 86, § 30, it is provided that the answers and statements sworn to by a trustee shall be deemed true, in deciding how far he is chargeable, until the contrary is proved, "but the plaintiff, defendant and trustee may allege and prove any facts material in deciding that question."

Various sections of the chapter of the Revised Statutes relating to trustee process provide for the proceedings when two cases are pending at the same time, one against a defendant and trustee, and the other where the defendant therein is plaintiff in a suit directly against the trustee, which need not be here particularly referred to. But that a principal defendant has a legal interest in the adjudication upon the question of liability of a person summoned as his trustee is conclusively shown by section 76 of that chapter, which is as follows: "The judgment against any person as trustee discharges him from all demands by the principal defendant, or his executors or administrators, for all goods, effects and credits, paid, delivered or accounted for by the trustee thereon; and if he is afterwards sued for the same by the defendant, or his executors or administrators, such judgments, and disposal of the goods, effects and credits as above stated, being proved, shall

be a bar to the action for the amount so paid or delivered by him."

In a case of this kind, where there is no claimant for the funds in the trustee's possession, and no controversy as to the amount due, and where the only question is whether or not the funds in the trustee's hands are exempted from attachment by this process, because of the provision of the statute that an amount due the principal defendant as wages for his personal labor performed within one month next before the service of the process, except where the suit is for necessities, cannot be thus attached, the principal defendant is the only one, except the plaintiff, who has any real interest in the determination of the question.

It would be an anomaly if a person thus interested could not appeal from an adjudication charging the trustee, because he is not aggrieved by such adjudication, when, by force of the statute above referred to, he is estopped by such judgment to claim the funds in the trustee's hands.

We have no doubt that, under the circumstances of this case, the principal defendant had the right of appeal, and that her appeal carried the whole case to the appellate court.

* * * * *

SHOLTY v. MCINTYRE.

Supreme Court of Illinois. 1891.

139 Illinois, 171.

MAGRUDER, C. J. This is an action of trespass brought in the circuit court of McLean county by the widow and heirs of Jacob Sholty, deceased, including Levi W. Sholty, against Robert S. McIntyre, as administrator of the estate of Benjamin D. Sholty, deceased. The suit was brought in the name of said widow and heirs, but for the use of the Patrons' Mutual Fire & Lightning Insurance Company of Stamford, Conn. Upon the trial in the circuit court the jury found the defendant guilty, and assessed the damages at \$2,500. Motions for a new trial and in arrest of judgment were overruled, and judgment was rendered on the verdict.

A writ of error was prosecuted from the appellate court to the circuit court by Levi W. Sholty, one of the nominal plaintiffs below, in the name of McIntyre, the administrator, who was the defendant below, but without the knowledge or consent of the latter. McIntyre, as administrator of Benjamin D. Sholty's estate, being the sole defendant against whom the judgment was rendered in the circuit court, and being the plaintiff in error in whose name the writ of error was sued out in the appellate court, made a motion in the latter court to dismiss the writ of error, which motion was allowed. The case is brought before us by writ of error to the appellate court to review the action of the appellate court in so dismissing the writ of error pending in that court.

A motion is also made in this court by McIntyre, administrator, who is the plaintiff in error here, to dismiss the present writ of error, upon the ground that the writ was sued out by Levi W. Sholty without the consent or authority of the plaintiff in error.

Did McIntyre, administrator, the plaintiff in error in the appellate court, have the right to dismiss the writ of error sued out there in his name? Has he the right to dismiss the writ of error sued out from this court in his name?

Levi W. Sholty, who has sued out these writs of error in the name of the original defendant in the judgment below, is a brother and heir of Benjamin D. Sholty, deceased, the latter having died unmarried. He is also a creditor of his deceased brother's estate. In his own right and in his own name he has a judgment against Benjamin D. Sholty's estate for \$2,250, and, as administrator of his deceased wife, he has another judgment against said estate for \$2,500. *McIntyre v. Sholty*, 121 Ill. 660, 13 N. E. Rep. 239. It is conceded that said estate is insolvent, and insufficient to pay the two last-named judgments; so that, if said judgments were paid, there would be nothing left to apply upon the judgment of the present defendant in error.

It is a general rule that no person can sue out a writ of error who is not a party or privy to the record, or who is not shown by the record to be prejudiced by the judgment. *Colman v. Oil Co.*, 25 W. Va. 148; *Howse v. Judson*, 1 Fla. 133; *Townsend v. Davis*, 1 Ga. 495; *Porter v. Rummery*, 10 Mass. 64; *Steel v. Bridenbach*, 7 Watts & S. 150; *Heirs of Hill v. Hill's Ex'rs*, 6 Ala. 166; *Dale v. Roosevelt*, 8 Cow. 333;

Jaqueth v. Jackson, 17 Wend. 434; 2 Tidd Pr. 1135, and note a; 6 Amer. & Eng. Enc. Law, 817. Levi W. Sholty was one of five or six nominal plaintiffs suing in the court below for the use of the insurance company. He made a motion in that court to have the suit dismissed as to him, upon the ground that he had not authorized it to be prosecuted in his name; but this motion was overruled, and judgment was rendered in his favor, and in favor of his co-plaintiffs, for the use of the insurance company, against McIntyre, administrator of said estate. The writ of error is usually brought by the party or parties against whom the judgment was rendered. 2 Tidd. Pr. p. 1134. Here it has been brought in the name of the party against whom the judgment was rendered, but without his consent, his name being made use of by one of the parties in whose favor the judgment was rendered.

It has been said that a writ of error may be brought by a plaintiff to reverse his own judgment, if erroneous, in order to enable him to bring another action. 2 Tidd. Pr. p. 1134; *Johnson v. Jebb*, 3 Burrows, 1772. In the *Jebb* Case, it would appear that the judgment was for a less amount than the plaintiff claimed that it ought to be.

Whether or not Levi W. Sholty could prosecute a writ of error under the circumstances of this case is a question which it is not necessary to pass upon, further than to say that, if he could do so, he would be under the necessity of suing it out in the name of all the plaintiffs in the judgment below, including his own. All the plaintiffs or defendants in the original suit who are alive must join in the writ of error, and it is competent for one to join the others without their consent. The reasons for this rule are that the writ must agree with the record, and that, if one of a number of plaintiffs, or one of a number of defendants, who have not distinct and several interests, should be permitted to bring a writ of error, every one might do the same, and such a practice would tend to multiply suits. If the parties whose names are thus used by a co-plaintiff or co-defendant choose to abide an erroneous judgment, and refuse to appear and assign errors, they must be summoned and severed, and then, after the severance, the writ may be prosecuted in the name of such co-plaintiff or co-defendant. *Jameson v. Colburn*, 1 Stew. & P. (Ala.) 253; *Watson v. Whaley*, 2 Bibb, 392; *Deneale v. Archer*, 8 Pet. 526;

2 Tidd, Pr. 1162, 1163, note a; *Harding v. Larkin*, 41 Ill. 413; *Page v. People*, 99 Ill. 418.

We are therefore of the opinion that Levi W. Sholty is not such a party to the record in the present case as that he has the right to sue out a writ of error in the name of the defendant below without the latter's consent.

It cannot be said that Levi W. Sholty is in any way privy to the record. There are privies in blood, as the heir is to the ancestor; privies in representation, as is the executor or administrator to the deceased; privies in estate, as lessor and lessee, etc. If this judgment had been rendered against Benjamin D. Sholty in his life-time, then Levi W. Sholty, being a brother and heir, might be entitled to sue out a writ of error as a privy in blood. But there can be no relation of privity between an heir of the deceased and the administrator of the deceased's estate.

Nor can it be said that Levi W. Sholty is shown by the record in this case to be prejudiced by the judgment below. It being admitted that the estate of Benjamin D. Sholty is insolvent, and that it will not be sufficient to pay the judgments in favor of Levi W. Sholty in his own right and as his wife's administrator, then Levi W. Sholty cannot be prejudiced as his brother's heir whether the judgment of the insurance company in this case is reversed or is allowed to stand. The heirs can take nothing until the debts are paid, and the estate will not be able to pay the debts not involved in this suit.

It is true that, as a creditor of his brother's estate, Levi W. Sholty will be indirectly prejudiced if the judgment in favor of defendants in error is allowed to stand, because the assets of the estate will in such case be applied to the payment of their judgment as well as to the payment of his judgments, and thereby the amount received by him will be lessened. But it has never been held that, where one creditor obtains a judgment against a debtor, another creditor can prosecute a writ of error from such judgment against the debtor's consent. In *Colman v. Oil Co.*, *supra*, the supreme court of West Virginia say: "No creditor of any one, whether a corporation or an individual, against whom a judgment has been pronounced, has a right in the name of such corporation or individual to prosecute a writ of error." See, also, *Steel v. Bridenbach*, *supra*, and *Townsend v. Davis*, *supra*. Bail cannot have a writ of error to reverse a judgment against his

principal, nor can the principal sue out the writ to reverse a judgment against the bail, nor can they join in the writ, the judgments being distinct and affecting different persons. 2 Tidd. Pr. 1135.

A writ of error is a writ of right by the common law, and, in this state, it lies from either this court, or the appellate court, to all inferior courts of record, to review their final determinations in all cases involving property rights or personal liberty, where no appeal is given from such inferior court of record. "This right exists independently of any statutory or constitutional provisions by force of the common law, in all cases in which the jurisdiction of such inferior court is exercised according to the course of the common law." *Haines v. People*, 97 Ill. 161; *Unknown Heirs v. Baker*, 23 Ill. 484; *Kingsbury v. Sperry*, 119 Ill. 279, 10 N. E. Rep. 8. But, as the right thus existing at common law can only be exercised by one who is a party or privy to the record, or is shown by the record to be prejudiced by the judgment, and as Levi W. Sholty does not occupy the position upon the record designated by the rule, he had no right to sue out the writ of error in the name of McIntyre, administrator, either in the appellate court or in this court; and the motion of the plaintiff in error to dismiss the writ of error in the appellate court was properly granted in that court, and must be allowed in this court, unless there is some statute which changes or contravenes the rule already considered.

* * * * *

SHERER v. SHERER.

Supreme Judicial Court of Maine. 1899.

93 Maine, 210.

Exceptions from supreme judicial court, Knox county.

This was an appeal by Charles Sherer, administrator of the goods and estate of Reuben Sherer, from a decree of the judge of probate for the county of Knox authorizing Fred Sherer to commence a suit on the probate bond of said administrator for the benefit of said estate.

When the appeal came on to be heard, the presiding justice ruled, as a matter of law, that Charles Sherer, the administrator, had no right to appeal from the decision of the judge of probate authorizing the commencing of a suit on his probate bond, under any circumstances, or upon any state of facts. To this ruling the appellant, Charles Sherer, excepted. Overruled.

The exceptions present only the legal proposition as stated in the ruling of the court. The facts upon which the appeal was based are not stated.

The material portion of the statute (Rev. St. c. 63, § 23) under which the right of appeal was claimed is as follows:

"Sec. 23. The supreme judicial court is the supreme court of probate, and has appellate jurisdiction in all matters determinable by the several judges of probate; and any person aggrieved by any order, sentence, decree, or denial of such judges, except the appointment of a special administrator, may appeal therefrom to the supreme court to be held within the county," etc.

The decree of the judge of probate authorizing the commencement of a suit on a probate bond is by virtue of the provisions of Rev. St. c. 72, § 16, which reads as follows, so far as material:

"Sec. 16. The judge of probate may expressly authorize any party interested, to commence a suit on a probate bond for the benefit of the estate, and such authority shall be alleged in the process."

EMERY, J. * * *

* * * Only persons "aggrieved" by a decree can appeal therefrom (Rev. St. c. 63, § 23), but it is now long and well settled that a person is not "aggrieved," in the statutory sense of that word, unless he would be concluded by the decree from the assertion of some claim of personal or property right. The mere fact that a person is hurt in his feelings, wounded in his affections, or subjected to inconvenience, annoyance, discomfort, or even expense, by a decree, does not entitle him to appeal from it, as long as he is not thereby concluded from asserting or defending his claims of personal or property rights in any proper court. Thus, a debtor of a deceased person cannot appeal from the appointment of a particular person as administrator, notwithstanding his argument that the person appointed would act oppressively towards him. *Swan*

v. Picquet, 3 Pick. 443. A person claiming property under a gift to him *causa mortis* cannot appeal from a decree charging the administrator with the property, and ordering its distribution among the next of kin, notwithstanding the argument that such decree would subject him to the annoyance and expense of a lawsuit. *Lewis v. Bolitho*, 6 Gray, 137. A creditor cannot appeal from a decree denying a petition for license to sell real estate for the payment of debts, though such denial may compel him to incur the expense of an action and levy. *Henry v. Estey*, 13 Gray, 336. The stepmother of minor children, whose parents are both dead, cannot appeal from a decree appointing some other person as guardian, though such decree may deprive her of their custody and companionship. *Lawless v. Reagan*, 128 Mass. 592. Trustees of a fund bequeathed to a minor cannot appeal from a decree appointing a particular person as guardian for the minor, however much they may prefer some one else, or even no guardian. *Deering v. Adams*, 34 Me. 41. A sister to a person of unsound mind cannot appeal from a decree appointing some other person to be the guardian of her relative, unless at least she has an interest in the estate of her relative, as heir. *Briard v. Goodale*, 86 Me. 100, 29 Atl. 946.

Tested by the rule above stated and illustrated, the administrator in this case is not aggrieved by, and cannot appeal from, the decree allowing a suit upon his bond. He is not concluded by it from asserting or defending any claim of personal or property right with respect to the estate, the heirs, legatees, or creditors. It does not even conclude him from asking the court to allow him in his account the expenses of the suit. His appeal, therefore, was rightfully dismissed.

* * *

IN RE SWITZER.

SWITZER v. SWITZER.

*Supreme Court of Missouri. 1906.**201 Missouri, 66.*

Fox, J. * * *

1. It is manifest from the brief of learned counsel for appellant that the vital and most important question involved in this proceeding is the right of the sureties on the guardian's bond to appeal from the final settlement of the guardian, made and approved by the probate court of Jackson county. This proposition necessitates the consideration of the statutes conferring the right of appeal. The sections of the statute pertinent to this question, are, first, section 278, Rev. St. 1899, which provides that the right of appeal in cases involving the administration of estate shall extend to any heir, devisee, legatee, creditor, or other person having an interest in the estate under administration. Section 3535, Rev. St. 1899, provides for the right of appeal from any final order or judgment of the probate court in guardianship matters in like manner and in the same effect as in appeal in cases of administration. The question to be answered in this proceeding is, have the sureties upon the guardian's bond such an interest in the administration of the estate of a minor to bring them within the provisions of the statute conferring the right of appeal in such cases?

It is earnestly insisted by learned counsel for appellant that the sureties upon Mrs. Switzer's bond as guardian for the appellant were not parties to the proceeding in the probate court, had nothing to do with the final settlement, and therefore have no right of appeal. We are unable to give our assent to this contention. The very terms of the statute indicate that the Legislature did not intend to limit the right of appeal to simply those who were parties to the proceeding. The statute applicable to administration of estates gives the right of appeal to any heir, devisee, legatee, creditor, or other person having an interest in the estate. This provision certainly does not contemplate as a condition precedent to the right of appeal that the persons enumerated must necessarily

be parties to the proceeding. We are unable to conceive of any persons who are more interested in the administration of a minor's estate (other than the minor himself) than the sureties on the guardian's bond. Their contract upon the bond makes them responsible for all the acts of the guardian respecting the administration of his ward's estate; therefore, they are deeply interested in the fair and proper administration of the estate and the distribution of the assets. Upon a careful consideration of the provisions of the statute applicable to appeals in cases of this character, we are decidedly inclined to the opinion that the sureties on the guardian's bond are persons that have such an interest in the administration of the estate as confer upon them the right of appeal from a judgment approving the final settlement of the guardian, for whose acts and conduct they are sureties.

In vol. 2, Cyc. 638, in the text, we find this general rule announced: "The sureties on an official bond become parties to the record by a judgment against the principal on the bond, and may appeal from such judgment." Numerous authorities are cited in support of the rule announced in the text from various states, including our own state. The reason assigned for this rule (and we confess that it is a good one) is that, "in the absence of fraud or collusion, a judgment against a principal is conclusive as against his surety," therefore, we can readily see the interest the surety has in a judgment, which, so far as the record is concerned, only purports to affect the principal.

* * * * *

This court in *Nolan v. Johns*, 108 Mo. 431, 18 S. W. 1107, very clearly announces the rule applicable to the right of appeal. While in that case the court had in judgment the statute applicable to appeals from the circuit court in civil cases, yet the principles announced are clearly applicable to the proposition now confronting us in this proceeding. The distinction between the statute in judgment before the court in that case and the statute applicable to the case at bar is very slight. Section 3710, Rev. St. 1879, gave the right of appeal to every person aggrieved by any final judgment or decision of any circuit court in any civil cause. The statute as applicable to this case gives the right of appeal to any heir, devisee, legatee, creditor, or other person interested in the estate under administration. In the case last cited the ques-

tion of the rights of sureties upon an injunction bond were involved. There was a judgment in the circuit court against the principal in the bond alone, and the sureties sought to be heard, but were refused, and they prosecuted an appeal. It was insisted in that case, as it is in the case at bar, that there was no right of appeal on the part of the sureties. Judge MacFarlane, in speaking for this court, thus clearly treated the question. He said: "It is clear that it was not intended that the right of appeal should be limited to persons who were technically parties to the suit, and against whom the judgment was directly rendered. 'Every person aggrieved' includes every person whose rights were in any respect concluded by the judgment. The use of the designation 'person' instead of 'party' in a chapter of the statute treating exclusively of practice and proceedings in civil cases is itself suggestive that others than those technically parties to a suit and judgment should have the right of appeal. Furthermore, it is right and just that any person whose interests are injuriously affected and concluded by a judgment should have the right to a review by the appellate court of the proceedings which resulted in such judgment." During the course of the opinion, the learned judge, in further treating of the question presented, said: "But it is insisted that, as no judgment was in fact rendered against the sureties, their rights are not affected by the judgment against the principal alone. We do not think the conclusion follows. The conditions of the bond were that plaintiff 'shall pay all sums of money, damages, and costs that shall be adjudged against him (the principal) if the injunction shall be dissolved.' The rule is that 'wherever a surety has contracted in reference to the conduct of one of the parties in some suit or proceeding in the courts, he is concluded by the judgment' if free from fraud and collusion. * * * We conclude that the appeal was properly taken by the sureties."

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WILSON v. BOARD OF REGENTS.

*Supreme Court of Colorado. 1909.**46 Colorado, 100.*

BAILEY, J. This appeal is by the executor Thomas V. Wilson from an order of the court directing a partial distribution of the *residuum* of the estate of Andrew J. Macky, deceased. Upon appellee's motion to dismiss the same we have examined the record with the utmost care and are unable to ascertain therefrom that the appellant has any appealable interest therein whatsoever. Indeed there is no real controversy or issue presented by this appeal for determination by the court. Appeals are not allowed for the mere purpose of delay, or to present purely abstract legal questions however important or interesting, but to correct errors injuriously affecting the rights of some party to the litigation. Only parties aggrieved may appeal. The word "aggrieved" refers to a substantial grievance; the denial to the party of some claim of right, either of property or of person, or the imposition upon him of some burden or obligation. It is not apparent that appellant is thus affected by the order complained of. He is not concerned in the slightest degree, in any legal sense, with the question of the proposed partial distribution of the *residuum* of said estate. There is no dispute anywhere as to whom it rightfully belongs and lawfully must go. He has no personal interest in it; he acts purely in a representative and official capacity. It is not for him, on his own motion, representing no one in interest and no one aggrieved by such action, to question, dispute and deny the order of the court in this behalf. Nevertheless he brings this matter here by appeal, in behalf of no one but himself, speaking for no one but himself, and for no other interest, except such as seem purely personal.

It has been necessary to examine the facts of the case, sufficiently at least, to determine appellant's right of appeal, which is the vital question at issue on this motion. No one having a direct or other interest in and to, or claim upon, the estate, in whole or in part, objects to or complains of the order of partial distribution. The executor alone does this, the result of which is simply to keep in his hands this large prop-

erty, upon which, and upon no part of which, has he any personal claim whatever.

True it is that a possible balance of fees may yet be allowed him as executor, with a possible further allowance for an attorney, to cover which, upon any possible contingency, clearly an abundant amount under the court's order is retained in his hands. Moreover a bond of \$50,000 is required to be given by the Regents of the State University to the executor, as such, to protect him against any and every possible future adverse happening.

If the contention of the appellant is correct and to be upheld, the power is placed in the hands of such a representative official to indefinitely tie up and postpone the settlement and distribution of any estate, where no dispute of substance whatever exists, and upon flimsy and trifling pretexts, in the interest only of one seeking in his official capacity to retain possession of the property involved. The law does not contemplate or approve such action, and courts should neither allow nor sanction it when properly called to their attention.

* * * * *

The appeal should be dismissed, and it is so ordered.

BOSWORTH v. TERMINAL RAILWAY ASS'N.

Circuit Court of Appeals, Seventh Circuit. 1897.

80 Federal Reporter, 969; 26 Circuit Court of Appeals, 279.

In a suit brought by the Mercantile Trust Company on the 21st day of September, A. D. 1893, to foreclose a mortgage upon the Chicago, Peoria & St. Louis Railway, the court appointed a receiver, with the authority usually conferred upon receivers in the charge and operation of railways and in the general administration of the estate, and required the receiver to pay (1) all past-due taxes; (2) all current operating expenses; (3) all past-due wages; (4) "all claims for materials and supplies which have been incurred in the operation and maintenance of said property during the six months last past, and all ticket, trackage, and traffic balances due from said railroad." To this last item the Mercantile

Trust Company objected, which objection the court overruled. On the 27th day of May, 1895, the Terminal Railroad Association of St. Louis, the appellee, filed its intervening petition, asserting a claim against the railway company, amounting to \$8,162.11, for switching, engine and car repairs, etc., done within six months prior to the date of the order appointing a receiver, and asking for the allowance of the claim as a preferential claim under the order of the court appointing the receiver. An answer was filed to this petition by the receiver, asserting that the facts stated might be true for anything known to the contrary, but, being stranger to the matters, he demanded strict proof, and denying that the petitioner was entitled to the relief demanded. The intervening petition, under a general order of reference, went to the master, whose report was to the effect that the claim was a just one, and that the amount is a lien upon the property of the railway company prior and superior to the claims of the mortgage bondholders under the order appointing the receiver, and that it should be paid out of the surplus income, or from a sale of the property of the railway company. To this report the receiver filed exceptions, not impugning the finding of the master that the claim was a just one against the company, but to the finding that the claim should be paid from the surplus income, or from a sale of the property of the railway company, "whereas," the exception proceeds, "the said master should have found that the aforesaid amount is due the said petitioner, but is not a lien upon the property of the railway company prior or superior to the lien of the mortgage bondholders." Upon hearing, the court, on July 30, 1896, overruled the exceptions, and entered a decree allowing the claim at the amount stated, and declaring that it was a claim of the character embraced in the order appointing the receiver, to be paid as a preferred claim, and directing that the receiver pay to the intervener the amount of the claim "out of the income of said receivership, if any such income is in his hands, and, in case he has not the funds in hand for this purpose, it is ordered, adjudged, and decreed that the same be paid out of the proceeds of the sale of the mortgaged premises in preference to the mortgage debt, and, until paid, the same is hereby declared a lien upon the said mortgaged estate superior to the lien of the mortgage herein." To this decree the receiver assigned error, in substance, to the effect that the court erred in adjudging

that the claim of the intervening petitioner was entitled to priority to the mortgage debt. The receiver thereupon prayed an appeal, which was allowed.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The contention of the receiver is thus stated in the brief of his counsel:

"The question thus presented to this court for determination is one as to the displacement of vested contract liens by unsecured creditors. There is no controversy as to the labor having been performed or the materials furnished within the six months next prior to the appointment of the receiver of the insolvent corporation, nor as to the value of the same. The only controversy is as to whether or not the appellee is entitled, on its petition and proof made thereunder, to have the vested lien of the mortgagee displaced to the extent of his claim."

* * * The broad ground is taken that a court of equity, assuming, at the request of a trustee, the operation of a railway, has not the right to provide for the payment, out of the income or the *corpus* of the road, of operating expenses incurred within a limited time prior to the suit, unless there has been diversion of income, and then only to the extent of such diversion.

It is, however, objected by the appellee that with this question the receiver is not concerned, and that, the justice of the debt being conceded, it is none of his affair that it is preferred by the decree to the mortgage debt. This contention, we think, must be sustained. While it is true that a receiver is the instrument of the court for the conservation of the estate which the court has taken into its possession for administration, it is also true that in a sense he represents all parties in interest. His duty is to defend the estate against all claims which he deems to be unjust. His duty is to conserve the estate as a whole for its distribution by the court among those who shall be adjudged to be entitled. He represents the estate, with right to sue to recover demands due to it, with right to defend it against claims asserted. In this respect we concur with the circuit court of appeals for the Fourth circuit that this duty carries with it the right and the duty, in case of doubtful claim, to take the judgment of the court of last resort. *Thom v. Pittard*, 8 U. S. App. 597, 10 C. C. A.

352, and 62 Fed. 232. This right and duty should, however, be limited in its exercise to those cases in which the estate, as a whole, is interested to enforce a right or to defend against a claim asserted. In respect to many matters the receiver has no right of appeal, while in respect to others his right to appeal may not be gainsaid. Thus, he may rightfully appeal from a decree refusing him compensation, or disallowing his accounts, or establishing a claim against the estate, or denying a claim asserted for the estate. He has no right to appeal from a decree removing him from his position, for that is matter of discretion with the court appointing him, and he holds his position by the sufferance of the court; nor has he the right of appeal from a decree authorizing an issue of receivers' certificates, or directing a particular management of the trust property, or directing sale of the mortgaged property, or confirming its sale, or directing the turning over of property in his hands; for he is neither the censor of the court, nor interested in the event. Illustrations might be multiplied. The true line of demarcation we think to be this: He has the right of appeal with respect to any claim asserted by or against the estate, for therein he is the representative of the entire estate. He has the right of appeal from any decree which affects his personal right, for therein he has an interest. But he has not the right of appeal from a decree declaring the respective equities of parties to the suit. He should therein be indifferent, and not a partisan. His duty is to all parties in common. He should not become the advocate of one against another. *Trust Co. v. Sullivan*, 46 U. S. App. 601, 603, 23 C. C. A. 458, and 77 Fed. 778.

* * * Neither the trustee nor the bondholders nor the purchaser is here objecting. Who made the receiver the guardian of their interests in this regard? What duty is imposed upon him to assert the supposed right of one creditor over another in respect to a common fund; and this, whether the estate remains in his custody or has passed from his possession and control under decree and sale? By what right does he become the partisan advocate when his duty demands of him impartiality and indifference with respect to the division of this common fund? By what authority may he assert the rights of a purchaser? By what right does he undertake to prevent the enforcement of this claim against the purchased estate, presumably by the decree of sale charged as a

lien upon it? He has no such right. He is, in so doing, an interloper, obtruding himself, in breach of his duty, where he has no right, and in a matter with which he is not concerned. To sanction such action is to encourage vexatious litigation at the expense of the estate, which should be cast upon the interested parties, and to hold out the temptation to a receiver and his counsel to swell the cost of administration by assuming litigation with which he has not right to interfere.

* * * * *

The appeal will be dismissed.

McFARLAND v. PIERCE.

Supreme Court of Indiana. 1897.

151 Indiana, 546.

HACKNEY, J. The appellees sued the appellants Abraham W. McFarland, the Ridgeville Milling Company, a corporation, and two others, seeking an accounting by said McFarland and others, as the officers and managers of said company, and the appointment, without notice, of a receiver, pending the litigation, to take the custody of the property, books, and effects of said milling company. The circuit court, on April 20, 1896, appointed a receiver as prayed; and on the 21st day of April, as shown by the bill of exceptions, but on the 22d day of April, as shown by the order-book entry, said McFarland and said milling company entered a special appearance "for the special purpose of making objections and taking exceptions to the appointment of a receiver." Upon the face of the documents filed by them in entering such appearance, and in the objections, it is recited that the same were filed April 20, 1896, and it is recited also that said receiver had then been appointed. Said objections were overruled; an exception was reserved; and this appeal was perfected. The assignment of error is by "the appellants Abraham W. McFarland and the Ridgeville Milling Company" jointly, and of the numerous specifications of error counsel say they "bring in review before this court the sufficiency of

the complaint to justify the appointment of a receiver *ex parte* without notice."

Appellees object to a consideration by us of any question assignable by said milling company alone, and they insist that said company alone could complain of the appointment of a receiver, and, since it has not separately assigned error, no question arises for decision. By Rev. St. 1894, § 1245 (Rev. St. 1881, § 1231), the right of appeal from the appointment of a receiver is given only to "the party aggrieved." Our first inquiry, therefore, is as to whether, in a legal sense, McFarland was aggrieved by said appointment, for, if he was not, and the milling company has joined him in the assignment of error, when there is no available error as to him, there can be no joint assignment made available. *Medical College v. Commingore*, 140 Ind. 296, 39 N. E. 744; *Goss v. Wallace*, 140 Ind. 541, 39 N. E. 920; *Armstrong v. Dunn*, 143 Ind. 433, 41 N. E. 540. The allegations of the complaint sought nothing with reference to the separate property of McFarland, and nothing with reference to joint property of McFarland and the milling company. McFarland was a stockholder in the milling company, and was charged with misconducting the affairs of said company, and appropriating its moneys to his own uses. The allegations as to an accounting are not before us to determine McFarland's interest in the suit, inasmuch as that branch of the controversy has not reached this court. As a stockholder, his interest in the company was held in common with the other stockholders; and the interests, as such, of all stockholders, were represented in and by the corporation defendants. He was not a party to the complaint, because he was a stockholder; and, for the purposes of the appointment of a receiver, it cannot be maintained that, as a stockholder, he was a proper or necessary party. He was made a party to respond to the primary allegations of the complaint and cause of action wherein he was charged personally with bad faith, and it was sought to require him to account and pay to the use of the company the funds belonging to and withheld from it. "The word 'aggrieved,' in the statute refers to a substantial grievance, a denial of some personal or property right, or the imposition upon a party of a burden or obligation. *People v. Kent*, 4 N. Y. Wkly. Dig. 62; *Reid v. Vanderheyden*, 5 Cow. 719; *Steele v. White*, 2 Paige, 478; *Colden v. Botts*, 12 Wend. 234; *Kelly*

v. Israel, 11 Paige, 147; *Card v. Bird*, 10 Paige, 426; *Bush v. Bank*, 48 N. Y. 659; *Hall v. Brooks*, 89 N. Y. 33; *Grow v. Garlock*, 29 Hun, 598; *People v. Common Council of City of Troy*, 82 N. Y. 575. "To be 'aggrieved' is to have a legal right, the infringement of which by the decree complained of will cause pecuniary injury." *Hewitt's Appeal*, 58 Conn. 226, 20 Atl. 453; *Dickerson's Appeal*, 55 Conn. 223, 10 Atl. 194, and 15 Atl. 99; *Andress v. Andress*, 46 N. J. Eq. 528, 22 Atl. 124; *Swackhamer v. Kline's Adm'r*, 25 N. J. Eq. 503; *Parker v. Reynolds*, 32 N. J. Eq. 293. The appellant must have a legal interest which will be enlarged or diminished by the result of the appeal. *Woodward v. Spear*, 10 Vt. 420; *Hemmenway v. Corey*, 16 Vt. 225; 2 Enc. Pl. & Prac. p. 170; *Wiggin v. Swett*, 6 Metc. (Mass.) 194; *Lewis v. Bolitho*, 6 Gray, 137; *Lawless v. Reagan*, 128 Mass. 592; *Deering v. Adams*, 34 Me. 41. Under any of these definitions, the appellant McFarland has no appealable interest in the one question now in this court,—the appointment of a receiver. If he has any interest to be affected by that action, it is but remote and contingent, and that interest is of a corporate character, and its legal representative is in court. That interest may be protected alone by such legal proceedings as the corporation may employ, and the stockholder cannot, in his individual capacity, dictate the course, nor set up his judgment against the course chosen by the corporation, so long as it does not act *ultra vires*. Having concluded that McFarland had no appealable interest, the joint assignment of himself and the company presented no question in favor of the company alone. The judgment is affirmed.

ON PETITION FOR REHEARING.

HACKNEY, J. Our holding that McFarland had no appealable interest in the matter of the appointment of a receiver for the milling company is questioned—First, because McFarland, employed as the manager of the milling plant, had a financial interest in the question to the extent of his compensation as manager; and, second, because, as such manager, he was in possession of the property. His possession is that of the corporation. He is the mere agent of and custodian for the corporation, with no alleged interest above that of a servant. In his own right he makes no claim of possession.

and his every interest in possession is merged in that of the corporation. His financial interest is that of a salaried agent of the corporation. To maintain a possessory or financial interest in the property in behalf of McFarland would render it necessary, in every case of the appointment of a receiver for a corporation, to make defendants and give an appealable interest to the servants drawing salaries and, as servants, holding custody of all or any part of the corporate property. The superintendent of a railway, the manager of a gas plant or a manufactory, would certainly possess no appealable interest in a proceeding against any such corporation for the appointment of a receiver of the corporate property. If McFarland, by reason of the fact that a receiver might cut off his salary as an agent of the company, could interpose to deny the right to such receiver, the same could be said of any employe of any corporation. When it is remembered that the servant has no interest in the corporate property or its possession above that of the corporation itself, it at once appears that that which precludes the corporation precludes such servant. The petition is overruled.

AGNEW v. BALDWIN.

Supreme Court of Wisconsin. 1908.

136 Wisconsin, 263.

[Action for breach of a contract to deliver lumber, plaintiff claiming \$368.56 damages. Defendant filed a counterclaim for breach of the same contract by the plaintiff, claiming \$180 damages. At the trial the answer was amended so as to fix the damages on the counterclaim at \$500.]

The jury returned a general verdict for the defendant for \$1.56, thus allowing the counterclaim at a trifle more than the plaintiff's claim. Plaintiff moved to set aside the verdict and for a new trial, which motion was granted, unless the defendant should file a stipulation consenting to remit all but the sum of \$180 from his damages and allow plaintiff a judgment of \$188.46 as tendered in the original answer with costs, and, in the case of the filing of such stipulation, denying the mo-

tion. The defendant filed the stipulation specified in the order of the court, and judgment was entered in accordance therewith, from which both parties appeal.

WINSLOW, C. J. It seems plain that by stipulating to the entry of the judgment the defendant waived his right of appeal therefrom. The circuit judge evidently granted a new trial in the exercise of his discretion because he was dissatisfied with the damages allowed by the jury on the counterclaim, but granted to the defendant the privilege of averting a new trial by reducing his damages to a sum which the court deemed reasonable. The defendant could take any one of three courses—he could appeal from the order if he deemed that the court's discretion had been abused, or he could submit to the new trial, or he could file his stipulation and avoid another trial. He had his choice, and he chose to stipulate for the entry of the very judgment which was entered. In so doing he did not act under compulsion in any legal sense. A party cannot voluntarily stipulate that a certain judgment be entered, and then appeal from it after its entry. He cannot be heard to complain of an act to which he deliberately consents. "*Consensus tollit errorem.*"

The plaintiff, however, has done nothing to forfeit his right of appeal. He promptly moved for a new trial, and his motion was granted, subject to defendant's right to stipulate to reduce his damages. He did not even move for judgment on the stipulation, and has done nothing to waive his claim to recover the entire amount of the balance due on the lumber contract without reduction. His appeal must therefore be considered.

* * * * *

57 "If a judgment be rendered against a party by his consent, he cannot be said to be aggrieved."—Powell v. Turner, (1885) 139 Mass. 97. On this ground no appeal lies (in the absence of statute to the contrary) from a judgment by confession, which amounts to a release of errors,—Garner v. Burleson, (1862) 26 Tex. 348; Manderville v. Holey, (1828) 1 Pet. (U. S.) 136; or from a decree taken *pro confesso*.—New Jersey Bldg. Loan & Inv. Co. v. Lord, (1903) 66 N. J. Eq. 344; Murphy v. Am. Life Ins. Co., (1840) 25 Wend. (N. Y.) 249; or from a judgment by default,—McLean v. Territory, (1903) 8 Ariz. 195; Schwartz v. Flaherty, (1905) 99 Me. 463; Thompson v. Haselton, (1885) 34 Minn. 12; Flake v. Van Wagenen, (1873) 54 N. Y. 25; State v. Simpson, (1914) 69 Ore. 93; Bank v. Ralphsnyder, (1903) 54 W. Va. 231, except on the ground of the insufficiency of the record to sustain the judgment,—Benton v. Holliday, (1884) 44 Ark. 56; White v. Iltis, (1877) 24 Minn. 43; Gadsden v. Home Fertilizer Co., (1911) 89 S. C. 483. But some cases allow appeals

generally from default judgments.—*Jameson v. Simonds Saw Co.*, (1904) 144 Cal. 3; *Lovejoy v. Stutsman*, (1915) 46 Okl. 122; *Rhode Island Mtg. Co. v. Spokane*, (1898) 19 Wash. 616.

In *Hart v. State Fire Marshal*, (1914) 178 Mich. 609, two cases involving the validity of the same law were heard together. The court held the law invalid in the first case, and when the second case was taken up the attorneys suggested that they did not care to go into the merits in view of the court's opinion on the law and proposed that the court merely make the same order as in the other case, in order to make a basis for an appeal. This the court did, stating that it was done to enable the matter to be tested in the Supreme Court. The appeal, when taken, was dismissed on the ground that the order was made with the consent of the appellant and was therefore not appealable.

The express reservation of the right to appeal will not be effective against a judgment entered by consent.—*Twitchell v. Risley*, (1910) 56 Ore. 226; *Jarvis v. Palmer*, (1846) 1 Barb. ch. (N. Y.) 379; *Cameron v. Smith*, (1912) 171 Mich. 333; *McBride v. Hunter*, (1880) 64 Ga. 655.

UNITED STATES v. SANGES.

Supreme Court of the United States. 1892.

144 United States, 310.

GRAY, J. The jurisdiction of this court is invoked by the United States under that provision of the judiciary act of 1891 by which "appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court," "in any case that involves the construction or application of the constitution of the United States." Act March 3, 1891, c. 517, § 5, (26 St. pp. 827, 828.)

But the question which lies at the very threshold is whether this provision has conferred upon the United States the right to sue out a writ of error in any criminal case.

This statute, like all acts of congress, and even the constitution itself, is to be read in the light of the common law, from which our system of jurisprudence is derived. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 545; *Rice v. Railroad Co.*, 1 Black, 358, 374, 375; *U. S. v. Carll*, 105 U. S. 611; *Ex parte Wilson*, 114 U. S. 417, 422, 5 Sup. Ct. Rep. 935; 1 Kent, Comm. 336. As aids, therefore, in its interpretation, we naturally turn to the decisions in England and in the several states of the Union, whose laws have the same source.

The law of England on this matter is not wholly free from

doubt. But the theory that at common law the king could have a writ of error in a criminal case after judgment for the defendant has little support beyond sayings of Lord Coke and Lord Hale, seeming to imply, but by no means affirming it; two attempts in the house of lords, near the end of the seventeenth century, to reverse a reversal of an attainder; and an Irish case and two or three English cases, decided more than sixty years after the Declaration of Independence; in none of which does the question of the right of the crown in this respect appear to have been suggested by counsel or considered by the court. 3 Inst. 214; 2 Hale, P. C. 247, 248, 394, 395; *Rex v. Walcott*, Show. Parl. Cas. 127; *Rex v. Tucker*, Show. Parl. Cas. 186, 1 Ld. Raym. 1; *Regina v. Houston*, (1841), 2 Craw. & D. 191; *The Queen v. Mills*, (1843), 10 Clark & F. 534; *The Queen v. Wilson*, (1844), 6 Q. B. 620; *The Queen v. Chadwick*, (1847), 11 Q. B. 173, 205. And from the time of Lord Hale to that of *Chadwick's Case*, just cited, the text-books, with hardly an exception, either assume or assert that the defendant (or his representative) is the only party who can have either a new trial or a writ of error in a criminal case, and that a judgment in his favor is final and conclusive. See 2 Hawk. P. C. c. 47, § 12; Id. c. 50, § 10 *et seq.*; Bac. Abr. "Trial," L. 9, "Error," B; 1 Chit. Crim. Law, 657, 747; Starkie, Crim. Pl. (2d Ed.) 357, 367, 371; Archb. Crim. Pl. (12th Eng. & 6th Amer. Ed.) 177, 199.

But whatever may have been, or may be, the law of England upon that question, it is settled by an overwhelming weight of American authority that the state has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law.

In a few states decisions denying a writ of error to the state after judgment for the defendant on a verdict of acquittal have preceeded upon the ground that to grant it would be to put him twice in jeopardy, in violation of a constitutional provision. See *State v. Anderson*, (1844), 3 Smedes & M. 751; *State v. Hand*, (1845), 6 Ark. 169; *State v. Burris*, (1848), 3 Tex. 118; *People v. Webb*, (1869), 38 Cal. 467; *People v. Swift*, (1886), 59 Mich. 529, 541, 26 N. W. Rep. 694.

But the courts of many states, including some of great authority, have denied, upon broader grounds, the right of the state to bring a writ of error in any criminal case whatever, even when the discharge of the defendant was upon the decision of an issue of law by the court, as on demurrer to the indictment, motion to quash, special verdict, or motion in arrest of judgment.

* * * * *

In many of the states, indeed, including some of those above mentioned, the right to sue out a writ of error, or to take an appeal in the nature of a writ of error, in criminal cases, has been given to the state by positive statute. But the decisions above cited conclusively show that under the common law, as generally understood and administered in the United States, and in the absence of any statute expressly giving the right to the state, a writ of error cannot be sued out in a criminal case after a final judgment in favor of the defendant, whether that judgment has been rendered upon a verdict of acquittal, or upon a determination by the court of an issue of law. In either case, the defendant, having been once put upon his trial and discharged by the court, is not to be again vexed for the same cause, unless the legislature, acting within its constitutional authority, has made express provision for a review of the judgment at the instance of the government.

In the light of these decisions, we come to the consideration of the acts of congress on the subject of writs of error in criminal cases.

* * * * *

In none of the provisions of this act, defining the appellate jurisdiction, either of this court or of the circuit court of appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States.

Writ of error dismissed for want of jurisdiction.⁵⁸

⁵⁸ Statutes usually allow appeals by the state only where no general verdict of acquittal of the defendant has been found by the jury.—State v. Allen, (1920) 107 Kan. 407; United States v. Evans, (1907) 30 App. D. C. 58; Commonwealth v. Fore, (1914) 158 Ky. 465; State v. Finstad, (1903) 16 S. D. 422; State v. Marshall, (1894) 124 Mo. 483; State v.

Minnick, (1898) 33 Ore. 158; State v. Hubbell, (1898) 18 Wash. 482; State v. Savery, (1900) 126 N. C. 1083.

When allowed in case of a verdict of not guilty the appeal serves only the purpose of authoritatively expounding the law.—State v. Kinney, (1876) 44 Ia. 444; State v. Spear, (1916) 123 Ark. 449; State v. Brown, (1912) 8 Okl. Cr. 40; State v. Laughlin, (1908) 171 Ind. 66. But see State v. Miller, (1913) 14 Ariz. 440, holding that such an appeal presented a moot case of which the appellate court had no jurisdiction.

If the statute attempts to give the state a right of appeal for the purpose of reversing the judgment on a verdict of not guilty, it is unconstitutional as involving double jeopardy.—People v. Webb, (1869) 38 Cal. 467; People v. Miner, (1893) 144 Ill. 308.

On appeals by the state in criminal cases see monographic note to People v. Miner, 19 L. R. A. 342, and 19 Mich. L. Rev. 79.

SECTION 2. WHO MUST BE JOINED.

MASTERSON v. HERNDON.

Supreme Court of the United States. 1870.

10 Wallace, 416.

Appeal from the Circuit Court for the Western District of Texas; the case being thus:

Howard and others filed in the court below a bill of peace and for the conveyance of pretended title to a tract of land described, against *S. A. Maverick*, and *J. H. Herndon*, and on that bill the court decreed that the complainant "have and recover of the said *S. A. Maverick* and the said *J. H. Herndon* the tract of land in the bill described, and that their title to the same is hereby decreed to be free from all clouds cast thereon by the said defendants."

From this decree *Herndon* appealed. In regard to *Maverick*, the petition, which was signed by counsel only, and was not sworn to, was thus:

"Your petitioner *says* that his co-defendant, *Maverick*, refuses to prosecute this appeal with him."

* * * * *

MILLER, J., after stating that a careful examination of the record satisfied the court that the decree was a joint decree, and that the appeal was clearly taken by *Herndon* alone, delivered its opinion as follows;

It is the established doctrine of this court that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error; and in chancery cases, all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this: 1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. That the appellate tribunal shall not be required to decide a second or third time the same question on the same record.

In the case of *Williams v. Bank of the United States*, 11 Wheat. 414, the court says that where one of the parties refuses to join in a writ of error, it is worthy of consideration whether the other may not have remedy by summons and severance; and in the case of *Todd v. Daniel*, 16 Pet. 521, it is said distinctly that such is the proper course. This remedy is one which has fallen into disuse in modern practice, and is unfamiliar to the profession; but it was, as we find from an examination of the books, allowed generally, when more than one person was interested jointly in a cause of action or other proceeding, and one of them refused to participate in the legal assertion of the joint rights involved in the matter. In such case the other party issued a writ of summons, by which the one who refused to proceed was brought before the court, and if he still refused, an order or judgment of severance was made by the court, whereby the party who wished to do so could sue alone. One of the effects of this judgment of severance was to bar the party who refused to proceed, from prosecuting the same right in an other action, as the defendant could not be harassed by two separate actions on a joint obligation, or on account of the same cause of action, it being joint in its nature. This remedy was applied to cases of writs of error when one of the plaintiffs refused to join in assigning errors, and in principle is no doubt as applicable to cases where there is a refusal to join in obtaining a writ of error or in an appeal. The appellant in this case seems to have been conscious that something of the kind was necessary, for it is alleged in his petition to the Circuit Court for an appeal, that Maverick refused to prosecute the appeal with him.

We do not attach importance to the technical mode of pro-

ceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join. But the mere allegation of his refusal, in the petition of appellant, does not prove this. We think there should be a written notice and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made to permitting one to appeal without joining the other, that is, it would enable the court below to execute its decree so far as it could be executed on the party who refused to join, and it would estop that party from bringing another appeal for the same matter. The latter point is one to which this court has always attached much importance, and it has strictly adhered to the rule under which this case must be dismissed and also to the general proposition that no decree can be appealed from which is not final in the sense of disposing of the whole matter in controversy, so far as it has been possible to adhere to it without hazarding the substantial rights of parties interested. We dismiss this appeal with the less regret, as there is still time to obtain another on proceedings not liable to the objection taken to this.⁵⁹

⁵⁹ Where a liability is both joint and several, and the parties are sued jointly, they must join in an appeal.—*Bassett v. Loewenstein*, (1901) 22 R. I. 468; 48 Atl. 934.

"The absence of a party to a joint judgment who will necessarily be affected by a modification or reversal defeats the jurisdiction of the court, and there can be no review of any part of the judgment."—*Barber Asphalt Paving Co. v. Botsford*, (1893) 50 Kan. 331. *Accord*, *Hamilton v. Blair*, (1892) 23 Ore. 64. But statutes sometimes allow any party to appeal irrespective of the nature of the judgment against him,—*Senter v. De Bernal*, (1869) 38 Cal. 637; *Johnson v. Reed*, (1896) 47 Neb. 322; *Indiana, Burns St.*, 1914, §§ 674, 675.

WORMLEY v. WORMLEY.

*Supreme Court of Illinois. 1904.**207 Illinois, 411.*

MAGRUDER, J. * * *

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3. It is further claimed by the defendants in error that the writ of error should be dismissed for misjoinder of parties. All of the defendants in error, except John T. Wormley, were co-complainants in the court below with the present plaintiff in error, George D. Wormley, and claimed the same rights; and it is said that they should have been joined here as plaintiffs in error with George D. Wormley. The general rule undoubtedly is that all the plaintiffs or defendants against whom a joint judgment is rendered must be joined as plaintiffs in error where a writ of error is sued out by one or more of them. Section 70 of the practice act, provides that, in all cases where a judgment or decree shall be rendered against two or more persons, either one of them may remove such suit to the Appellate Court by appeal or writ of error, and for that purpose shall be permitted to use the names of all such persons, if necessary. 3 Starr & C. Ann. St. 1896 (2d Ed.) p. 3099; *McIntyre v. Sholty*, 139 Ill. 171, 29 N. E. 43; *Cooke v. Cooke*, 194 Ill. 225, 62 N. E. 536. It is true that the present plaintiff in error, George D. Wormley, could have used the names of all his co-complainants in the court below as co-plaintiffs in error with himself in suing out the present writ of error. As was said in *McIntyre v. Sholty*, 139 Ill. 176, 29 N. E. 44: "All the plaintiffs or defendants in the original suit who are alive must join in the writ of error, and it is competent for one to join the others without their consent. The reasons for this rule are that the writ must agree with the record, and that, if one of a number of plaintiffs, or one of a number of defendants, who have not distinct and several interests, should be permitted to bring a writ of error, every one might do the same, and such a practice would tend to multiply suits. If the parties whose names are thus used by a coplaintiff or codefendant choose to abide an erroneous judgment, and refuse to appear and assign errors, they must be summoned and severed, and then after the severance the

writ may be prosecuted in the name of such coplaintiff or co-defendant." If in the present case George D. Wormley had sued out the writ of error in his own name, and also in the names of the other co-complainants with him in the court below, and if they had refused, when their names were so used, to join in the prosecution of the writ, he could have summoned them into court, and obtained a judgment of severance against them, so that then he could have prosecuted the writ alone, and as sole plaintiff in error. 7 Ency. of Pl. & Pr. pp. 860-862. While this was not done in the present case, yet, when George D. Wormley sued out the writ of error alone in his own name, he made all of his co-complainants below defendants in error with the defendant below, John T. Wormley. All of his co-complainants have been served as defendants in error, or have entered their appearance as defendants in error. They are therefore before this court. They might have assigned cross-errors, or they might have asked to be joined with George D. Wormley as coplaintiffs in error for the purpose of prosecuting the writ of error. They have not taken any such steps. But being before the court as defendants in error by entry of appearance, the case stands in the same position as though there had been a summons and a severance. They are in court, and this would be the only effect which could result from a summons. Where there are several defendants in an action, all may plead jointly one and the same defense, or each may plead a separate defense for himself, and in the latter case he is said to sever; and his doing so is termed "severance in pleading." 25 Am. & Eng. Ency. of Law (2d Ed.) p. 631. In the present case there is an actual severance, because the plaintiff in error, George D. Wormley, is prosecuting this writ of error alone, and not jointly with the other complainants in the bill. Their action in declining or neglecting to assign cross-errors, or to unite with him in the prosecution of the writ of error while they are in court by their entry of appearance, operates to create a severance, and justifies him in prosecuting the writ of error alone. For these reasons, the motion to dismiss the writ of error is overruled. * * *⁶⁰

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⁶⁰ The use of the names of other appellants by the one wishing to appeal is proper in the absence of any statute.—*Van Buskirk v. Hoboken & N. Y. RR. Co.*, (1865) 31 N. J. L. 367; *Flournoy v. Burke*, (1840) 4

How. (Miss.) 337; 2 Saund. 101f. But in any case the appeal is not thereby taken in behalf of the rest; each one who wishes the benefit of the appeal must take steps to become a party to the appeal.—Hammond v. The People, (1897) 164 Ill. 455.

AYRES v. POLSDORFER.

Circuit Court of Appeals, Sixth Circuit. 1900.

105 Federal Reporter, 737; 45 Circuit Court of Appeals, 24.

Before LURTON and SEVERENS, Circuit Judges, and EVANS, District Judge.

SEVERENS, Circuit Judge. This is an action of ejectment brought by Polsdorfer and wife, the defendants in error, against Ayres, the plaintiff in error, Thomas Price, and others, to recover several thousand acres of land fronting other lands owned by the plaintiffs in the suit, on the eastern shore of the Mississippi river, in Louderdale county, Tenn. Their right to recover the lands in question, which had been formed in the bed of the river by changes in the current and the deposit of alluvion, was rested upon the claim that they were accretions to the land which they owned along the shore. The parties defendant were made such under the provisions of the statute of Tennessee (Shannon's Code, § 4972 [3231]) which provides that, if there be no actual occupant of the lands, the action is to be brought "against any person claiming an interest therein, or exercising acts of ownership at the commencement of the suit." * * * Ayres filed the general plea of not guilty, and a special plea of the statute of limitations of Tennessee. Price pleaded not guilty. For the purposes of the decision of this court, it is unnecessary to detail the proceedings in the suit which relate to or were taken by the other defendants. The case came on for trial before a jury. The plaintiffs gave evidence of their ownership of the land on the Tennessee shore, and of facts on which the accretion of the land in question was claimed to have inured to them by virtue of such ownership. The defendant Ayres (now plaintiff in error) gave evidence, to support his claim to the land, of a grant from the state of Arkansas, to a person from whom he deraigned title, of lands

constituting an island or islands in the river, lying west of the middle of the channel, which constituted the boundary of the states, and of facts tending to support his contention that the lands in suit were accretions to that ownership. Price defended his claim to the lands under a grant of the lands by the state of Tennessee of recent date, contending that the plaintiff's ownership extended only to the shore, and that the made land was between that to which the plaintiff had title and the middle thread of the river, and rested upon that which had never passed from the state until its grant to that defendant. At the close of the evidence the jury, under direction of the court, rendered a verdict for the plaintiffs against both Ayres and Price for all the land claimed by each of them, except a portion claimed by Price only. The defendants excepted to this direction of the verdict. Judgment was entered thereon as follows:

"It is therefore considered, ordered, and adjudged that the plaintiffs do have and recover of and from the defendants, severally, the lands hereinbefore described, found by the verdict of the jury to belong to them in fee, and that the plaintiffs do have and retain the possession of such lands under and in accordance with their said title, and that as to the lands herein sued for, not embraced by the verdict of the jury in favor of the plaintiffs, the defendants go hence without day, and that the plaintiffs recover of the defendants all their costs herein expended, and that execution issue therefor."

Ayres tendered a bill of exceptions, which was settled and filed, and, without taking notice of Price, who appears to have been the only other contestant for the lands recovered, sued out this writ of error. Upon the hearing, counsel for defendants in error raised the objection that Ayres alone prosecuted the writ, without having obtained any order permitting him (Ayres) to proceed alone, or taking any equivalent steps in that regard to justify himself in suing out the writ without the joinder of Price, and this presents a question which we must first consider. The rule is firmly established, at least in the appellate courts of the United States, that, where a judgment or decree is rendered against two or more jointly, all must join in suing out the writ of error or prosecuting an appeal, unless those who are not joined have been invited to come in and have refused; and

proof that this has been done must be made to appear by the record of the circuit court, before a writ of error or an appeal by less than the whole can be allowed. * * * In its enforcement a dubious question has frequently arisen, as to whether the judgment or decree was in legal contemplation a joint or several one, and in solving it the courts have looked to its substance rather than its form. See the above-cited cases, and those which follow. In many cases the rule has been held not applicable where the party claiming to be aggrieved, although he is one of several parties against whom the judgment was rendered, yet alone represents some distinct and substantive subject-matter, in which the others have no concern, or are only incidentally concerned by reason of the allowance or rejection of the claim in question. *Cox v. U. S.*, 6 Pet. 172, 8 L. Ed. 359; *Todd v. Daniel*, 16 Pet. 521, 10 L. Ed. 1054; *Germain v. Mason*, 12 Wall. 259, 20 L. Ed. 392; *Hanrick v. Patrick*, 119 U. S. 156, 7 Sup. Ct. 147, 30 L. Ed. 396; *Gilfillan v. McKee*, 159 U. S. 303, 16 Sup. Ct. 6, 40 L. Ed. 161; *The New York* (decided by this court Oct. term, 1900) 104 Fed. 561. It is earnestly insisted by counsel for the plaintiff in error that this case falls within the class of cases last mentioned, because it appears that Ayres and Price founded their claim to the land upon wholly distinct and antagonistic titles. But it was the land itself which was the subject of the suit, and the titles which each of these defendants advanced amounted to no more than separate means to a joint defense. Each of these means was also available to both defendants, for the plaintiff must recover upon the strength of his own title as against all others. The rule is that separate pleas and separate defenses, founded upon distinct sources of right, do not make the judgment several, when they are brought forward in defense of a single cause of action, upon which the judgment is recovered. The *res* is not thereby divided. In many of the cases already cited there was no unity of title between the parties bound by the judgment from which the appeal was taken,—cases wherein the appeal was held ineffectual, because parties not joined had an interest in the question whether the judgment should stand or be reversed.

* * * * *

The writ of error must be dismissed.

GERMAIN v. MASON.

*Supreme Court of the United States. 1870.**12 Wallace, 259.*

Motion by Mr. Nathaniel Wilson to dismiss a writ of error to the Supreme Court of Montana Territory; the case as it seemed, from a not very clear record, being thus:

J. Mason and L. B. Duke brought suit in the court below against Jules Germain to recover a balance due for work and materials furnished in building a house, and to enforce a mechanic's lien against the house and the lot on which it was built for the debt. One C. L. Dahler, A. J. Davis, and eighteen other persons, who the petition stated "had or claimed to have some interest, claim, or lien on the incumbered premises," were made defendants, but the petition alleged that their interest, claim, or lien, if any, had accrued subsequently to that of the plaintiffs; and it prayed "for judgment *against the said Jules Germain in the sum of \$6651,*" and that it be adjudged that the defendants, C. L. Dahler, A. J. Davis, and the eighteen others named, and all persons claiming under them subsequently to the commencement of the action, be barred and foreclosed of all right, claim, lien, &c., in, on, or to the incumbered premises, "and that the premises be decreed to be sold," &c. The court decided that the lien of the plaintiffs was paramount to that of all other persons, and gave judgment against Germain *in personam* for the debt, with an order that if it could not otherwise be made out of him, the real estate on which the lien was claimed should be sold, and out of the proceeds of the sale the debt of the plaintiffs should be first paid. To this judgment Germain alone sued out a writ of error.

* * * * *

MILLER, J. The cases relied on for the dismissal of the writ are all reviewed in *Mussina v. Cavazos*, 6 Wallace, 355, and it is there said that they rest upon the principle that all the parties to the original judgment must, when it is a *joint* judgment, be brought before this court, and that this is not done by a writ which does not give their names.

In the case before us the writ is sued out by Germain alone, who is the only party mentioned as damaged by the

alleged error of the court, and who alone gives the appeal bond. If, therefore, Germain can bring the writ without joining other parties as plaintiffs in error, the writ is not defective.

We have examined the record—a very confused one—but from it we gather enough to satisfy us that the judgment of which Germain complains is such a separate judgment against him as authorizes him to ask a review of it here without joining his co-defendants in the court below, who have not thought proper to disturb the judgment. *Mastersson v. Herndon*, 10 Wallace, 416.

The lien creditors, co-defendants with Germain, have not sought to reverse the judgment; but German, who has a separate, distinct, personal judgment against him for money, in which the other defendants have no interest, has a right, we think, to prosecute a writ of error in his own name without joining them.

Motion overruled.

HUMPHREY v. HUNT.

Supreme Court of Oklahoma. 1899.

9 Oklahoma, 196.

BURWELL, J. This action was commenced in the district court of Kingfisher county by Maggie Hunt against Lewis Humphrey, Grant Humphrey, Joseph C. Post, Lewis Wolf, E. A. Davis, J. W. Watkins, Joseph H. Lowry, C. P. Blakely, and Fred Belt for \$10,000 damages for the death of her husband, which plaintiff alleges was caused by the falling of a defective cotton-gin building upon her husband while the deceased was in the employ of the above-named defendants. A change of venue was granted, and the cause removed to Grant county, where a trial by jury was had, which resulted in a verdict and judgment for plaintiff for \$2,100 against Lewis Humphrey, Grant Humphrey, Lewis Wolf, E. A. Davis, J. W. Watkins, Joseph H. Lowry, and C. P. Blakely, and a verdict and judgment in favor of Fred Belt and against plaintiff. No verdict was rendered either

for or against J. C. Post. The defendants against whom the judgment was rendered appealed therefrom to this court. The plaintiff, Maggie Hunt, was the only party served with the case-made, and she has filed a motion to dismiss the appeal for the reason that all of the parties who would be affected by a reversal of the judgment were not served with the case-made, and are not made parties to the appeal. It is clear that Belt might be affected by a reversal of the judgment by which he was discharged from all liability to the plaintiff, and, if it should be vacated and set aside and a new trial granted, he would have to defend in another trial, and take the chances of a verdict being rendered against him. If he had been made a party, he could urge any reason he may have why the judgment should stand; but, from this record, the law presumes that he has no knowledge of the pendency of this appeal, and he cannot, therefore, be expected to enter an appearance. In the case of *Gillette v. Murphy*, 7 Okl. 91, 54 Pac. 413, it was held, by implication, that if a party can, by a reversal or modification of the judgment appealed from, be in any way affected, he is a necessary party. * * *

It might be argued that, inasmuch as Mrs. Hunt failed to appeal from the judgment in favor of Belt, it became final as to him. This, however, cannot be true. The plaintiff submitted the entire matter to the jury, and, while she failed to recover a judgment against all of the parties whom she sued, she was satisfied with it, because she failed to appeal. But the judgment was a joint judgment, and all of the parties affected thereby must be made parties, and given an opportunity to be heard, or the judgment will not be disturbed.

* * * * *

For the reasons herein stated, the appeal is hereby dismissed, at the cost of the appellant, and the case remanded to the lower court, with direction that the judgment rendered by the district court be carried into execution. All of the justices concurring, except MCATEE, J., who presided at the trial below, and BURFORD, C. J., who was of counsel, not sitting.

JACKSON COUNTY v. BLOOMER.

*Supreme Court of Oregon. 1895.**28 Oregon, 110.*

This is an action brought by the County of Jackson against George E. Bloomer and the sureties on his bond as treasurer of such county, to recover for his alleged defalcation as such official. The complaint, *inter alia*, alleges the qualification of Bloomer by giving the bond in suit, and that between the dates mentioned in the complaint he, as such treasurer, collected and received something over seven thousand eight hundred dollars belonging to the county, which, in breach of his trust, and in violation of the conditions of his undertaking, he failed and neglected to account for or pay over. Bloomer, although served with summons, made default, and the sureties answered jointly, denying the defalcation alleged in the complaint, and upon the issues thus made the cause was tried, and a judgment rendered in their favor on the merits. From this judgment the plaintiff appealed, without serving a notice on Bloomer. For this reason the respondents move to dismiss the appeal, claiming that Bloomer is an adverse party to the appellant, and should have been served with notice.

BEAN, C. J. The rule is well settled in this state that every party to a litigation whose interest in relation to the judgment or decree appealed from is in conflict with the modification or reversal sought by the appeal is an "adverse party" within the meaning of section 537 of Hill's Code, and must be served with the notice of appeal; and if such party is not served the appeal must be dismissed. And the fact that a party whose interests are adverse to the appellant, has made default, does not preclude the necessity of serving such notice of appeal upon him: *The Victorian*, 24 Or. 121; *Moody v. Miller*, 24 Or. 179; *Hamilton v. Blair*, 23 Or. 64. If, then, Bloomer has an interest in sustaining the judgment from which this appeal is taken, he is an adverse party to the appellant, and the failure to serve him with notice of the appeal is fatal, and the appeal should be dismissed. Now, the undertaking on which this action was brought is a joint obligation of Bloomer and the sureties, in so far, at least, as

that all are liable or none, and, therefore, although he made default, the defense successfully made by the other defendants, going as it did to the merits and showing that the plaintiff had no right of action against any of the defendants, inures to his benefit, and prevents the entry of judgment against him on his default. The rule on this question is thus clearly stated by Mr. Black in section 209 of his work on Judgments: "In an action of contract against several defendants, if one of them suffers default, and another, under the general issue, sets up and maintains a defense which negatives the plaintiff's right to recover against either of the defendants, and shows that he has no cause of action, the plaintiff will not be entitled to judgment against the one who was defaulted, but, on the contrary, the successful defense will inure to the latter's benefit, and judgment must be rendered for both the defendants." And to this effect are the authorities: *French v. Neal*, 24 Pick. 55; *State v. Gibson*, 21 Ark. 140; *Morrison v. Stoner*, 7 Ia. 493; *Adderton v. Collier*, 32 Mo. 507; *Waugh v. Suter*, 3 Ill. App. 271; *Stapp v. Davis*, 78 Ind. 128. From this it seems manifest that Bloomer's interests would be materially affected by the reversal of this judgment, for the reason that it appears from the record as it now stands that plaintiff has no right of action against him or his sureties for a breach of the conditions of his undertaking on account of any of the matters or things alleged in the complaint, and so long as the judgment stands unreversed it is in effect a judgment in his favor, and prevents the entry of a judgment on his default. He is, therefore, vitally interested in sustaining the judgment as it now stands, and consequently is an adverse party to this appeal.

* * * * *

Dismissed.

DAVIS v. MERCANTILE TRUST CO.

*Supreme Court of the United States. 1894.**152 United States 590.*

On February 18, 1889, the Mercantile Trust Company of New York filed in the circuit court of the United States for the southern district of Ohio its bill against the Kanawha & Ohio Railway Company. The bill alleged that on May 1, 1886, the defendant, the Kanawha & Ohio Railway Company, issued a series of bonds, and on the same day executed to the Mercantile Trust Company its mortgage or deed of trust to secure the payment of the principal and interest of such bonds. It alleged a default in the payment of interest due on January 1, 1889, as well as the existence of a large floating debt, and prayed the appointment of a receiver, and a decree of foreclosure and sale. On February 19th the defendant entered its appearance, and on the same day a receiver was appointed, who qualified, and took possession of the mortgaged property. Subsequently, and on July 24th, an amended bill was filed, making additional parties defendant the Toledo & Ohio Central Railway Company and the Shawnee & Muskingum River Railway Company. On October 26th a decree *pro confesso* was entered against the latter company. On October 30th, Erwin Davis, the present appellant, filed a petition alleging that he was the owner of more than \$100,000 of the bonds secured by the mortgage or deed of trust sought to be foreclosed in this suit, and also the owner of more than \$500,000, par value, of each class of stock of the defendant the Kanawha & Ohio Railway Company, to wit, first and second preferred, and common, and asking for the removal of the receiver on the ground of his incompetency, and the appointment of some capable and disinterested person as such receiver. On the same day a decree *pro confesso* was entered against the Kanawha & Ohio Railway Company. On November 13th the petition of Davis for the removal of the receiver, and the appointment of another in his stead, was denied, and at the same time this order was made: "It is further ordered that said Erwin Davis be and is permitted to intervene herein, and that he have liberty to be heard upon any and all proceedings herein

for the protection of his interests as bondholder and stockholder of the Kanawha & Ohio Railway Company."

On November 29th the Toledo & Ohio Central Railway Company filed its consent to the entry of a decree according to the prayer of the amended bill of complaint, and that the "cause proceed in like manner as if an order *pro confesso* had been duly entered against it more than thirty days prior" thereto. On December 5th Davis filed a second petition, reciting his interest as before, and in addition alleging the existence of certain prior mortgage liens upon the property described in the plaintiff's bill, or part of it; that in the bill there was claimed that the Kanawha & Ohio Railway Company had a floating debt of about \$330,000; that since the filing of the bill that company had confessed Judgment in favor of the Kanawha Improvement Company in a court of West Virginia for the sum of \$285,232.20; and that as a bondholder and stockholder of Kanawha & Ohio Railway Company, on behalf of himself and all other stockholders and creditors, he had filed a bill in the circuit court of the United States for the district of West Virginia, attacking such judgment so confessed, on the ground of fraud, and praying that it be canceled, set aside, and held for naught. He attached a copy of this bill, and closed the petition in these words:

"Your petitioner respectfully represents that he is advised that no decree of sale of the property included in said mortgage should be decreed until a reference is had to ascertain the liens which shall have been first ascertained thereon, the amounts thereof, and the order of their priorities; that a sale should not be decreed until the validity of the judgment referred to shall have been first adjudicated.

"Petitioner therefore prays that this his petition be read and considered at the hearing; that your honors will not at said hearing enter a decree of foreclosure, as prayed for in said bill, until the matters of this petition have been fully heard and a proper reference to a master be made to ascertain all liens upon said railroad, and the order of their priorities, and that petitioner have full relief in the premises; and, as in duty bound, he will ever pray," etc.

On the same day, to wit, December 5, 1889, a decree of foreclosure and sale was entered. That decree found a default in the payment of interest, and decreed a sale unless

such interest should be paid within 30 days. At the close of the decree was this entry: "Thereupon, came the intervening petitioner, Erwin Davis, and prayed the court for the allowance of an appeal, with *supersedeas*, from the foregoing decree, and the court thereupon refused the appeal."

Subsequently, an application was made to Mr. Justice Harlan, of this court, for an appeal; and on February 11, 1890, it was allowed. The only security given on this appeal was a cost bond, in the sum of \$500, executed by Davis and his surety to the appellee, the Mercantile Trust Company, alone. This bond was approved February 27, 1890, and a citation was then signed by Mr. Justice Harlan; the citation running to the Mercantile Trust Company, the Kanawha & Ohio Railway Company, the Toledo & Ohio Central Railway Company, and the Shawnee & Muskingum River Railway Company. This was served on the Mercantile Trust Company, the Toledo & Ohio Central Railway Company, and the Shawnee & Muskingum River Railroad Company, but not on the Kanawha & Ohio Railway Company, the mortgagor. No *supersedeas* bond having been executed, a sale was had under the decree on March 4, 1890, and the property struck off to Nelson Robinson and William B. Post for the sum of \$505,000. On April 7, 1890, this sale was confirmed, and a deed ordered. From such order of confirmation, Davis prayed an appeal, which was allowed. On such appeal, also, a cost bond to the Mercantile Trust Company, alone, was given, and a citation issued, running only to the Mercantile Trust Company.

BREWER, J., (after stating the facts in the foregoing language). As a preliminary matter, the standing of the appellant in this court is challenged. In the court below he was not a party to the record, either plaintiff or defendant; was never substituted for either; filed no bill, cross bill, or answer; but was simply permitted to intervene, with liberty to be heard upon any and all proceedings for the protection of his interests as bondholder and stockholder. Assuming, under the authority of *Williams v. Morgan*, 111 U. S. 684, 698, 4 Sup. Ct. 638, that this gave him a right of appeal from any decision of the circuit court affecting his interests, it did not change the ordinary rules respecting appeals, one of which is that all the parties to the record, who appear to have any interest in the order or ruling challenged, must be given an

opportunity to be heard on such appeal. The rule, and the reasons therefor, are fully stated in *Masterson v. Herndon*, 10 Wall. 416, and restated in *Hardee v. Wilson*, 146 U. S. 179, 181, 13 Sup. Ct. 39, and need not, therefore, be again repeated. See, also, *Inglehart v. Stansbury*, 151 U. S. 68, 14 Sup. Ct. 237.

In this case the appellant has taken two appeals,—one from the decree, and the other from the order confirming the sale. These appeals being taken separately, each must stand or fall on its own merits. Noticing first the appeal from the order of confirmation, it will be seen that the sale confirmed was of the mortgaged property to Robinson and Post for the sum of \$505,000, of which sum \$50,000 had been paid in cash by the purchasers, and the balance secured by a deposit of \$1,069,000, first mortgage bonds of the Kanawha & Ohio Railway Company,—the bonds in suit. Who is more vitally interested in the question whether such sale and confirmation shall stand than these purchasers? If the sale be set aside, they lose the purchased premises, and all the profit which might result from their purchase, and assume all the risks and delay in recovering that which they have paid into court. In *Kneeland v. Trust Co.*, 136 U. S. 89, 95, 10 Sup. Ct. 950, this court said that “supported by sound reasons are the following propositions: First, a party bidding at a foreclosure sale makes himself, thereby, a party to the proceedings, and subject to the jurisdiction of the court, for all orders necessary to compel the perfecting of his purchase, and with a right to be heard on all questions thereafter arising, affecting his bid, which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree.”

Again, not only is the purchaser interested, but also the mortgagor. He may be satisfied with the sale which was made,—may believe that at no other sale would it be possible to realize so much in satisfaction of his indebtedness. At any rate, the setting aside of one sale, and the ordering of another, may affect, prejudicially or beneficially, his interests, and because of that he has a right to be heard upon the question of setting it aside. Now, the only party respondent to this appeal is the trustee. It is the only party named as obligee in the cost bond. The citation, in terms, runs to it, only; and there is no pretense that the mortgagor or the other defendants, or the purchasers at the sale, have ever been

brought into this court to respond to this appeal. Manifestly, it would be the grossest injustice to attempt to determine the question of the validity of this sale in the absence of these so vitally interested parties.

Neither does the appeal from the decree stand in any better condition. In a decree for the foreclosure of a mortgage, the two parties principally and primarily interested are the mortgagee and the mortgagor. No third party should be permitted to disturb such a decree, unless and until both mortgagee and mortgagor are given an opportunity to be heard. The mortgagor may be unwilling that the decree should be set aside, notwithstanding irregularities in prior proceedings, for fear that on a subsequent hearing a larger sum may be decreed against him. It is not necessary, in any given case, to determine that his interests would or would not be promoted by the setting aside of the decree. It is enough that in that matter he has a direct interest, and because of this interest common justice requires that no change shall be made in the terms of that decree, nor shall it be set aside, without giving him a chance to be heard in its defense. Ordinarily, it may be presumed that all the parties to the record are interested, and so it is often said that all such parties must be joined as appellants or appellees, plaintiffs in error or defendants in error; but it is unnecessary to rest this case upon the mere fact that the mortgagor in this case was a party to the record,—the only defendant in the first instance. It was not only such a party, but is also one directly and vitally interested in the question whether the decree of foreclosure and sale shall stand, and yet it is not before us. The trustee is the only obligee named in the appeal bond, and while the citation, on its face, runs to all the parties to the record, it was not served on the mortgagor, the Kanawha & Ohio Railway Company; and that company has never been brought into this court, and never entered an appearance here. This is fatal to the appeal. The appellant seems to have assumed that he was authorized to represent the corporation mortgagor, and all the stockholders, but this is obviously a mistake. He was not by order of court substituted for the defendant mortgagor, nor was he allowed to represent the mortgagor, or to carry on its defense. The only authority given to him was to intervene for the protection of his personal interests as bondholder and stockholder. The corporation mortgagor

still represented all the other stockholders, as did the trustee all the other bondholders; and while the appellant appears to have had a considerable interest, both as stockholder and bondholder, it was only a minor fraction. Out of 1,160 bonds, 1,069 (all but 91) were tendered by the purchasers upon application for confirmation of sale; and, while he claims to be the owner of \$1,500,000 of the stock, it appears that the total amount thereof was \$12,200,000. So that, in fact, he was the owner of less than one-eleventh of the bonds, and one-eighth of the stock. No authority from these other bondholders or stockholders to him to act for them is shown. So that neither in fact nor in law was he representing the corporation mortgagor in this litigation; and as that mortgagor was interested in, and affected by, the decree of foreclosure and sale, it should have been made a party to this appeal, and brought into this court, and because of the failure so to do the appeal cannot be maintained.

For the reasons above given both appeals are dismissed.

JACKSON, J., did not hear the argument, or take any part in the decision of this case.

SECTION 3. DEATH AND TRANSFER OF INTEREST.

KUHNERT v. CONDE.

Supreme Court of Kansas. 1888.

39 Kansas, 265.

VALENTINE, J. On April 22, 1886, a judgment was rendered in the district court of Atchison county in an action of ejectment, in favor of Peter C. Conde, the plaintiff, and against William F. Kuhnert, the defendant. On January 23, 1887, Conde died. On April 2, 1887, a petition in error and case were filed by W. D. Webb as attorney for Kuhnert in the office of the clerk of the supreme court, making Kuhnert the plaintiff in error, and purporting to make Peter C. Conde the defendant in error, and praying for a reversal of said judgment. Webb was the attorney of record for Kuhnert. L. F.

Bird, who had formerly been an attorney in the case for Conde, waived the issuance of summons and the service thereof, and no summons was ever issued in the case. On October 11, 1887, a notice was served by Samuel Woodworth, the attorney and next friend of the representatives and successors of Conde, upon Kuhnert's attorney of record, Webb, of an application to revive the judgment aforesaid, in the district court, in the names of the representatives and successors of Conde. This notice gave the names of the representatives and successors of Conde, and was signed by Bird as attorney for plaintiff. Webb, as the attorney of Kuhnert, accepted service of the notice, and consented to the revivor. Afterwards, and on January 11, 1888, the judgment was revived by order of the judge of the district court. On April 3, 1888, Woodworth and Bird, as the representatives and attorneys of the representatives and successors of Conde, appeared specially in this court, and moved that the case be dismissed. It will be observed that at the time of Conde's death the case was wholly and entirely in the district court, and there is no pretense that anything connected therewith was in the supreme court. No attempt had yet been made to bring the case or anything connected therewith to the supreme court. Hence no revivor could at that time have been had either of the action or of the judgment except in the district court; and no revivor was attempted in that court, or in any other court, within one year after the time of the rendition of the judgment or of Conde's death. Before any revivor was had or even attempted, an attempt was made to bring the case to the supreme court. Of course that attempt was abortive. It was attempted to make Conde the defendant in error, but as Conde was dead, he could not be made a defendant in error. He could not appear in any court and defend. Nor could Bird, nor anyone else, legally appear for him, as an attorney or otherwise. Bird ceased to be an attorney for Conde when Conde died. No service of summons could be made upon Conde after his death, and no waiver of service or of summons could be had by the consent of Bird, or otherwise, and no attempt was made to make the representatives or successors of Conde parties to the proceedings in this court; and they have never been made parties to any such proceedings. Indeed, there never has been any defendant in error in this court. The case has never legally been brought to this court,

and in law has never been in this court at all, and it is now too late to bring it here. A proceeding in error to reverse an order or judgment of the district court can be brought to the supreme court only within one year after the order or judgment complained of has been made or rendered. Civil Code, § 556. In this case a judgment is complained of, and that judgment was rendered more than two years ago, and yet, in legal contemplation, no part of the case in which the judgment was rendered has ever been brought to this court; for, as before stated, there has never been any defendant in error in this court. It was about nine months after the time when the judgment was rendered before Conde's death took place, and nearly two years before the judgment was revived in the district court, and yet the deceased, Conde, after his decease, is and has been the only defendant in error, or supposed defendant in error, in this court. The case has never legally been in this court, and it will be dismissed.⁶¹

⁶¹ "It can make no difference whether the deceased is the appellant, or moving party, or the respondent in the proceeding."—*Judson v. Love*. (1868) 35 Cal. 463.

ALEXANDER v. REA.

Supreme Court of Alabama. 1873.

50 Alabama, 64.

PETERS, C. J. The appellee makes a motion in this court to dismiss this appeal, on two grounds: 1. That one of the appellants, said William Williams, died between the rendition of the decree in the court below and the taking of this appeal. * * *

Appeals, in our practice, take the place of writs of error at common law. For this reason, they must be governed, to a very great extent, by the same rules and reasons of practice that apply to writs of error. In writs of error, where a party has died after judgment, and before the appeal is taken, and such deceased party is not the sole party to the judgment, the survivor may take the writ of error in his own

name, after suggesting the death of the party who has died, and as such survivor he may proceed in the writ of error. 2 Tidd's Pr. pp. 1135, 1136; *Perrine v. Babcock*, 6 Porter, 391. The appellant in this case will be permitted to amend and correct his appeal, by striking out the name of William Williams, who is dead, and to assign errors and proceed in the name of Lewis Alexander, as surviving defendant in the court below. Rev. Code, 4420. The motion to dismiss is denied, with costs.

GREEN v. WATKINS.

Supreme Court of the United States. 1821.

6 Wheaton, 260.

March 1st, 1821. B. Hardin, for the defendant in error, moved to dismiss the writ of error, in this case, which was a real action, upon a suggestion of the death of the demandant and plaintiff in error, pending the proceedings in this court.
* * *

March 8th. STORY, J. The preliminary question which has been argued at the bar is, whether the writ of error in this case, which is a writ of right, has abated by the death of the demandant, who is the plaintiff in error, pending proceedings in this court. There is a material distinction between the death of parties, before judgment and after judgment, and while a writ of error is depending. In the former case, all personal actions, by the common law, abate; and it required the aid of some statute, like that of the 31st section of the judiciary act of 1789, ch. 20, to enable the action to be prosecuted by or against the personal representative of the deceased, when the cause of action survived. In real actions, the like principle prevails, for a still stronger reason, for, by the death of either party, the right descends to the heir, and a new cause of action springs up; and the plea is not, therefore, in the same condition as it was in the lifetime of the party.

But in cases of writs of error upon judgments already rendered, a different rule prevails. In personal actions, if the

plaintiff in error dies, before assignment of error, it is said, that by the course of proceedings at common law, the writ abates; but if, after assignment of errors, it is otherwise. In this latter case, the defendant may join in error, and proceed to get the judgment affirmed, if not erroneous; and he may then revive it against the representatives of the plaintiff. But in no case, does a writ of error, in personal actions, abate by the death of the defendant in error, whether it happen before or after errors assigned. If it happen before, and the plaintiff will not assign errors, the representatives of the defendant may have a *scire facias quare executio non*, in order to compel him; if it happen after, they must proceed as if the defendant were living, till judgment be affirmed, and then revive by *scire facias*. And the plaintiff, in order to compel the representatives of the defendant in error, to join in error, may sue out a *scire facias ad audiendum errores*, either generally, or naming them. Such is the doctrine of approved authorities. 2 Tidd's Pr. ch. 43, Error, p. 1096. It is clear, therefore, that at common law, in these cases, a writ of error does not necessarily abate; and that the personal representatives may not only be admitted voluntarily to become parties, but a *scire facias* may issue to require them to become parties. And such has been the practice hitherto adopted in this court, in all personal actions, whether there has been an assignment of errors or not; for a specific assignment of errors has never been insisted on here, as a preliminary to the argument, or decision of the cause.

In respect to real actions, this is the first time the question has presented itself upon a writ of error, where the death of either party has occurred *pendente lite*. There is no doubt, that the heir, or privy in estate, who is injured by an erroneous judgment, may prosecute a writ of error to reverse it. And there seems no good reason why, in case of the death of his ancestor, pending proceedings, he may not be admitted to become a party, or be cited to become a party, to pursue or defend the writ, in the same manner as in personal actions. The death of neither party produces any change in the condition of the cause, or in the rights of the parties. It would seem reasonable, therefore, that the suit should proceed, and not be dismissed or abated. In the absence of all authority which binds the court to a different course, we are disposed

to adopt this doctrine, and shall promulgate a general rule on the subject.⁶²

⁶² Whether the heir or personal representative should be made a party to the appellate proceedings, or the cause should proceed as though the decedent were alive, to be subsequently revived, is a matter upon which the practice differs in different jurisdictions.—3 C. J. §§ 978, 987.

If the successors in interest are to be substituted, the method of accomplishing the substitution differs. In some states it is done by motion, —Reed v. Farrand, (1910) 198 N. Y. 207; in some by writ of error and citation,—McClane v. Boon, (1867) 6 Wall. (U. S.) 244; in some by suggestion of death and *scire facias*,—Newcastle County Common v. Holcomb, (1856) 6 Del. 293; Mayer v. McLure, (1858) 36 Miss. 389.

O'SULLIVAN v. PEOPLE.

Supreme Court of Illinois. 1892.

144 Illinois, 604.

PER CURIAM. Patrick O'Sullivan and others were convicted in the criminal court of Cook county of the crime of murder, and sentenced to be punished therefor by confinement in the penitentiary. He sued out of this court a writ of error upon the record. Errors were assigned on his behalf upon that record, and there was joinder in error by the attorney general; and the questions thus presented were discussed in printed arguments presented to us at our March term, 1891. But the record being unusually voluminous, and the questions discussed numerous, and requiring for their examination and solution the careful reading of hundreds of printed pages of evidence, and many legal authorities, it was impossible for us to give judgment thereon at that term, and so we then took the case under advisement. It is now made known to us that, on the 5th day of May, 1892, and before we had caused judgment to be entered upon the record or in any manner indicated to the parties or the public what our judgment would be, Patrick O'Sullivan died, intestate, leaving personal property which has been administered upon pursuant to law. It has been suggested to us, by one of the attorneys representing O'Sullivan in his lifetime, as *amicus curiæ*, that we now cause judgment to be entered in the case, *nunc pro tunc*, as of our March term, 1891, or as of some day subsequently, but be-

fore the death of O'Sullivan; and the administrator of O'Sullivan's estate, by his attorneys, makes a motion to that effect. We do not question either our power or the propriety of our causing judgments to be entered of record in cases pending before us, after the death of a party to the record subsequent to the submission of the case to us for decision, as of a day before his death, where the delay in causing judgment to be entered has been purely for the convenience of the court or of some of its members, and in certain other cases, where injustice will otherwise result to one or both of the parties to the record, provided the judgment thus to be entered of record can be operative and effective as a judgment from the day as of which it is entered. But no case has been cited to us which holds that a judgment should be entered *nunc pro tunc* when it can be no more operative and effective than where it is entered of record as of a present date; and, since a court is never required to do a useless act, we do not think that any well-reasoned case so holding can be found. Judgments in civil cases, whether in actions upon contracts or upon torts, are for the recovery or the denial of something either specifically or in the form of damages of some pecuniary value. If the plaintiff recovers, he thereby becomes entitled to have, and the defendant must lose, something which, but for that recovery, he would not have had and the defendant would not have lost. But in criminal cases, under indictments for felonies, the sole purpose of the action is not to give the people anything, but to punish the defendant in his person; and the primary judgment, when the defendant is found guilty, is, simply, the defendant being found guilty, that he be punished, specifying how. It is true that, under our statute, judgment is also rendered for costs; but this is incidental only, and it stands or falls with the primary judgment that the defendant be punished. The inquiry upon the trial is only whether the defendant be guilty, and, if guilty, the punishment that shall be inflicted upon his person; the question of costs being neither submitted nor considered, and the judgment therefor resulting solely as a legal consequence of the primary judgment. It is therefore apparent that, in judgments in civil cases, property rights are more or less directly affected; and such rights, under statute, are made to descend to and be obligatory upon the representatives, after death, of either or all of the parties to the judgment. But in

criminal cases, where judgments are rendered against the defendants under indictment for felony, the people acquire no property rights, and the representatives of the defendant do not take that which is affected by the primary judgment, namely, the person of the defendant. It would therefore seem to inevitably follow that the common-law rule in civil cases, that a writ of error does not abate by the death of the plaintiff in error, after error joined, (2 Tidd. Pr. 1086), can have no application to criminal cases, since that rule rests upon the right of the defendant in error to have the judgment revived against the personal representatives of the plaintiff in error, and to thus enforce against them the judgment against him whom they represent. The only instance found in the books in which a writ of error can, at common law, be prosecuted by the representatives of a deceased person, upon the record of his conviction in a criminal case, is that of an attainder for treason or felony. The effect of such attainder at common law was forfeiture of all estate, both real and personal, and corruption of blood. 4 Bl. Comm. p. 382. And it was held that a writ of error may be brought by the party attainted, "or, after his death, by his heirs or executors, to reverse an attainder of treason or felony, but by no other persons, whatever interest they may claim in the reversal." 1 Chit. Crim. Law, 746, 747. But, since our constitution provides that "no conviction shall work corruption of blood or forfeiture of estate," (article 2, § 11, Const.,) there can be no attainders for treason or felony here, and hence no case upon which the heir or executor can prosecute a writ of error to reverse an attainder. The principle upon which the heir or executor was allowed to prosecute a writ of error to reverse the attainder was that the direct effect of the attainder was to take from them, and give to the government, property belonging to them as representatives of the person attainted.

* * * * *

* * * Nor can it be said that the common-law rule does not extend this far, simply because at common law there was no judgment for costs to be paid out of the estate of the defendant, for fines for misdemeanors were, at common law, collectible out of the estate of the defendant, and a *scire facias* would issue for their collection. 1 Chit. Crim. Law, 809, 810. And, upon the death of the defendant, the executor or administrator was chargeable with their payment out of

assets of the deceased in their hands for administration. 2 Wms. Ex'rs, (7th Ed.) 1740. And yet we have hunted in vain for authority, common-law or statutory, for an executor or administrator of a deceased person, convicted and fined for a misdemeanor in his lifetime, to prosecute a writ of error upon the record of such conviction.

* * * * *

* * * We think the conclusion is inevitable that the writ of error abated upon the death of O'Sullivan, and that a judgment *nunc pro tunc* cannot prevent that result. The motion to enter judgment *nunc pro tunc* is overruled. The writ of error is abated. No judgment will be entered for the costs of either party.⁶³

⁶³ For the form of such an order entered *nunc pro tunc*, see Holloway v. Galliac, (1874) 49 Cal. 149.

MOSES v. WOOSTER.

Supreme Court of the United States. 1885.

115 United States, 285.

On Motion.

WAITE, C. J. The suit below was in equity and brought by George H. Wooster, the appellee, against Solomon Moses, Gotcho Blum, and Solomon Weil, partners under the name of Moses, Blum & Weil, for an infringement of letters patent. A final decree for an injunction and damages was rendered against the defendants, May 23, 1883. From this decree all the defendants appealed, and the appeal was docketed here October 12, 1883. Blum died January 2, 1884. On the eleventh of April, 1885, Wooster appeared in this court and suggested his death; whereupon the usual order under rule 15, § 1, was entered, that unless his representatives should become parties within the first 10 days of this term, the appeal would be dismissed. Proof of the due publication of a copy of this order has been made, but the representatives of the deceased appellant have not appeared. The surviving appellants now move that the action abate as to the decedent, but that it proceed at their suit as survivors. The judiciary act

of 1789, (1 St. 90, c. 20, § 31), provided that "if there be two or more plaintiffs or defendants, and one or more of them shall die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated, but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants."

This was re-enacted in the Revised Statutes as section 956, and is substantially a copy of the act of 8 and 9 Wm. III, c. 11, § 7, which it was held in *Clarke v. Rippon*, 1 Barn. & Ald. 587, was applicable to writs of error. Lord Ellenborough, in giving that judgment, said: "The proceeding is an action which is commenced by a writ, and the cause of action is the damage sustained by the parties from the error in the previous judgment, and this damage equally attaches on the survivor in this as in any other action." This court gave the same effect to our statute in *McKinney v. Carroll*, 12 Pet. 66.

Appeals to this court from the circuit and district courts are "subject to the same rules, regulations, and restrictions as are or may be prescribed by law in cases of writs of error." Rev. St. § 1012. The cause of action in this appeal, that is to say, "the damage sustained by the parties in the previous decree," attaches to the surviving appellants. All the defendants were enjoined from infringing the patented machine, and all were made liable for the payment of the damages which the patentee had sustained by their joint act as partners. Clearly, therefore, the case is within the statute, and may be proceeded with accordingly. The cause of action is one that survives to the surviving appellants. Undoubtedly cases may arise in which the presence of the representatives of a deceased appellant will be required for the due prosecution of an appeal, notwithstanding the survivorship of others. If that should be so, the court can, with propriety, direct that the appeal be dismissed, unless it be properly revived within a limited time. The house of lords made such an order in *Blake v. Bugle*, a note of which is found in Macqueen's Pr. H. L. 244. Here, however, there is no need of a revivor that substantial justice may be done. The decree below was against all the defendants jointly, upon a joint cause of action. It affected all alike, and the interest of the decedent is in no way separate or distinct from the others. If the representatives

of a deceased appellant voluntarily come in and ask to be made parties, they may be admitted. Such a course was adopted by the house of lords in *Thorpe v. Mattingley*, 1 Phil. 200. In the present case the representatives of the decedent, although notified, do not appear. It is proper, therefore, that the appeal should proceed under the statute at the suit of the survivors, and an entry to that effect may be made.⁶⁴

⁶⁴ Where an application for the substitution of the personal representatives of a deceased appellant was made by the other appellants, it was said:—"The substitution is wholly unnecessary for the purposes of this appeal, to protect the rights of any of the parties. If the order appealed from should be reversed it is apparent that the substitution would be useless; and if affirmed, the judgment can be enforced against any property of the plaintiffs, both living and dead, upon which it is a lien, and can be enforced in the same manner as if all were living. (3 R. S. 5th Ed. 642, § 30, 649, § 41). If the judgment shall be satisfied out of the personal property of the remaining plaintiffs, as it could have been before the death of William McGregor, such survivors, if compelled to pay more than their share, can seek contribution from the estate of the deceased."—*McGregor v. Comstock*, (1863) 28 N. Y. 237.

BAKER v. NORTHWEST BUILDING & INVESTMENT
CO.

Supreme Court of Washington. 1903.

33 Washington, 677.

PER CURIAM: This was an application by Peter A. Berg to be substituted as plaintiff and respondent in this case in place of John S. Baker. The action was brought in the lower court by John S. Baker to restrain the continuance of a public nuisance in the city of Tacoma. The complaint alleges, in substance, that the plaintiff was the owner of three certain lots of land in Tacoma, adjoining property upon which a bawdyhouse was being maintained by defendants, and that, by reason of the proximity of said bawdyhouse to his said lots, plaintiff was specially injured in a manner different from the general public. Upon a hearing in the lower court, defendants' demurrer to the complaint was overruled, and an injunction *pendente lite* was issued. From the order overruling this demurrer and granting the restraining order, the

defendants appealed to this court. After the appeal had been taken, the respondent Baker sold all his interest in and to the lots owned by him, and described in the complaint, to the applicant, Peter A. Berg. Mr. Berg now moves this court to be substituted as respondent in place of Mr. Baker.

We think the application should be granted. Section 4824, Ballinger's Ann. Codes & St., provides that every action shall be prosecuted in the name of the real party in interest. Section 4837 provides that no action shall abate by the transfer of any interest therein, if the cause of action survive or continue, but the court may allow the action to be continued by the successor in interest. Under code provisions similar to our own, substitution has been allowed in the following cases: *McKinnis v. Mortgage Co.*, 55 Kan. 259, 39 Pac. 1018; *Keough v. McNitt*, 7 Minn. 29 (Gil. 15); and *Nickerson v. Crawford* (Sup.) 11 N. Y. Supp. 503. The respondent, having sold and assigned all of his right, title, and interest in and to the property affected by the nuisance, has no further special interest in the case. The fact that he was the owner of the property described, and that this property was specially affected differently from other property in the community, gave him standing to maintain the action in a court of equity. Without these facts appearing, he was not entitled to maintain the action for injunctive relief. When he parted with the property, he parted with his right to maintain the action. The cause of action, however, continued with the property. The new owner has the same right to maintain the action as the old owner had. When the applicant purchased the property, he succeeded to all the rights of the respondent, and, under the plain terms of the statute above named, is entitled to be substituted as respondent, and to have exclusive control of the litigation.

The application is therefore granted, and the applicant is substituted as respondent in place of John S. Baker.⁶⁵

⁶⁵ Statutes providing that no transfer of interest pending suit shall abate the action are found in most states (1 Cyc. 116), but some do not authorize or require any substitution of parties. Thus, in *Emerson v. Miller*, (1902) 115 Ia. 315, the court said: "By Code, section 3476, it is provided that no action shall abate by the transfer of any interest therein during its pendency. * * * It has been repeatedly held that the transfer of an interest in an action pending does not necessitate the substitution of a new party. * * * Moreover, the mere fact of an assignment does not show that plaintiff is not still the real party in interest. The assignment may have been for the purpose of collection,

or to secure an indebtedness, or for other purposes." In *Culver v. Randle*, (1904) 45 Ore. 491, the court held that substitution of parties involved questions of fact difficult to determine, and would not be ordered in the absence of a statute expressly commanding it. See also *Trumbull v. Jefferson County*, (1910) 60 Wash. 479, holding that the assignee may either become substituted or he may allow the action and appeal to proceed in the name of his assignor for his own benefit.

CHAPTER VII.

LAYING A FOUNDATION FOR REVIEW.

SECTION 1. OBJECTION AND EXCEPTION.

GELSTON v. HOYT.

Court of Errors of New York. 1816.

13 Johnson, 561.

The Chancellor. The suit in the Supreme Court between these parties was an action of trespass, in which Hoyt declared against Gelston and Schenck, for seizing, taking, and carrying away his ship, called the American Eagle. To this charge the defendants plead, not only the general issue, but two special pleas in bar; and to these pleas there was a general demurrer and joinder, and judgment for the plaintiff.

* * * * *

The first error assigned on the part of the plaintiffs in error, is, that the matters contained in the 2d and 3d pleas in bar, and which appear upon the record, amounted, in law, to a justification, and that the judgment on the demurrer ought to have been in favor of those pleas. * * *

The judges of the Supreme Court have not assigned reasons for the judgment which they pronounced on the demurrer; because, as was stated by Mr. Justice Spencer, in behalf of that Court, "when the cause was called, (meaning the issue joined on the demurrer,) the defendant's counsel appeared, and declined to argue; whereupon judgment was given for the plaintiffs, on the defendant's counsel declining the argument."

Are, then, the plaintiffs in error to be permitted to come here and argue the questions arising upon the demurrer, when they declined the argument in the Court below? This is an important question, and it meets us in the very threshold of the case.

(962)

I am of opinion that they are precluded, and for the following reasons:

1. In the first place, it is an unfair pleading, for it takes from the party demurring an advantage which he would have been entitled to in the Supreme Court, if the inclination of that Court had been against him, of withdrawing his demurrer and replying to the pleas. I presume this Court cannot grant such a favor. If it can, the favor would be overloaded with costs. I know of no such precedent. It is not a case of amendment, and not within the ordinary province of a Court merely of review. A party acts against good conscience if he will not come forward and disclose his reasons, when called upon by the proper tribunal, but reserves himself for another Court, and for the cold, hard purpose of accumulating costs, or of depriving his adversary of the opportunity of correcting his error.

2. This point is within the reason of the decision of this court, at the last session, in the case of *Sands v. Hildreth*. (12 John. Rep. 493). There the appeal was dismissed because the appellant did not appear in the Court of Chancery after the cause had been regularly set down for hearing, on due notice, but voluntarily suffered a decree to pass against him by default. That decision was not founded on any new principle, and it equally applies to this case. There is the same rule in the English house of lords; and in *Dean v. Abel*, (Dicken's Rep. 287), an appeal was dismissed without going into the merits, because the party, at the hearing in chancery, had made default, and suffered a decree to be pronounced against him. So, again, in a late case, (2 Schoale & Lefroy, 712). Lord Eldon said it was well known as an established rule, that no point not made in the Court below, could be made on appeal to the house of lords.

3. This is a just and wise rule; for the very theory and constitution of a Court of appellate jurisdiction only, is the correction of errors which a Court below may have committed; and a Court below cannot be said to have committed an error when their judgment was never called into exercise, and the point of law was never taken into consideration, but was abandoned, by the acquiescence or default of the party who raised it. To assume the discussion and consideration of a matter of law, which the party would not discuss in the Supreme Court, and which that Court, therefore, did not con-

sider, is to assume, in effect, original jurisdiction. It is impossible to calculate all the mischiefs to which such a course of proceeding would lead. Either party would then be able, in every case, to bring his question of law, as new, undiscussed points, before this Court. This would, indeed, be leaving the Supreme Court, with its plenitude of power, to enjoy the *otium cum dignitate* in harmless repose; but this was never the intention of the constitution. That Court was created, with all its competence and organs, to be the great trustee, the tutelary guardian of the vast body of the common law. What good motive can a party have, who will not argue a law question in the Supreme Court, but insists on bringing it here to be exclusively discussed? It is according to the genius of our whole judicial establishment, that the Court which originally decides a cause, should be subject to review by another Court; but on the plan pursued in the present case, this Court, though only a Court of review, will be the first and the last, originally, and finally, to decide the law. Why should not a party be obliged to obtain the opinion of the Supreme Court before he comes here? How can he know but that such opinion might have saved him the expense, and us the trouble, of the writ of error? It is certainly as much as we can do well, and I fear more than we can do with despatch, to hear and decide questions of law after they have been maturely considered in the Supreme Court, and with the assistance of all the light and knowledge which can be imparted to the subject, from the researches of that tribunal.

* * * * *

For these reasons, I have thought it to be my duty to abstain from any consideration of the first point, in the plaintiff's case, respecting the demurrer to the second and third pleas. * * *⁶⁶

⁶⁶ It is equally necessary to the review of legal and equitable cases that the points made on appeal should have been passed on below.—Cumberland Lumber Co. v. Clinton Hill Lumber Co., (1898) 57 N. J. Eq. 627; Carrington v. Basshor Co., (1913) 121 Md. 71; Copper Belle Mining Co. v. Costello, (1908) 11 Ariz. 334; Van Namee v. Groot, (1868) 40 Vt. 74; Elliott v. Page, (1914) 98 S. C. 400.

NICHOLS v. BOARD OF COMMISSIONERS.

*Supreme Court of Wyoming. 1904.**§ 13 Wyoming, 1.*

The action was brought by M. V. Nichols against the Board of County Commissioners of the County of Weston and others to set aside a tax sale. From a judgment in favor of the defendants and quieting the title in one of the defendants to the property in controversy, the plaintiff brought error.

Gibson, Clark and S. A. Osborn, for plaintiff in error.

The denial in an answer of the allegations of the petition constitutes, if established, a mere bar to plaintiff's suit and furnishes no ground for affirmative relief. (Pomeroy's Code Rem., sec. 88.) If the second defense of the answer is to be considered as in the nature of a counter-claim or cross-petition, it is wholly insufficient. It does not allege that defendants, or any of them, are, or ever were, in possession of the property, which allegation is necessary in a suit to quiet title (R. S., sec. 4104; Pomeroy's Code Rem., sec. 369; 3 Pomeroy Eq. Jur., sec. 1396; *Thomas v. White*, 2 O. St. 540). The necessary allegation is not made that the plaintiff or anyone is making any claim to the property adverse to the defendant cattle company. (R. S., sec. 4104). * * * A tax sale of dams and ditches cannot of itself vest in the purchaser the title and all rights to the property, for the reason that such property is real and not personal in character, and the purchaser would not acquire a legal title, but only a right to a certificate of sale entitling him to a deed in the event that the property is not redeemed in three years. * * *

* * * * *

CORN, C. J. This suit was brought by plaintiff in error to set aside a sale of certain dams and irrigation ditches for taxes claimed to be due to Weston county. The defendants answered, first, by a general denial. For a second defense they allege that "the county treasurer of said Weston county proceeded to advertise the property in controversy as required by law, and the defendant the Kent-Bissell Cattle Company were the purchasers thereof for value and in good faith, and they are now, and ever since have been, the absolute and unqualified owners thereof." And the answer concludes with

the prayer: "That the said sale be approved by this court, and the property in controversy and the title thereto be quieted in the defendant the Kent-Bissell Cattle Company, and for such other and further relief as the court may deem just and proper in the premises." The court, upon a hearing, found that the sale for taxes was regular and legal, and vested the title to the property in the defendant cattle company, and ordered that the sale be approved and the title quieted in the said company. No exception was taken by the plaintiff to any of the proceedings or orders of the court below, and there was no motion to set aside or modify the judgment, but the case is before us, without any bill of exceptions, upon the record proper of the district court.

Plaintiff in error urges that under the pleadings and the findings of the court, as set forth in the order and judgment, it had no jurisdiction or power to render any judgment against the plaintiff other than to dismiss his petition and allow costs against him in favor of the defendants, and that the judgment, in so far as it attempts to quiet the title of the company to the property and to enjoin plaintiff from making any claim thereto, is not supported by the pleadings or the findings of the court, and should be reversed. Defendants in error, upon the other hand, contend that, in the absence of any bill of exceptions or transcript of the evidence, and no exception noted upon the record to the entry of judgment in the court below, the objection will not be heard or entertained in the first instance in this court. It is not contended by defendants in error that the judgment is supported by the pleadings or the findings, but the case is submitted by them upon the single proposition that, in the absence of any sort of exception by the plaintiff in the court below, the judgment is not before this court for review. The question is scarcely an open one in this court. The Supreme Court of Ohio, from which state the provision of our statutes bearing upon the subject of exceptions were taken, long ago decided that "they manifestly relate to decisions which are made by the court upon questions of law which arise during the progress of the trial." And they say "these provisions of the Code do not relate to the final judgment of the court, which, at the close of the trial, definitely fixes the rights of the parties in the action. The judgment is not properly a part of the trial, but forms the subject of a distinct title in the Code. If the record

shows such final judgment to be erroneous, it is the right of the party aggrieved to have it reversed, vacated, or modified, on petition in error, to the proper reviewing court. To note an exception to a final judgment, in the court which renders it, after the controversy is there ended, would seem to be utterly futile." *Com. Nat. Bank v. Buckingham*, 12 Ohio St. 402. Other states adopting the Ohio Code of Procedure have, so far as we have been able to ascertain, all adopted this view of the meaning of these provisions. *Welton v. Beltezore*, 17 Neb. 399, 23 N. W. 1; *Black v. Winterstein*, 6 Neb. 225; *Koehler v. Ball*, 2 Kan. 169, 83 Am. Dec. 451; *Lender v. Caldwell*, 4 Kan. 346; *Wilson v. Fuller*, 9 Kan. 176; *Wood v. Nicolson*, 43 Kan. 462, 23 Pac. 587. In the last-named case the plaintiff obtained judgment quieting his title under a tax deed. The defendant did not preserve any exception and did not appear or answer in the lower court, but took the case to the Supreme Court, alleging that the petition did not state facts sufficient to constitute a cause of action against her. The Supreme Court found, upon an examination of the record, that the petition was fatally defective, and reversed the judgment. The court say: "Any material error apparent in the final judgment of a district court may be corrected by proceedings in error in this court, although no exception was taken by the party complaining, and no appearance by him at the trial and judgment, and no motion made to set aside the judgment." And the Supreme Court of this territory, prior to the adoption of the Ohio Code in this jurisdiction, decided the point in the same way, citing *Ins. Co. v. Piaggio*, 16 Wall. 378, 21 L. Ed. 358, *Mitchell v. Anderson*, 1 Hill (S. C.) 69, 26 Am. Dec. 158, and *McNamara v. O'Brien*, 2 Wyo. 441. These authorities are applicable to the case under consideration, and we think they are binding upon this court.

Counsel for defendants in error, however, referring to 8 Ency. Pl. & Pr. 287, and the cases there cited, maintain that the Supreme Court of the United States and the courts of 24 of the states establish a different rule. But this is a misconception of the decisions. It is true that matters occurring in the trial, not vital to the question of jurisdiction or the foundation of right, and not in the record proper, will not be noticed by the reviewing court unless they are excepted to at the time and brought into the record by a bill of exceptions. They are presumed to have been waived. But error of a sub-

stantial kind appearing upon the face of the record proper is error in law, and will be corrected by the reviewing court without any exception having been taken, and, of course, no bill of exceptions is necessary to bring such matters into the record. *Andrews' Stephen's Pleadings* 204. This principle is repeated over and over again by the Supreme Court of the United States. In *Slacum v. Pomery*, 6 Cranch, 221, 3 L. Ed. 204, the court found that the omission of a certain averment was fatal to the declaration, and they say: "Had this error been moved in arrest of judgment, it is presumable the judgment would have been arrested; but it is not too late to allege as error, in this court, a fault in the declaration, which ought to have prevented the rendition of a judgment in the court below." In *Bennett v. Butterworth*, 11 How. 676, 13 L. Ed. 859, the verdict was held not to support the judgment, and the court say: "As these errors are patent upon the record, they are open to revision here, without any motion in arrest of judgment or exception taken in the district court." *Suydam v. Williamson*, 20 How. 433, 15 L. Ed. 978; *Pomeroy v. Bank*, 1 Wall. 600, 17 L. Ed. 638; *Rogers v. Burlington*, 3 Wall. 661, 18 L. Ed. 79; *Thompson v. R. R. Co.*, 6 Wall. 137, 18 L. Ed. 765; *Ky. Life Ins. Co. v. Hamilton*, 63 Fed. 93, 11 C. C. A. 42.

The rule is the same in all the states whose decisions we have examined. * * * The judgment will be reversed and vacated, and the cause remanded for such further proceedings in the court below as may be proper upon the record.

Reversed and remanded.

MARTIN v. FOULKE.

Supreme Court of Illinois. 1885.

114 Illinois, 206.

MULKEY, J. This is an appeal from a judgment rendered by the circuit court of Will county, in an action of ejectment, wherein the appellees were plaintiffs and the appellants defendants. * * *

In the view we take of this case it is unnecessary to inquire

whether any of the above errors are well assigned or not, for an examination of the record shows that no exception was taken to the findings of the court or to the rendering of the judgment, and that not even a motion for a new trial was made. * * * The position of appellants, as we understand it, is this: that if the court, upon the trial of a cause, makes an improper ruling against a party, to which no exception is taken, he may, nevertheless, on appeal, assign for error the improper ruling; and if the opposite party joins in error, the only inquiry then will be, whether, as matter of fact, the error occurred, and if it did, the complaining party may avail himself of it precisely in the same way, and to the same extent, as if the proper exception had been taken. Whatever may be the rule in this respect elsewhere, it certainly can not be the law here. The Reports of this State abound with instances of erroneous rulings by trial courts which this court has uniformly refused to consider on the ground no exceptions were taken to them, in all of which, except, perhaps, in a case now and then omitted through inadvertence, there was a joinder in error. *Miere v. Brush*, 3 Scam. 21; *Armstrong v. Mock*, 17 Ill. 166; *Gridley v. Capen*, 72 id. 11; *Hill v. Harding*, 93 id. 77. This practice is of too long standing, and the rule too firmly established, to admit of change now.

The only error complained of being such as we can not consider, the judgment must be affirmed.

*Judgment affirmed.*⁶⁷

⁶⁷ The necessity for exceptions is the same when the review is had upon case-made as when had upon a regular bill of exceptions and writ of error.—*Turner v. Grand Rapids*, (1870) 20 Mich. 390. And the rule is the same in equity as at law.—*Phipps v. Penn*, (1867) 23 Ia. 30; *J. Walter Thompson Co. v. Whitehed*, (1900) 185 Ill. 454; *Gunn v. Brantly*, (1852) 21 Ala. 633.

BRIGGS v. WALDRON.

*Court of Appeals of New York. 1881.**83 New York, 582.*

RAPALLO, J. This case was decided on the ground, among others, that although upon the trial some objections were taken on the part of the defendant which should have been sustained, the rulings of the court upon them were not excepted to. The counsel for the defendant now moves for a reargument, claiming that this court must have overlooked a statement contained in the case showing that it was understood upon the trial that an exception followed every objection. It does appear that at the beginning of the trial, upon an objection being overruled and an exception taken, the court directed that to whatever should be objected the stenographer should enter an exception, and the defendant's counsel thereupon stated: "We will have it understood that an exception follows every objection on this trial;" which statement does not appear to have been dissented from. This court did not overlook the alleged stipulation, but regarded it simply as entitling the defendant, on the settlement of the case, to have exceptions entered to such rulings as he might desire to have reviewed upon appeal. If it went farther and was intended to govern the action of the appellate tribunals, and require them to review rulings to which no exception was entered in the case, we cannot give effect to it. The provisions of law which require a party, desiring to review rulings upon a trial, to take exceptions in proper form, are established for the convenience of the courts as well as for the protection of the parties, and the latter cannot, by stipulation, have their cases heard on appeal without regard to those provisions.

The direction given by the court was that an exception should be noted by the stenographer whenever an objection was taken. The court did not undertake to order that its decisions might be reviewed without inserting exceptions in the case. It was the duty of the appellant to see that all exceptions, upon which he intended to rely, were properly noted. This seems also to have been his understanding, for numerous exceptions are noted to rulings made after this direction was

given; and these are the only rulings open to review here.

* * * * *

If the objections which we thought well taken were substantial and could have affected the final result, we might have been inclined to afford the appellant an opportunity to apply to the court below for a resettlement of his case, and the insertion of the proper exceptions. But they relate wholly to matters of form and do not affect the merits. * * *

WECK v. RENO TRACTION CO.

Supreme Court of Nevada. 1915.

38 Nevada, 285.

Action by Charles E. Weck against the Reno Traction Company for damage to an automobile. From a judgment for the plaintiff and denial of its motion for a new trial, defendant appeals.

COLEMAN, J. * * *

It is also contended that the trial court erred in giving instruction No. 13, for the further reason that it alludes to braking appliances, as there is no testimony in the case concerning the condition of the brakes. It is a general rule of law that it is error to give an instruction which is correct in law, but which is not based upon evidence (*White v. City of Trinidad*, 10 Colo. App. 327, 52 Pac. 216; *Spiking v. Con. Ry. & P. Co.*, 33 Utah, 313, 93 Pac. 844); but the objection and exception taken to the instruction at the time it was given do not point out that this portion of the instruction was not based upon any evidence. From a reading of the exception, it is apparent that counsel did not have this point in mind at all, but that his objection went only to the last clear chance phase. Nor does it appear that this point was urged as a ground for a new trial, as is necessary before it can be considered by this court. Section 5328, Revised Laws. This court, in the case of *Paul v. Cagnaz*, 25 Nev. on page 325, 50 Pac. 857, 60 Pac. 983, 47 L. R. A. 540, which was a case in which several propositions were covered by the instruction, said:

"We think the rule is well established that in such case, if

any portion excepted to is sound, the exception cannot be sustained. *Morrill v. Palmer*, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411, and cases cited. 'Exceptions should be specific, and should be directed, not to the charge as a whole, but to the portion or portions thereof which are considered objectionable. It is only where the charge is erroneous in its whole scope and meaning or where the charge, in effect, asserts but a single proposition, that a general exception will be available.' 8 Enc. Pl. & Prac. 257. See citations given of many cases in 25 state courts, and numerous cases in the federal courts."

See, also, *Schollay v. Moffit-West Drug Co.*, 17 Colo. App. 126, 67 Pac. 182; *City of Denver v. Strobridge*, 19 Colo. App. 435, 75 Pac. 1076; *Hain v. Mattes*, 34 Colo. 345, 83 Pac. 127.

Since the instruction covered two points, and the objection and exception went to one of them only, and that the one not complained of here, the alleged error should not be considered by this court.

GRAVES v. BONNESS.

Supreme Court of Minnesota. 1906.

97 Minnesota, 278.

JAGGARD, J. This was an action brought to recover payment for three seasons' cut of saw logs, delivered by the plaintiff and respondent to defendant and appellant. Plaintiff demanded judgment for \$73,842.73. The answer prayed the judgment of the court that the plaintiff recover against the defendant the sum of \$584.62, and no more. The main issue tried to a jury concerned the contract between the parties. The jury brought in a verdict of \$37,827.23. From an order of the district court denying defendant's motion for a new trial, this appeal was taken.

1. The principal assignment of error was addressed to a ruling on the part of the trial court in receiving in evidence a letter of defendant's bookkeeper, Rosche, to the plaintiff. For present purposes, it is conceded that, if the objection to the offer of this letter was sufficient, the case must be reversed, and that Exhibit 3 was originally offered in evidence

after defendant had, on cross-examination by plaintiff, testified as to Rosche's charge of the business, when the defendant was away, and as to his connection with the firm correspondence. The objection was on the ground "that it is incompetent, irrelevant, and immaterial, and no foundation laid." The court then sustained the objection at that time on the ground of insufficient foundation. Subsequently the deposition of Rosche, the writer of the letter, was introduced, *inter alia*. It strongly tended to show Rosche's authority to write the letter for defendant. The record of its final admission in evidence is as follows: "Mr. Barker: Now, Exhibit 3 is not in, I believe. That has been offered, and it was refused at that time. It seems to me that at the present time this exhibit is perfectly proper, I will offer it again. Mr. Brown: Objected to upon the ground it is incompetent, irrelevant, immaterial, and no foundation laid. The Court: The objection is overruled. I think the testimony in the deposition since this letter was offered would make the letter competent."

It is obvious that the point, and the only point, to which the attention of the court and of opposing counsel was in fact directed, was the authority of Rosche, as agent for the defendant, to write the letter. In the brief of counsel for defendant in this court it is said: "The remark of the court concerning the admissibility of the letter (which has just been quoted) would seem to indicate that he had in his mind at that time only one phase of the matter, so far as the foundation for the letter was concerned, and that he ruled upon the objection to it without sufficiently considering all of the reasons against its reception presented by the objection to its competency." It was not the province of the trial court to see that counsel offering evidence had rendered that evidence competent for admission by laying sufficient foundation, or that objecting counsel had formulated an appropriate and specific objection; but to rule upon the objections as reasonably and fairly interpreted in the light of the immediate circumstances. When the court and opposing counsel, as in this case, are clearly misled by the ambiguous character of the objections in connection with the previous course of the testimony, it is not material whether the objecting counsel deliberately tried to "draw the wool over the court's eyes," or resorted to the dialectical strategy of a masked battery, or

allowed the point to escape him. A reversal in an appellate court because of error in a consequent ruling by the trial court will not reward such deceit, sharp practice, or inadvertence. There is nothing in this record, however, which imputes bad faith to the objecting counsel. It fairly appears from the record that the point now made was not in mind at the time the objection was interposed. However, they waived the point that plaintiff's counsel failed to show delivery of the letter, alike whether that point did not suggest itself to them or whether they saw it, but were silent because the plaintiff, who produced the letter, which on its face purported to be in answer to previous correspondence between the parties, was in court apparently able to supply the missing link. In any view of the case the defendant cannot now be heard to complain of the admission of the letter in evidence, because of their omission in fact to interpose a correct and specific objection.

This conclusion is fully sustained by authorities, general and specific. "A party objecting to the introduction of evidence must state his point so definitely that the court may intelligently rule upon it and the opposing party may, if the case admit of it, remove the objections by other evidence." Gilfillan, C. J., in *Gilbert v. Thompson*, 14 Minn. 544 (Gil. 414, 416). And see *U. S. v. McMasters*, 4 Wall. 680, 18 L. Ed. 311; *Burton v. Driggs*, 20 Wall. 125, 22 L. Ed. 299; *Wood v. Weimar*, 104 U. S. 795, 26 L. Ed. 779. "The rule is universal that, when an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, unless it be of such a character that it could not have been obviated." Mr. Justice Field in *Noonan v. Caledonia Gold Min. Co.*, 7 Sup. Ct. 911, 30 L. Ed. 1061. And see cases collected 8 Enc. Plead & Prac. 218. This "cardinal principle, no sooner repeated by the courts than it is forgotten by counsel" (1 Wigmore on Ev. § 18), has been applied with unwavering rigidity in uncounted hundreds of cases to the permutations and combinations of the conventional words "incompetent," "irrelevant," and "immaterial." 46 Cent. Dig. cols. 944 to 967, §§ 194, 211; 4 Current Law, p. 1392, § 8. It has been reiterated time after time by this court.

The almost unanimous concurrence of all these cases in an emphatic refusal to treat as reversible error the admission of evidence upon an objection not clear and specific enough to

point out to the court exactly what question was raised shows how unjustified are the current criticisms that American appellate courts rule on such questions to sustain or reverse the trial courts because of convictions as to the merits of the case; or for other reasons which they are unwilling or unable to express; and that American courts, to a deplorable extent, avoid verdicts for trivial violations of merely technical requirements of the rules of evidence which are unknown in other common-law countries.

The reasoning of the law in this connection is admirably set forth by Dunne, C. J.: "The object of requiring the grounds of objections to be stated, which may seem to be a technicality, is really to avoid technicalities and prevent delay in the administration of justice. When evidence is offered to which there is some objection, substantial justice requires that the objection be specified, so that the party offering the evidence can remove it, if possible, and let the case be tried on its merits. If it is objected that the question is leading, the form may be changed; if that the evidence is irrelevant, the relevancy may be shown; if that it is incompetent, the incompetency may be removed; if that it is immaterial, its materiality may be established; if to the order of introduction, it may be withdrawn and offered at another time—and thus appeals could often be saved, delays avoided, and substantial justice administered. Counsel are held to the grounds of objection stated at the time they call for a decision of the judge below, because they are supposed to know the law of their case, and, if they do not offer other objections, they are supposed to waive them, and evidence admitted without valid objection should stand. Counsel must not be permitted to wink at the introduction of evidence to which they think there is a valid objection, hoping that it may benefit them, and, if it goes the other way, move to exclude it; neither must they be permitted to plead inattention as an excuse. It is their business to be attentive on a trial, and, if they miss a point by neglect, they must lose it. Neither can we allow them to strike between wind and water on the trial, and then go home to their books and study out other objections and urge them here. They must stand or fall upon the case they made below, for this court is not a forum to discuss new points of this character, but simply a court of review to determine whether the rulings of the court below on the case as pre-

sented were correct or not." *Rush v. French*, 1 Ariz. 99, 124 25 Pac. 816. And see 1 Thomp. on Trials, § 693.

This general rule has been applied to almost every possible formula of objection and exception. The courts have refused to regard as sufficient basis for reversible error at one extreme, ambitious, obvious or humorous generalities, like "subject to all legal objections" (*Willard v. Pike*, 59 Vt. 202, 9 Atl. 907), or "on all grounds ever known or heard of" (*Johnston v. Clements*, 25 Kan. 376), and, at the other extreme, objections apparently specific, but really equivocal and sometimes dangerously deceptive, including those which are addressed to preliminary proof in general. The objection to such proof will not be reviewed unless it distinctly appears that the paper was objected to at the trial on the particular ground assigned as error on appeal. *Morris v. Henderson*, 37 Miss. 492, 501; *Norton v. Webber*, 69 App. Div. 130, 74 N. Y. Supp. 524; *Crawford v. Witherbee*, 77 Wis. 419, 46 N. W. 545, 9 L. R. A. 561; *Payne v. South Springfield*, 161 Ill. 285, 44 N. E. 105; *Drow v. Drum*, 44 Mo. App. 25; *Conway v. Case*, 22 Ill. 127. And see 8 Enc. P. P. 235.

There is an especial reason for enforcing the rule where the objection is calculated in effect, if not also in intention, to mislead the trial court into ruling correctly upon one aspect of an equivocal objection, and where it is then sought in an appellate court to reverse his holding, because of another aspect of the case not presented on trial. *Stillman v. Railway Co.*, 34 Minn. 420, 26 N. W. 399, *Bedal v. Spur*, 33 Minn. 207, 22 N. W. 390; *Nelson v. Railway Co.*, 35 Minn. 170, 28 N. W. 215; *Swaim v. Swaim*, 134 Ind. 596, 33 N. E. 792; *Chicago, etc., Ry. Co. v. Champion*, 9 Ind. App. 510, 36 N. E. 221, 37 N. E. 21, 53 Am. St. Rep. 357. The rule is enforced in order to promote frankness and fair dealing in the trial of cases. *Cannady v. Lynch*, 27 Minn. 439, 8 N. W. 164. It is not permissible to so frame an objection that it will serve to save an exception for the action of the court of review, and yet conceal the real complaint from the trial court. *Boggs, J., in Coffeen C. C. Co. v. Barry*, 56 Ill. App. 587, 590. In accordance with the general principle that parties must abide by the consequences of their own acts, a party cannot, on appeal, complain of an error in the lower court which he was instrumental in causing or which he invited, whether error was committed by himself alone or by the court at his instance.

2 Current Law, 1590. Accordingly, where the conduct of a party is such as to induce the opposing counsel and the court to act upon the assumption that further preliminary proof was waived, he cannot be heard, on review, to complain of the failure of preliminary proof. *Thomasson v. Wilson*, 146 Ill. 385, 34 N. E. 432; *Huling v. Fort's Administrator*, 12 Ky. 193.

The objection that no sufficient foundation is laid might be sustained because of failure to show a number of different matters of necessary proof. In some cases it amounts to little more than the general objection of incompetency. In others it may be sufficiently definite in fact. But whenever it clearly results in the reasonable and natural misdirection of the attention of the trial court and of opposing counsel to only certain of a larger number of possible phases of preliminary proof, and in a correct ruling thereon, an appellate court will not reverse a cause because of failure of preliminary proof upon different phases in the absence of any reason why that proof might not have been supplied. *McElroy v. Williams*, 14 Wash. 627, 45 Pac. 306; *De Braekeleer v. Schwabeland*, 86 Hun, 143, 33 N. Y. Supp. 212; *Stahl v. Duluth*, 71 Minn. 347, 74 N. W. 143; *First Nat. Bank v. Schmitz* (Minn.) 95 N. W. 577. And see *Cox v. Gerkin*, 38 Ill. App. 340; *McDanel v. McDanel*, 136 Ind. 607, 36 N. E. 286; *Mathews v. Herron*, 102 Iowa, 45, 67 N. W. 226, 70 N. W. 736; *Ingram v. Smith*, 38 Tenn. 411. Cf. *Kenosha Stove Co. v. Shedd*, 82 Iowa, 546, 48 N. W. 933. In this case a verdict of \$37,827.23 will not be set aside merely because of defendant's own omission to interpose an unequivocal and specific objection whereby the testimony might have been excluded or the missing link supplied. The assignment of error fails because under the circumstances of this case the objection was fatally ambiguous, and, in fact, misled the court.

* * * * *

SOUTHERN INDIANA RAILWAY CO. v. FINE.

*Supreme Court of Indiana. 1904.**163 Indiana, 617.*

Action by Andrew J. Fine against the Southern Indiana Railway Company. A judgment was rendered in favor of plaintiff, from which defendant appealed to the Appellate Court, and the case was transferred to the Supreme Court under Burns' Ann. St. 1901, § 1337u. Affirmed.

GILLET, J. * * *

It is disclosed by a bill of exceptions that in making the closing argument one of the attorneys for appellee said to the jury: "Find your general verdict, inserting the amount you will give the plaintiff. Then take each interrogatory, and answer each so that it may dovetail in and agree with your general verdict, and"— At this point the argument was interrupted by one of appellant's attorneys, who objected to said statements, and moved the court to withdraw the submission of the cause from the jury on account of the misconduct of counsel, and he further objected to proceeding with the cause. It is disclosed that the court overruled the objections and motions, and that it stated that it would instruct the jury to answer the interrogatories according to the evidence, to each of which rulings, as the bill states, appellant excepted. Upon the conclusion of the incident, appellee's counsel stated, in proceeding with his argument, "that the plaintiff did not desire a verdict of any kind that was not based upon the evidence." Among the instructions afterwards given is one which directed the jury to "answer each of the interrogatories submitted as the evidence warrants, without reference to your general verdict."

* * * But we have no hesitation in stating that the suggestion made by counsel for appellee in arguing the cause to the jury was improper. The objection to the statement in question lay in its strong, if not necessary, implication that, having reached a general verdict in favor of the plaintiff, the jurors should not approach the task of answering interrogatories with ingenuous minds, but that they should do so with the predominant purpose of making such answers as would not be out of accord with a general verdict in favor of the

plaintiff. If in the argument of a cause counsel go beyond the confines of legitimate argument, the court, as a minister of justice, should interfere; and this it should do whether opposite counsel are objecting or not. It does not follow, however, that a litigant who claims to have been prejudiced by improper argument can successfully complain of the failure of the court to so interfere. A duty is devolved upon his counsel directly to bring the matter to the attention of the court, to make specific statement, if reasonably required, of the ground of the objection, and, if the wrong is not incurable, to request the court to admonish the jury not to consider the statement to which the objection is made. *Coppenhaver v. State*, 160 Ind. 540, 67 N. E. 453; *Robb v. State*, 144 Ind. 569, 43 N. E. 642; *Worley v. Moore*, 97 Ind. 15; *Morrison v. State*, 76 Ind. 335. An exception is defined by Civil Code as "an objection taken to the decision of the court upon a matter of law." Section 637, Burns' Ann. St. 1901. It therefore follows that an exception cannot be reserved to the argument of opposite counsel. *Robb v. State*, *supra*; *Coppenhaver v. State*, *supra*. It is only where the court has refused to sustain a proper motion that an exception can be reserved in case of improper argument. The making of the statements here under consideration furnished no ground for setting aside the submission of the cause. Appellant was only entitled to have the jury sufficiently admonished without delay that the statements should not be considered. *Blume v. State*, 154 Ind. 343, 56 N. E. 771. We may assume that appellant's bill of exceptions concerning the incident states the facts as strongly as was warranted, and we may therefore presume that the statement of the court that it would instruct the jury to answer the interrogatories according to the evidence was made in the presence and hearing of the jury. This was ultimately followed, as we have seen, by an instruction that the jury was to answer each of the interrogatories without reference to the general verdict. While the court might, with propriety, have given a seasonable and emphatic admonition to the jury, yet, apart from the failure to reserve an exception to the refusal to grant a proper motion, we think that appellant has no just cause to complain of the failure of the court to go further than it did. While much is made of the incident in appellant's brief, yet it appears to us that the failure of the court to duly

and seasonably admonish the jury was quite as much the fault of the complaining party as it was of the court.

* * * * *

SECTION 2. FINDINGS IN TRIAL WITHOUT JURY.

CAMPBELL v. BOYREAU.

The Supreme Court of the United States. 1858.

21 Howard, 223.

TANEY, C. J. This is an action of ejectment (although the pleadings are not in the form prescribed by the common law) to recover a tract of land called San Leandro, situated in California. It was brought in the Circuit Court of the United States for that district. The parties agreed to waive a trial of the facts by a jury, and that the facts as well as the law should be decided by the court, upon the evidence adduced by the parties.

In pursuance of this agreement, evidence was offered on both sides; and the court proceeded to decide the facts in dispute, and then proceeded to decide the questions of law arising on the facts so found by the court; and finally gave judgment against the plaintiffs in error, who were defendants in the court below. And this writ of error is brought to revise that judgment.

It appears by the transcript that several exceptions to the opinion of the court were taken at the trial by the plaintiffs in error—some to the admissibility of evidence, and others to the construction and legal effect which the court gave to certain instruments of writing. But it is unnecessary to state them particularly; for it has been repeatedly decided by this court, that, in the mode of proceeding which the parties have seen proper to adopt, none of the questions, whether of fact or of law, decided by the court below, can be re-examined and revised in this court upon a writ of error.

It will be sufficient, in order to show the grounds upon which this doctrine has been maintained, and how firmly it has been settled in this court, to refer to two or three recent

cases, without enumerating the various decisions previously made, which maintain the same principles. The point was directly decided in *Gould and others v. Frontin*, 18 How., 135; which, like the present, was a case from California, where a court of the United States had adopted the same mode of proceeding with that followed in the present instance. And the decision in that case was again reaffirmed in the case of *Suydam v. Williamson and others*, 20 How. 432; and again in the case of *Kelsey and others v. Forsyth*, decided at the present term.

Indeed, under the acts of Congress establishing and organizing the courts of the United States, it is clear that the decision could not be otherwise; for, so far as questions of law are concerned, they are regulated in their modes of proceeding according to the rules and principles of the common law, with the single exception of the courts in the State of Louisiana, of which we shall presently speak. And by the established and familiar rules and principles which govern common-law proceedings, no question of the law can be reviewed and re-examined in an appellate court upon writ of error, (except only where it arises upon the process, pleadings, or judgment, in the cause), unless the facts are found by a jury, by a general or special verdict, or are admitted by the parties, upon a case stated in the nature of a special verdict stating the facts, and referring the questions of law to the court.

The finding of issues in fact by the court upon the evidence is altogether unknown to a common-law court, and cannot be recognized as a judicial act. Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. And this court, therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties. Nor can any exception be taken to an opinion of the court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impanelled, and the exception reserved while they were still at

the bar. The statute which gives the exception in a trial at common law gives it only in such cases. And as this court cannot regard the facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal. Consequently, as the Circuit Court had jurisdiction of the subject-matter and the parties, and there is no question of law or fact open to our re-examination, its judgment must be presumed to be right, and on that ground only affirmed.

The cases referred to in the argument, which were brought up by writs of error to a Circuit Court of Louisiana, do not apply to this case. The act of Congress of May 26, 1824, (4 Stat., 62) adopted the practice of the State courts in the courts of the United States. And a writ of error to a Circuit Court of that State, therefore, is governed by different principles from a like writ to the Circuit Court of any other State. And as, by the laws of Louisiana, the facts, by consent of parties, may be tried and found by the court without the intervention of a jury, this court is bound, upon a writ of error, to regard them as judicially determined, and treat them as if they had been found by the special verdict; and the questions of law which arise on them are consequently open to the revision of this court.

But the practice in relation to the decisions in that State is an exception to the general rules and principles which regulate the proceedings of the courts of the United States; nor can the laws or the practice of any other State authorize a proceeding in the courts of the United States different from that which was established by the acts of 1789 and 1803, and the subsequent laws carrying out the same principles and modes of proceeding.

Upon the grounds above stated, the judgment in this case must be affirmed. But it must at the same time be understood that this court express no opinion as to the facts or the law as decided by the Circuit Court, and that the whole case is open to re-examination and revision here, if the questions of fact or law should hereafter be brought legally before us, and in a shape that would enable this court to exercise its appellate jurisdiction.⁶⁸

⁶⁸ Statutes are now very common which provide for findings of fact

by the court, and they are usually construed to give such findings the force and effect of a special verdict.—*Bard v. Kleeb*, (1890) 1 Wash. 370; *Simmons v. Hamilton*, (1880) 56 Cal. 493; *Hill v. City of Clarinda*, (1897) 103 Ia. 409; *Leavitt v. Taylor*, (1901) 163 Mo. 158; *Smith v. Spencer*, (1899) 8 Okl. 459; *McClung v. McPherson*, (1905) 47 Ore. 73; but this is true to its full extent only in law cases, since in equity cases the court on appeal is not bound by the findings below.—*Walker v. Sedgwick*, (1855) 5 Cal. 192; *Wilson v. Wilson*, (1913) 256 Mo. 541; *Finlen v. Heinze*, (1905) 32 Mont. 354; *Coad v. Coad*, (1910) 87 Neb. 290; *McNair v. Benson*, (1912) 63 Ore. 66; *Stockett v. Ryan*, (1896) 176 Pa. 71; *Roberts v. Washington Nat. Bank*, (1895) 11 Wash. 550.

Special findings of fact are therefore usually necessary where the case is tried by the court without a jury, if it is desired to challenge on appeal the sufficiency of the facts to sustain the judgment.—*Lehnen v. Dickson*, (1892) 148 U. S. 71; *Robson v. Dayton*, (1897) 111 Mich. 440; *City of Oskaloosa v. Pinkerton*, (1879) 51 Ia. 697; *Lacy v. Dunn*, (1870) 5 Kan. 567; *First Nat. Bank v. Woolen Mills*, (1906) 146 Ala. 610.

Special findings of law may also be necessary in order to raise questions on review as to the law of the case.—*McIntyre v. Sholty*, (1887) 121 Ill. 660; *McCullough v. Biedler*, (1886) 66 Md. 283; *Sell v. Bretelle*, (1901) 162 Mo. 373; *Martinton v. Fairbanks*, (1884) 112 U. S. 670.

SECTION 3. NECESSITY OF MOTION FOR NEW TRIAL.

SUTHERLAND v. PUTNAM.

Supreme Court of Arizona. 1890.

3 Arizona, 182.

KIBBEY, J. * * *

It is assigned as error that the evidence is insufficient to justify the decision of the court below. This error, if it is error, is good cause for a new trial. Our Code (section 833) provides that new trials may be granted on motion for good cause shown; and section 593, cl. 2, confers upon this court jurisdiction to review an order granting or refusing a new trial, sustaining or overruling a demurrer, or affecting a substantial right in an action or a proceeding. The only relief that appellants ask in this court, and all that this court can grant, is a new trial of the cause in the trial court. If it be true that the evidence is insufficient to warrant the decision, it is error. If it is error, we must presume that the court below would, upon application, have corrected it. If, however, the court below had denied the motion

for a new trial, such ruling could have been presented here for review. It is provided by the statute that the only remedy appellants seek here may have been awarded to them by the court below on motion. That method is prompt, efficacious, and inexpensive; and we think the appellants should first resort to it before coming to the appellate court. In a very early case in Texas, the supreme court of that state (*Foster v. Smith*, 1 Tex. 70) say: "We will here take occasion to say that, according to what is believed to be the correct rule of practice, no judgment ought to be reversed in this court, merely on the ground that the verdict was not supported by the testimony, unless a motion had been made in the court where the verdict was rendered for a new trial and overruled." And see, also, following this case, *Hart v. Ware*, 8 Tex. 115; *King v. Gray*, 17 Tex. 62; *Pyron v. Grinder*, 25 Tex. 159; *Cain v. Mack*, 33 Tex. 135; *Harrell v. Cattle Co.*, (Tex.) 11 S. W. Rep. 863; *Jacobs v. Hawkins*, 63 Tex. 1. And in *Morris v. Gordon*, 36 Tex. 71, that court, in referring to a statute which made the overruling of a motion for a new trial a prerequisite to an appeal to the supreme court, says: "And this is only a reiteration of the general rule that a party will not be heard in an appellate court until he has exhausted his remedies in the lower court." And this seems to us to be the true rule. It would be useless legislation to confer specifically upon this court jurisdiction to review orders refusing or granting new trials if it be held that, without such motion having been made and ruled upon, this court can review the very errors that are grounds for new trial upon appeal simply from the judgment. Section 833 gives the right to apply for a new trial. Section 834 provides that the grounds upon which it is founded shall be specifically stated, and that no others shall be considered. Section 842 provides that the motion, if overruled, may be embodied in a bill of exceptions, and so presented to, and the ruling thereon reviewed by, the supreme court. To hold that this court may consider errors occurring at the trial which are not urged upon motion below as grounds for a new trial, and which therefore, could not have been considered by the court below, is inconsistent and illogical. * * *

* * * This court cannot consider any error which would be good cause for a new trial unless a motion for a new trial upon that ground had been made to the court below, and the

motion had been overruled, and the ruling excepted to, and the motion embodied in a bill of exceptions, and the ruling assigned as error by a proper assignment. We have not cited the decisions of many, if not most, of the states, which, upon similar or analogous statutes, sustain the view we have taken, as a discussion of them would take too broad a scope; and for the same reason we do not notice others which seem to sustain a contrary view.

* * * * *

⁶⁹ *Accord*,—*Blonde v. Merriam*, (1913) 21 Wyo. 513; *Barnes v. Noel*, (1914) 131 Tenn. 126; *Maplegreen Realty Co. v. Trust Co.*, (1911) 237 Mo. 350; *Eggleston v. Williams*, (1911) 30 Okl. 129; *Root v. Glissmann*, (1909) 85 Nebr. 576; *Acme Mills & Elevator Co. v. Rives*, (1911) 141 Ky. 783; *Hinton v. Falls City Sav. & Loan Assn.*, (1916) 60 Ind. App. 470; *Geter v. Central Coal Co.*, (1907) 149 Ala. 578; *St. Louis Iron Mountain & So. Ry. Co. v. Raines*, (1909) 90 Ark. 482; *Carpenter v. Savage*, (1908) 93 Miss. 233; *McGraw v. Roller*, (1903) 53 W. Va. 75 (under a statute reading "No writ of error or *supersedeas* shall be awarded or entertained by an appellate court for any matter for which a judgment is liable to be reversed on motion by the court which rendered the judgment, until such motion be made and overruled in whole or in part").

The rule applies in many states equally to cases at law and in equity.—*Swenson v. Snell*, (1900) 22 Utah, 191; *Spangler v. Brown*, (1875) 26 Oh. St. 389; *Deputy v. Stepleford* (1861) 19 Cal. 302; *Berry v. Rood*, (1907) 209 Mo. 662; *Burbank v. Rivers*, (1887) 20 Nev. 81; *Danforth v. Fowler*, (1903) 68 Neb. 452. But other courts hold a motion for a new trial unnecessary in equity cases.—*Harrison v. Murphy*, (1912) 35 Okl. 135; *Le May v. Johnson*, (1879) 35 Ark. 225; *Nickels v. Collins*, (1913) 153 Ky. 219; *Ribordy v. Murray*, (1896) 70 Ill. App. 527; *Felch v. Lee*, (1862) 15 Wis. 265; *Fort Worth Imp. Dist. v. Fort Worth*, (1913) 106 Tex. 148.

A stipulation by the parties dispensing with a motion for a new trial as the basis for an appeal is ineffectual.—*Independence County v. Tomlinson*, (1910) 95 Ark. 565.

LAW v. SMITH.

Supreme Court of Utah. 1908.

34 Utah, 394.

FRICK, J. On April 25, 1907, appellant, as the county attorney of Cache county, Utah, filed an accusation in writing against respondent, the duly elected, qualified, and acting

sheriff of said county, to remove him from said office. * * *

After the evidence had all been submitted and the parties had rested, the appellant moved the court to direct the jury to find the respondent guilty upon two paragraphs, and the respondent asked that the court direct the jury to find him not guilty upon all the paragraphs of the accusation. The court denied appellant's motion, and directed the jury to return a verdict of not guilty upon all the charges, which the jury did, and the court entered judgment discharging the respondent, from which this appeal is prosecuted.

The appellant excepted both to the refusal of the court to direct a verdict against respondent and to the giving of the instruction in which the jury were directed to find him not guilty, and now assigns the rulings of the court in that regard as error. Appellant did not file a motion for a new trial, but presents the case upon the evidence produced and exceptions taken at the trial, all of which are preserved in a bill of exceptions which was duly settled and allowed by the trial court. Respondent's counsel insist that, in order to determine whether the court erred in directing a verdict, we must examine into and pass upon the evidence, and we cannot do so unless a motion for a new trial is filed and overruled in the court below. This contention is based upon the decision in *Touse v. Consolidated Ry. & Power Co.*, 29 Utah, 95, 80 Pac. 506. In that case it was held by a divided court that rulings made in admitting or excluding evidence, in charging the jury, and in refusing to charge as requested, including a request to direct a verdict, although duly excepted to and properly preserved in a bill of exceptions and assigned as error, were not before this court, unless a motion for a new trial was made and overruled by the court. If the decision in the *Touse* Case is to be adhered to, it would lead to an affirmance of the judgment in this case upon the sole ground that there is nothing before us for review.

In view that the decision in the *Touse* Case involves no property rights, but does affect an important question of practice on appeal, we have felt constrained to re-examine the propositions decided in that case. From such an examination, we have become convinced that the majority of the court misconceived the purpose the Legislature had in view in making the amendment to section 3304 as contained in Laws 1901, p. 25, c. 27. This amendment now constitutes

section 3304, Comp. Laws 1907, and as in force when the *Touse* Case was decided and as now in force reads as follows: "Sec. 3304. Upon an appeal from a judgment, all orders, rulings and decisions in the action or proceeding to which exceptions have been taken in the court below, or which are deemed excepted to, *as provided in this Code*, are before the Supreme Court for review. * * *

* * * When "all orders, rulings and decisions in the action or proceeding to which exceptions have been taken in the court below, or which are deemed excepted to, as provided by this Code," were declared to be before this court for review without a motion for a new trial, it certainly included every question that was submitted to the trial court requiring an order, a ruling, or a decision during the trial. Is there any act that a trial court can be called upon to make in any action or proceeding during a trial that does not directly come within one or more of those terms? We confess that we cannot conceive of a single act that can be required of a trial court during the trial that is not covered by the terms, orders, rulings, or decisions. The Legislature added the word "rulings" to make assurance doubly sure that every possible question upon which the trial court directly passes during the trial and on which he may err may be presented to this court for review without a motion for a new trial, provided the order, ruling or decision is duly excepted to, or when a statutory exception is implied. * * *

* * * * *

The decision in the *Touse* Case entirely misconceived the object and purpose of a motion for a new trial under the practice in force in this state. The right to move for a new trial is present in every case whether legal or equitable, or whether tried to a court or jury. If a party thinks he can convince the trial court that it committed prejudicial error and will grant him a new trial without an appeal, he may make his motion and obtain a ruling upon it; but, where he has obtained one ruling from that court and has taken or is given a statutory exception, he need not require the court to repeat the error before he is entitled to a review of the error by this court. Moreover, if he has not taken, or if the statute does not give him an exception to any ruling or decision before the filing of a motion for a new trial, he cannot obtain a review of such a ruling by simply filing a motion

and getting an adverse ruling upon it, and then except to such ruling. The motion for a new trial does not enlarge the matters that may be reviewed by this court, except upon matters which the trial court could not, and did not, pass on at the trial. These are specified in section 3292, and, in brief, are: (1) Irregularity in the proceeding of the court or jury; (2) misconduct of the jury or the adverse party; (3) accident and surprise; (4) newly discovered evidence; (5) excessive damages allowed by the jury; and (6) the insufficiency of the evidence to justify the verdict. In granting or refusing the motion the trial court may exercise a sound discretion which the losing party may invoke in the light of the whole proceedings in the case. This court cannot exercise such discretion, but is ordinarily limited to the review of specific rulings made by the trial court. It is manifest that all the matters enumerated in most all of the foregoing grounds for which the motion for a new trial may be granted can be submitted to the trial court but once for a ruling. If one ruling is sufficient as to those grounds, why is not one ruling and exception equally sufficient with regard to all other errors of law? This is the evident purpose of the law relating to the review of the rulings and decisions of the trial court by this court. If the trial court has passed upon a matter in the course of a trial and an exception is taken or is given by the statute, the ruling or decision made by the trial court, if assigned as error, is before this court for review on appeal. If, therefore, a matter comes up after the trial, or where some irregularity in the proceedings during the trial, or some of the matters arise which are enumerated in the first five grounds for a new trial to which we have directed attention, they must be brought to the attention of the trial court by a motion for a new trial, and his ruling upon them may then be reviewed by this court. They cannot be reviewed otherwise, since the trial court cannot pass upon them except in passing on a motion for a new trial. So, likewise, in a case a party desires to challenge the verdict of a jury upon the ground that the verdict is not sustained by the evidence, he must do so by a motion for a new trial, unless during the trial he raised the legal question involved by a motion for a nonsuit or for a directed verdict. Unless he has presented either a motion for a nonsuit or for a directed verdict, the trial court has had no opportunity to pass upon the

legal sufficiency of the evidence during the trial, and cannot do so unless a motion for a new trial upon the ground of the insufficiency of the evidence is presented to it. When, however, a motion for a nonsuit or a motion for a directed verdict has been made and ruled upon, the court has had the opportunity to pass upon the legal sufficiency of the evidence precisely the same as upon a motion for a new trial, and hence the latter motion, for the purposes of a review, may be dispensed with. In this way all the orders, rulings, and decisions of the trial court, whether made during the trial or on motion for a new trial, can be brought before this court for review, and on all of them the court need to pass judgment but once. Any other holding would bring about the incongruity of requiring the trial court to pass twice on some matters, while it may do so but once on others. Where, as in some jurisdictions, the motion for a new trial constitutes the foundation for a review, and where nothing can be considered by the appellate court except such matters as are incorporated into a motion for a new trial, the trial court is given the opportunity to pass upon the same question twice.

The argument that a motion for a new trial was intended by the Legislature to give the trial court an opportunity to review the ruling made during the haste of a trial is far more plausible than sound. If the Legislature had intended such to be the procedure, it would have been easy to have said so, and thus make the statute read so as to make the court's ruling upon the motion for a new trial the basis of a review. The Legislature, however, did not do this, but in unmistakable terms has said that all the orders, rulings, and decisions which are duly excepted to in the trial court, are before this court for review without a motion for a new trial. By section 3298 it is provided that the court may grant a new trial on its own motion in case the jury have plainly disregarded the instructions, or where a verdict is rendered under misapprehension of the instructions, or is based upon either passion or prejudice. Moreover, in case of an error, the losing party may always move for a new trial, and, if the error is prejudicial, the trial court, no doubt, will grant a new trial without compelling the applicant to come to this court for relief. In view, therefore, that under the statutes of this state, the review of errors of the trial courts is direct, and does not depend upon a motion for a new trial except for

matters upon which the trial court had no opportunity to pass during the trial, we have no right to impose duties upon the appellant which the law does not require of them. It is our duty to review all questions that are brought here in accordance with the statute giving the right of review. Where a statute is as clear, as is section 3304, we have no right to disregard it, and, if this court has made a palpable error in construing it, it is our duty to correct the error, when, as is the case here, the correction will not inflict serious injury on any one and will enforce the legislative intent. We refrain from referring further to the general law upon this subject. We are thoroughly satisfied with, and adopt and reiterate, the same as it is stated by Mr. Justice Straup in his dissenting opinion in the *Touse* Case.

From what has been said it necessarily follows that all the orders, rulings, and decisions made by the trial court during the trial, including his ruling in directing or in refusing to direct a verdict, and all questions of fact in equity cases on which the trial court has passed, including the findings, and also all errors in findings of fact and conclusions of law made by the court in law cases, are before this court for review without a motion for a new trial. The *Touse* Case, therefore, so far as it is in conflict with these conclusions, ought to be, and accordingly is, overruled.

* * * * *

70 *Accord*.—*Birch v. Abercrombie*, (1913) 74 Wash. 486; *National Council v. McGinn*, (1914) 70 Ore. 457; *Jones Lumber & Mercantile Co. v. Faris*, (1894) 5 S. D. 348; *Caldwell v. Parks*, (1874) 47 Cal. 640; *Earp v. Railroad Co.*, (1861) 12 Oh. St. 621; *Stitt v. Rat Portage Lumber Co.*, (1906) 98 Minn. 52; *Yarber v. Chicago & Alton Ry. Co.*, (1908) 235 Ill. 589; *Tubbs v. Roberts*, (1907) 40 Colo. 498; *Stewart v. Equitable Life Ass'n*, (1900) 110 Ia. 528; *Finfrock v. Nor. Cent. Ry. Co.*, (1915) 59 Pa. Super. 530; *Parrish v. Pensacola & A. RR. Co.*, (1891) 28 Fla. 251; *Levert v. Berthelot*, (1910) 127 La. Ann. 1004; *McDonald v. Champion Iron & Steel Co.*, (1905) 140 Mich. 401; *Cooper v. Pac. Mut. Life Ins. Co.*, (1871) 7 Nev. 116; *Dring v. St. Lawrence Twp.*, (1909) 23 S. D. 624; *McKinnon v. Morrison*, (1889) 104 N. C. 354; *Armstrong v. Whitehead*, (1902) 81 Miss. 35.

But the motion has been held necessary when the matter has not otherwise been brought to the attention of the trial court.—*McCue v. Detroit United Ry.*, (1920) 210 Mich. 554; *Dubeich v. Grand Lodge*, (1903) 33 Wash. 651.

KELLOGG v. SCHOOL DISTRICT NO. 10.

*Supreme Court of Oklahoma. 1903.**13 Oklahoma, 285.*

BURFORD, C. J. The plaintiff in error, Harry H. Kellogg, brought this action in the district court of Comanche county to enjoin the defendant in error, School District No. 10 of Comanche county, from erecting four schoolhouses in said district, and from creating a debt against said school district for the construction of said buildings. * * *

The issues were closed by a reply, and the cause submitted to the court upon the pleadings and oral testimony. The district court rendered judgment for the defendants in error, and dismissed plaintiff's action. Kellogg appeals, and the case is here for review.

It is contended by counsel for defendant in error that there is no sufficient assignment of error to present any question for the consideration of this court. This contention is not without some merit. In the trial court the plaintiff in error filed his motion for new trial, on which his only ground assigned was: "Errors of law occurring at the trial, and duly excepted to by the plaintiff." This is the eighth cause for new trial, as embraced in the Code (Wilson's Rev. & Ann. St. § 4493), and will present to the trial court any objection or exception properly saved during the progress of the trial. *Boyd v. Bryan*, 11 Okl. 56, 65 Pac. 940. And an assignment of error in this court to the effect that the trial court erred in overruling the motion for new trial will bring before this court for review every exception saved by the complaining party during the progress of the trial. But the errors complained of in this case do not belong to that class embraced in the term "occurring at the trial." This specification embraces every ruling and decision of the trial court upon the trial of the cause, from the time the trial begins until the cause is submitted to the jury for its verdict, or the court for its decision. But it does not include an erroneous verdict by the jury, or decision by the court upon the facts. The sixth cause for new trial is "that the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law." This cause was not set out in the motion for new

trial, but the contention of the plaintiff in error is, in this court, that the judgment of the court is contrary to law, upon the pleadings and undisputed facts. The contention of counsel for defendant in error is correct—that the motion for new trial does not present the objections urged by counsel for plaintiff in error in his brief. However, it does not necessarily follow that there is nothing presented by the record that this court can consider. There are some errors that may be presented for the first time in this court. It is a general rule that the appellate court will not review any alleged errors which were not presented to the trial court for its reconsideration, yet there are some exceptions to this rule. When the error is apparent upon the face of the judgment roll, or, as we say in more modern language, upon the face of the record proper, then such error will be considered by the appellate court, although not presented to the trial court in the motion for new trial. *Territory ex rel. Taylor v. Caffrey*, 8 Okl. 193, 57 Pac. 204; *Caffrey v. Overholser*, 8 Okl. 202, 57 Pac. 206. In this case the record proper, or judgment roll, consists of the petition, answer, reply, orders of the court, and final judgment. The fourth assignment in the petition in error is: "Said court erred in not rendering judgment for the plaintiff in error upon the pleadings and undisputed testimony." This assignment sufficiently presents to this court any error apparent upon the face of the judgment roll. While we cannot go into the testimony under any assignment of errors contained in the record, yet, if the judgment is contrary to law, as appears from the facts alleged and admitted in the pleadings, then this court is required to reverse such judgment. *Territory ex rel. Taylor v. Caffrey, supra*. It appears from the undisputed facts contained in the pleadings that the school district and its officers are proceeding to erect four separate and several schoolhouses upon four several and separate sites in the same school district, and to conduct and maintain four several and separate schools in said district, from the common funds of said school district, and that none of said sites are within one-half mile of the center of said district; also that the school board is expending the funds of the district for said four several schoolhouses, and that it has issued a warrant for \$1,500 against the funds of said district, and traded it for material to erect said four schoolhouses. It further appears that this is a country school

district, and there is no allegation or contention that any of said schoolhouses are for colored pupils. These facts being conceded, the trial court denied an injunction. This appears upon the face of the record. If there is no power or authority vested in an urban school district to erect more than one schoolhouse for white children, and no authority given to conduct more than one white school in a school district, and no authority given to erect a schoolhouse on a site more than a half mile from the center of the school district, then, or in either such case, the school board is acting without authority, and is misappropriating the funds of the district, and the judgment of the court is contrary to law.

SECTION 4. SAME THEORY TO BE PURSUED IN TRIAL AND APPELLATE COURTS.

LESSER COTTON CO. v. ST. LOUIS IRON MOUNTAIN & SOUTHERN RY. CO.

United States Circuit Court of Appeals (8th Circuit.) 1902.

114 Federal Reporter, 133; 52 Circuit Court of Appeals, 95.

[Action for damages for negligently setting fire to plaintiff's cotton by means of sparks from defendant's locomotive. Verdict for defendant, and plaintiff appealed.]

Before CALDWELL, SANBORN and THAYER, Circuit Judges.
SANBORN, Circuit Judge. * * *

Another objection to the portion of the charge here challenged now urged is that the defendant was operating its engine and freight train on Sunday; that this act was in violation of the law of Arkansas, which forbids work of this character on that day (Sand. & H. Dig. § 1887); and that the defendant is consequently liable for the damages resulting from its violation of the law, without regard to the question of negligence. But under the record presented by the bill of exceptions this court has no power or jurisdiction to consider or determine this question in this case. It was not presented to the court below, and no ruling was made upon it in that court. Counsel for the plaintiffs presented to the

court nine requests for instructions. They were all based upon the theory that the issue to be tried was whether or not the defendant was guilty of negligence in setting out the fire. They contained no request or suggestion that the court ought to instruct the jury that they were entitled to recover in the absence of negligence, because the defendant had violated the Sunday law. The portion of the charge now challenged was excepted to at the close of the trial, but the exception was general, and contained no statement that this excerpt was erroneous because the plaintiffs were entitled to recover on account of a violation of the Arkansas statute prohibiting labor on Sunday. Thus it appears that the issue of law here urged upon our consideration was not presented to, considered, or ruled by, the court below. It is not, therefore, here for our consideration, and we must decline to enter upon its discussion. In an action at law, this is a court for the correction of the errors of the court below, exclusively. Questions which were not presented to nor decided by that court are not open for review here, because the trial court cannot be guilty of any error in a ruling it has never made upon an issue to which its attention has never been called. *Association v. Wilson*, 100 Fed. 368, 373, 40 C. C. A. 411, 416; *Railway Co. v. Henson*, 58 Fed. 531, 532, 7 C. C. A. 349, 351, 19 U. S. App. 169, 171; *Schneider Brewing Co. v. American Ice Mach. Co.*, 77 Fed. 138, 149, 23 C. C. A. 89, 100, 40 U. S. App. 382, 403; *Board v. Sutliff*, 97 Fed. 270, 38 C. C. A. 167; *Railroad Co. v. Krohne*, 29 C. C. A. 674, 86 Fed. 230, 235; *Davis v. Town of Fulton*, 52 Wis. 657, 9 N. W. 809.

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SAVANNAH, FLORIDA AND WESTERN RAILWAY CO.
v. TALBOT.

Supreme Court of Georgia. 1905.

123 Georgia, 378.

EVANS, J. * * *

2. The plaintiff in error further contends that the judgment of the court is erroneous for the reason that the evi-

dence disclosed that the plaintiff had an adequate and complete remedy at law by an action of trover. If the defendant desired to avail itself of the objections that the owner had gone into a court of equity and invoked the aid of that court, when his remedy at law was complete, it should have done so by appropriate demurrer. It cannot submit the determination of the case to a court of equity, and, after an adverse judgment, for the first time raise the point that the plaintiff has not pursued the proper remedy. The only prayer in the petition was for injunction. The only issue submitted to the court by the pleadings was whether, under the facts, the plaintiff was entitled to relief by injunction. The failure of the railroad company to demur at the proper time, and the trial of the case by the judge without a jury, amounted to a consent that the issue made by the pleadings should be determined in that manner; and it is now too late, after the case has been decided, to raise the question that the plaintiff's legal remedy was ample, and that there was therefore no necessity to invoke the extraordinary powers of a court of equity. See *Hay v. Collins*, 118 Ga. 247, 248, 44 S. E. 1002.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.⁷¹

⁷¹ But where the action is one over which the court of equity has no jurisdiction, the objection can be made at any time.—*Stout v. Cook*, (1866) 41 Ill. 447; *Collins v. Sutton*, (1896) 94 Va. 127; *H. W. Metcalf Co. v. Martin*, (1907) 54 Fla. 531; *Allen v. Pullman's Palace Car Co.*, (1891) 139 U. S. 658.

STATE v. GARCIA.

Supreme Court of New Mexico. 1914.

19 New Mexico, 414.

PARKER, J. Appellants were indicted for murder, and were convicted of voluntary manslaughter.

* * * * *

5. A curious fact appears in the case. Francisco Garcia, one of the defendants, became engaged in an altercation with the deceased, whereupon deceased shot Garcia and he fell to

the floor, and remained there, unconscious, during the whole of the remainder of the difficulty. Cipriano Garcia, his brother, was at the time at the back end of the saloon where the difficulty occurred, and took no part in the same up to this time. Upon hearing the shot and seeing his brother fall to the floor, he rushed to his rescue, encountered the deceased, and killed him. No proof of concerted action on the part of the brother is shown. It thus appears that it was physically impossible for Francisco Garcia to be guilty of any crime in this connection, and he was entitled to an instruction to the jury to acquit him. Had the matter been called to the attention of the court before instructing the jury, no doubt he would have so directed them. But counsel sat quiet, speculated upon the result before the jury, and afterwards complained of an adverse result. Nor did counsel call the attention of the court to this proposition in the motion for a new trial. Under such circumstances, no relief can be granted here. No question is here for decision; the court below never having decided the point. The proposition, as presented, amounts to an appeal to this court for the first time to award a new trial to a defendant on the ground of the absence of evidence to convict him, when the lower court has never been asked to so decide. This is not available.

In *People v. Smith*, 106 Mich. 431, 434, 64 N. W. 200, the court said: "The difficulty with this defense is that no such contention was made at the trial." No request was made for an instructed verdict. "This objection * * * comes too late."

In *Clarke v. State*, 78 Ala. 474, 477, 56 Am. Rep. 45, the court said:

"There was evidence showing that the offense was committed in Jefferson county. No instruction was given or requested in respect to its sufficiency. Without a decision by the superior court made the subject of exceptions and involving an inquiry into the sufficiency of the evidence, this court cannot interfere."

In *State v. Secrest*, 80 N. C. 450, 453, the court said:

"No such point seems to have been made at the trial, and no such instruction asked of the court."

The same doctrine prevails in the federal courts. In *McDonnell v. United States*, 133 Fed. 293, 294, 66 C. C. A. 671, 672, it is said:

"It is well settled that where no motion is made for an instructed verdict, and, without objection, the court is permitted to charge the jury on the assumption that there is sufficient evidence to justify the submission of the case to them, the objection that there was no evidence to support the verdict cannot be heard and considered in an appellate court."

See, also, 12 Cyc. 813; *People v. Crowley*, 100 Cal. 478, 483, 35 Pac. 84; *Foley v. People*, 22 Mich. 227, 228; *Hubbard v. State*, 72 Ala. 164; *Pearson v. State*, 5 Ala. App. 68, 59 South. 526, 527; *State v. Brady*, 104 N. C. 737, 738, 10 S. E. 261; *State v. Taylor*, 65 Or. 266, 132 Pac. 713.

* * * * *

The remedy of the defendant, Francisco, is an application to the Governor for pardon.

This disposes of all the assignments of error which have been argued in the briefs, and for the reasons stated, the judgment of the lower court will be affirmed; and it is so ordered.

ON MOTION FOR REHEARING.

PARKER, J. We have determined to make a different disposition of the point discussed in the last paragraph of the former opinion. We held that no motion for an instructed verdict having been made in behalf of the defendant, Francisco Garcia, he could not complain of the verdict against him, notwithstanding the fact that there was, not only no evidence against him to support the verdict, but the evidence established, conclusively, that he was innocent. This is correct in view of the provisions of section 37 of chapter 57, Laws of 1907, which requires parties to take exceptions at the time a ruling is made, and which prohibits the taking of exceptions in this court to any proceedings in the district court except such as shall have been expressly decided in that court. Whether Francisco Garcia was entitled to an instructed verdict in his favor was not expressly decided in the district court, because the court was not requested to so decide, and he cannot now insist upon his right here. This is also in accord with the current of authority in the other states, as we pointed out in our opinion.

There exists in every court, however, an inherent power to see that a man's fundamental rights are protected in every

case. Where a man's fundamental rights have been violated, while he may be precluded by the terms of the statute or the rules of appellate procedure from insisting in this court upon relief from the same, this court has the power, in its discretion, to relieve him and to see that injustice is not done. The restrictions of the statute apply to the parties, not to this court. A man has been convicted and sentenced to imprisonment for a term of years where there is not only no evidence to support the verdict, but where the evidence conclusively established his innocence. Under such circumstances we cannot permit such an injustice to be done. For a similar case, and a similar holding, see *Sykes v. U. S.*, 204 Fed. 909, 123 C. C. A. 205, per Sanborn, Circuit Judge.

It follows that the judgment as to Cipriano Garcia will stand affirmed, and as to Francisco Garcia it will be reversed and the cause remanded to the district court, with instructions to award a new trial; and it is so ordered.

RAUB v. NISBETT.

Supreme Court of Michigan. 1896.

111 Michigan, 38.

GRANT, J. Plaintiff filed with the probate court a claim entitled as follows: "Bill of Particulars of Unsettled Claim of Samuel F. Raub against the Estate of Stephen F. Wilcox, Deceased." The first item was dated September 27, 1887, and the last, October, 1889, the total claim being \$15,145.49. The property described in the claim consisted of shingles, a shingle mill, and land. The affidavit attached to the claim stated that the estate was indebted to him in about the sum of \$4,000, as near as he could estimate the same. The claim was disallowed by the commissioners. Plaintiff appealed, and in the circuit court obtained a judgment. There is nothing upon the face of the claim to indicate the basis upon which it was made. It does not appear whether it is based upon the theory of the sale of the property described in the claim, or upon a trust relation. Upon its face it is as consistent with one theory as with the other. It is evident from the affidavit

attached to the claim that Mr. Wilcox received the property under some relation by which he was to account. It therefore required evidence before the commissioners to show the basis of recovery. The three commissioners were produced upon the trial in the circuit, and all testified that Mr. J. M. Raub, who was the sole witness before the commissioners to prove the basis of the claim against the estate, and who had died before the trial in the circuit, testified that the property was transferred to Mr. Wilcox in trust, to be manufactured and sold by him, the proceeds to be applied in payment of a debt due Wilcox, and other debts, amounting to about \$4,000, and that Wilcox was to take the shingle mill as it then was, and the shingles on hand, dispose of them to the best advantage, operate the mill, advance money to pay expenses, and to finally make an accounting; the balance, if any, to be turned over to Mr. Raub. There was no testimony to contradict that of the commissioners, and this evidence established the fact that the claim was presented to the commissioners on the basis of a trust. The lumber conveyed had all been manufactured, and, with the shingles on hand at the time of the conveyance, had been sold by Mr. Wilcox, and the mill plant also sold; and Mr. Wilcox had rendered an account showing that he had paid all the debts, and that there was a small balance due him. In the circuit court the plaintiff sought to establish his right of recovery, not upon a trust relationship, but upon the theory of an absolute sale. The law did not permit him to change the issue upon the trial in the circuit, and the court should, as requested, have directed the jury that there could be no recovery upon the basis of a sale. The two theories are utterly inconsistent, and, if plaintiff had presented his claim upon these two theories, the court would have compelled him to elect upon which he would proceed. *Meyers v. McQueen*, 85 Mich. 156, 48 N. W. 553. The issue before the commissioners was whether the estate was indebted to the plaintiff upon an accounting as trustee. This issue continued the same on appeal to the circuit court. *Hatheway's Appeal*, 52 Mich. 112, 17 N. W. 718.

* * * * *

SULT v. HOCHSTETTER OIL CO.

*Supreme Court of Appeals of West Virginia. 1908.**63 West Virginia, 319.*

POFFENBARGER, P. The A. Hochstetter Oil Company, a corporation, having entered upon a certain small tract of land in Ritchie county, known as the "Linch farm," and commenced the production of oil therefrom, Peter J. Sult, claiming under a prior lease, obtained a decree appointing a special receiver to take charge of the wells, machinery, and appliances on the land and operate the same for the production of oil and gas, and enjoining and restraining said company, its servants, agents and employes, from interfering in any way with the receiver's custody and operation of the wells and machinery, and the Eureka Pipe Line Company from delivering to the Hochstetter Company oil produced from the land; from which decree, as well as several other orders previously made in the cause, said company and J. O. Linch, its lessor, have appealed.

* * * * *

Reversal of the decree in whole and in part is sought on the ground that it places in the possession of the receiver the machinery, tools, and appliances of the defendant, and authorizes him to use the same in operating the wells. Ordinarily the court cannot commit to the possession of its receiver property other than that in controversy in the suit. High, Rec. § 378; Smith, Rec. § 53; *Noyes v. Rich.* 52 Me. 115; *Wormser v. Bank*, 49 Ark. 117, 4 S. W. 198. The plaintiff does not claim title to the tools and machinery used in the operation of the wells in question here. They are confessedly the property of the defendant; but they were, at the time of the appointment of the receiver, used by it in the operation of what it then claimed, and still claims, as its own wells. Its desire both to have these wells operated and to have its machinery and tools used in the operation thereof was manifested by its own conduct respecting both the wells and the tools. It had devoted and applied its tools to that work for its own benefit, and the operation of the wells and use of the tools under the receivership is conditionally for its benefit. It did not, at the time of the appointment, disclaim

title to the wells, or express a desire to have operation thereof discontinued, or to withdraw its tools for use elsewhere, or to have then relieved from the burden of use by the receiver, and accordingly demand the possession thereof. Had it done so, it may be that the court would have been compelled to allow removal of such of them as could have been detached without doing serious injury to the wells; but by its silence and acquiescence it has thus far waived any right of that kind it may have had. From its silence, taken in connection with its alleged ownership of the wells and consequent operation thereof for its own benefit, its consent to the use of its tools by the receiver may be presumed. If it intended otherwise, fairness to the court and the opposite party imposed the duty of giving notice to the contrary at the time of the appointment of the receiver. Had the court, without its consent, ordered a cessation of operation by the receiver for the purpose of removing defendant's machinery and installing some other, and thereby endangered the wells or subjected the land to drainage by means of wells on adjacent property, it may well be assumed that a protest would have been made on that ground more vigorous, and perhaps better founded, than the one now entered on the other ground. Two courses were open to the court and the parties. The court and the plaintiff took one, presumably with the consent of the defendant. To allow it to reverse the decree for the cause shown would sanction a "fast and loose" method of practice on the part of the litigants which has not hitherto been recognized, and cannot be introduced without greatly embarrassing the administration of justice. Courts will not tolerate in parties the taking of inconsistent positions. *Town v. Ralston*, 48 W. Va. 186, 36 S. E. 446; 11 Am. & Eng. Ency. Law, 446; Bigelow on Estoppel, 687; *Ellis v. White*, 61 Iowa, 644, 17 N. W. 28. These observations are limited to the appeal from this interlocutory decree. It is not intended here to say the tools and machinery cannot hereafter be withdrawn from the wells, or that they should not be excepted from a final decree, perpetuating an injunction and adjudging title to the wells to be in the plaintiff, in such a case as this. In the rendition of its final decree, as well as at any time before final decree, the court has power to modify any or all of its interlocutory decrees and orders. Our conclusion here is to deny to the appellant the right to reverse or modify the order

appointing the receiver so as to give relief it never asked for in the court below, probably did not want, and the right to which it must be deemed to have waived, until it shall have made a proper request for it in the court below.

* * * * *

OOLITIC STONE CO. v. RIDGE.

Supreme Court of Indiana. 1908.

169 Indiana, 639.

MONKS, C. J. This action was brought by appellee to recover damages for personal injuries received by him while in the employ of appellant. A trial of said cause resulted in a verdict for appellee, and over a motion for a new trial judgment was rendered thereon against appellant.

The theory adopted in the court below by the court and parties was that this action was under subdivision 2 of section 1 of the employer's liability act (Acts 1893, p. 294, c. 130; section 7083, Burns' Ann. St. 1901). It was upon this theory that the court below instructed the jury that there could be no recovery by appellee, except under said employer's liability act. It is claimed by appellant that the employer's liability act, except as applied to railroads, is in violation of the fourteenth amendment of the Constitution of the United States, and therefore the court erred in overruling its demurrer to the amended complaint, and its motion for a new trial. It is urged by appellee that said "employer's liability act is valid and constitutional, and that even if this cause is to be determined on this appeal on the theory that the case was instituted and prosecuted under said act, the judgment of the trial court should be affirmed." Since said briefs were filed in this case, this court, on March 1, 1907, in *Bedford Quarries Co. v. Bough* (Ind.) 80 N. E. 529, held that said employer's liability act was unconstitutional and void so far as it applied to corporations of the class to which the appellant belongs. It is insisted, however, by appellee in his said brief that said amended complaint, which is in one paragraph, stated a good cause of action at common law as well as under

the employer's liability act in favor of appellee against appellant, and that therefore this cause should not be reversed, even if said act is unconstitutional as applied to appellant.

* * *

When two or more theories are outlined in a pleading, and the record does not disclose which was adopted in the trial court, this court on appeal will determine the theory of each pleading, the sufficiency of which is properly challenged, from its general scope and tenor and not from fragmentary statements or conclusions, or, as stated in some of the cases cited, the court will construe such pleading by proceeding upon the theory which is most apparent and most clearly outlined by the facts alleged. But where, as in this case, a theory has been adopted by the parties and the trial court, and the case has been tried upon that theory, it must be adhered to on appeal. Elliott, App. Proc. §§ 489-496, and authorities cited. * * *

As the theory adopted in the trial court was that this action was brought under the second subdivision of section 1 of the employer's liability act of 1893, under the authorities cited, that theory must be adhered to in this court. As said act is unconstitutional so far as it applies to appellant, it follows that the court below erred in overruling appellant's demurrer to the amended complaint, and in overruling its motion for a new trial. * * *

SECTION 5. WHAT CAN BE RAISED FOR THE FIRST TIME ON APPEAL.

REED v. CITY OF MUSCATINE.

Supreme Court of Iowa. 1897.

104 Iowa, 183.

[Action for personal injuries caused by a defect in a street.]

DEEMER, J. There is but one question in the case which is of sufficient importance to be noticed in an opinion. The petition was filed on the 22d day of March, 1895; and it

is alleged that the injury occurred on the 24th day of August, 1894,—more than six months prior to the filing of the petition. There is no allegation that plaintiff gave the defendant notice of the happening of the accident, as required by section 1, c. 25, Acts 22d Gen. Assem. Defendant did not demur to the petition, nor did it raise the question of want of notice, in any manner, in the trial court. It has filed in this court, however, what its counsel have seen fit to denominate a “motion to reverse the judgment and dismiss the case.” This motion is bottomed upon the proposition that the notice is jurisdictional, and that, in the absence of allegations that the notice was given, the trial court had no right or authority to hear the case, and that, as the question is jurisdictional, it may be raised for the first time in this court. “Jurisdiction” has been defined to be the “power to hear and determine the subject-matter in controversy between parties to a suit; to adjudicate or exercise any judicial power over them.” *Rhode Island v. Massachusetts*, 12 Pet. 718. It is conceded that the court had jurisdiction over the parties, but it is argued that it had no jurisdiction over the subject-matter. The subject-matter is the right which one party claims against the other, and demands judgment of the court upon. *Jacobson v. Miller*, 41 Mich. 93, 1 N. W. 1013. In this case it was the right which plaintiff had to compensation for injuries received through the negligence of the defendant. The district court had the right to consider the question, and therefore had jurisdiction of the subject-matter. In determining such questions, it is important to distinguish between jurisdiction of the general subject and jurisdiction of the particular subject; for, if it be found that the case under consideration belongs to the former class, then it is within the jurisdiction of the court, and neither insufficiency of allegation nor informality in proceedings will affect that jurisdiction. See *Brown*, Jur. § 1; *Yates v. Lansing*, 5 Johns. 282; *Hunt v. Hunt*, 72 N. Y. 217. As said by Judge Elliott in his work on General Practice (volume 1, § 240), “Where there is authority to make a judicial inquiry, there is jurisdiction, and it is evident that this authority exists wherever there is power over a general class of cases.” The distinction is also pointed out in *Brown*, Jur. § 10. Objections to the jurisdiction of the general subject may be made at any stage of the proceedings, for they cannot be waived. But, as a general

rule, if there is jurisdiction of the general subject there may be a waiver of objections to the jurisdiction of the particular subject. That is to say, if the court has the right to decide the general class of cases to which the one in question belongs, its decision, although erroneous, cannot be collaterally attacked, and, if no objection or exception be taken, it will be considered as waived. The difference between a right to decide and a right decision clearly and briefly illustrates the distinction we are trying to elucidate. We have a case where there is unquestioned authority over the general subject, but it is claimed that there is no jurisdiction of the particular case, because of the absence of allegations as to notice. Such objection does not go to the jurisdiction of the subject-matter, but rather to the correctness of the decision in the particular case, and cannot be raised for the first time in this court. Plaintiff's failure to give notice simply affects his right to recover, and does not go to the jurisdiction of the court. The case is quite like that of *Sheel v. City of Appleton*, 49 Wis. 125, 5 N. W. 27, wherein it is held that failure to give notice simply affects the plaintiff's right to sue, and does not deprive the court of jurisdiction of the subject-matter. See, also, *Gould v. Hurt*, 61 Iowa, 47, 15 N. W. 588; *Bridgam v. Wilcut*, 4 G. Greene, 563; *Oskaloosa College v. W. U. Fuel Co.*, 90 Iowa, 387, 54 N. W. 152, and 57 N. W. 903. None of the authorities relied upon by appellant announces a contrary doctrine. In each and every of them the question was raised in the trial court by demurrer, motion in arrest, or otherwise. The motion to reverse and dismiss is overruled.

* * * * *

CRICHFIELD v. BERMUDEZ ASPHALT PAVING CO.

Supreme Court of Illinois. 1898.

174 Illinois, 466.

MAGRUDER, J. The appellate court reversed the judgment of the court below upon the ground that the agreement sued on in this cause was against public policy and void, and that, therefore, the appellants were not entitled to recover upon

the same. The only question which we deem it necessary to discuss in the case is whether the contract sued on is such a contract as the courts will refuse to enforce. If it is a contract which is against public policy, the maxim, "*Ex turpi causa non oritur actio*," applies.

* * * * *

It is clear to our minds that the contract now under consideration is a contract which provides for a contingent compensation for obtaining ordinances for paving. An ordinance passed by the common council, providing for the paving of a public street, is a species of legislation, as much as an act passed by the legislature, though the body passing it is subordinate in its character, and created by the legislature itself. The rule, therefore, which makes void a contract for a contingent compensation for obtaining legislation, applies as well to the common council of a city as to the legislature of a state. * * *

3. It is urged that the question of the invalidity of this contract is not raised by the pleadings in the court below, nor by objections to the introduction of evidence. Where a contract is in terms *contra bonos mores*, it is not necessary for the defendant to plead the objections. A court will not proceed to judgment upon it, even where both parties assent thereto. In such cases there can be no waiver. The defense is allowed, not for the sake of the parties, but for the sake of the law itself. "The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, '*Ex dolo malo non oritur actio*,' is limited by no such qualification. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted by the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded on its violation." *Shenk v. Phelps, supra*; *Coppell v. Hall*, 7 Wall. 542; *Collins v. Blantern*, 1 Smith, Lead. Cas. 630, and notes. Where an action is founded upon an illegal contract, the law will leave the parties where it found them, and grant no relief to either of them. In *Wight v. Rindskopt*, 43 Wis.

344, which was an action begun for a failure to perform a contract, one of the considerations of which was an agreement to stifle prosecution, the point that this agreement was contrary to public policy was not raised in the pleadings or at the trial in the court below. But the supreme court of Wisconsin took cognizance of the question, saying in their opinion: * * * It is judicial duty always to turn a suitor upon such a contract out of court whenever and however the character of the contract is made to appear." *Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068; *Handy v. Publishing Co.*, 41 Minn. 188, 42 N. W. 872. In *Gravier v. Carraby's Ex'r*, 17 La. 132, where the objection that an agreement was contrary to public policy had not been raised in the court below, and it was urged that the upper court could not consider it, the supreme court of Louisiana said: "Where an exception is put in at the argument in the supreme court, suggesting that the contracts between the parties to the suit are illegal, immoral, and contrary to public policy, the court is bound to notice it, even without any plea; and in such cases no recovery can be had." *Trust Co. v. Goodrich*, 75 Ill. 554. For the reasons above stated the judgment of the appellate court is affirmed. Judgment affirmed.

SYKES v. KRUSE.

Supreme Court of Colorado. 1911.

49 Colorado, 560.

CAMPBELL, C. J. This action was brought by H. Jacob Kruse, as indorsee of the Rocky Mountain National Bank, against the Kansas-Burroughs Consolidated Mining Company, the plaintiff in error Sykes, and one Hoffman, upon six promissory notes. The complaint contained six separately stated causes of action upon these several notes. Of five of them the mining company and plaintiff in error Sykes were indorsers merely; of one he was the maker. Sykes filed a separate demurrer to the complaint in its entirety, on the ground that it did not set forth facts sufficient to constitute a cause of action against him, which was overruled. He then filed a

separate answer and counterclaim. * * * The court rendered judgment for plaintiff against defendant Sykes in the aggregate sum of about \$40,000, being the full amount of the principal of the notes and the interest. This judgment was excepted to by Sykes, and he is here with his writ of error.
* * *

The complaint does not allege, nor does the proof show, that there was any presentment of these notes indorsed by defendant for payment, or notice of dishonor given; nor were any facts that would excuse presentment, demand, or notice pleaded or proved. That there must be presentment for payment and the giving of notice of dishonor, under our statute, in order to fix an indorser's liability, is conceded. This is the general rule, and this case, as pleaded, does not come within any exception. Sess. Laws 1897, pp. 225, 228, §§ 70, 89. It was the rule of the law merchant; our negotiable instruments act being substantially a codification thereof. 14 Enc. P. & P. 534 *et seq.*; *Commercial National Bank v. Zimmerman*, 185 N. Y. 210, 77 N. E. 1020; *Ford v. Booker*, 53 Ind. 395; *Bosch v. Kassing*, 64 Iowa, 312, 20 N. W. 454; *Knott v. Hicks*, 21 Tenn. 162; *Baxter v. Erwin*, 1 Shan. Cas. (Tenn.) 113; *Slacum v. Pomery*, 6 Cranch, 221, 3 L. Ed. 205; *Rushton v. Aspinall*, 2 Doug. Court of Kings Bench, 679; *Harlon v. Dew*, 3 Head (Tenn.) 505. Indeed, plaintiff does not question this rule of law, but seeks to escape its application upon the ground that defendant did not specifically call the attention of the trial court to the absence from the complaint of an allegation concerning presentment and notice of dishonor. The authorities already cited hold that in a case of this kind a complaint must contain these allegations, otherwise it is fatally defective; and some of the cases say that a judgment by default is not supported by such a complaint, and the defect is not cured by verdict. The complaint being thus fatally defective and not stating a cause of action upon the five causes of action, which were based upon the notes of which the defendant Sykes was merely an indorser, the objection under the express provision of section 55 of our Code may be raised at any time, even for the first time upon the review, though a general demurrer was not filed in the trial court. Plaintiff, however, says, since the general demurrer went to the whole complaint, there being one good cause of action stated, the one based on the note of which defendant

Sykes was maker, it was properly overruled. Unquestionably this is true, since there was one good cause of action. *Downing v. Haas*, 33 Colo. 344, 81 Pac. 33. This fact, however, does not preclude defendant from raising, at any time, the objection that the complaint does not state a good cause of action as against him upon the other five causes of action. Plaintiff cites the case of *Edward Malley Co. v. Londoner*, 41 Colo. 436, 93 Pac. 488, to the proposition that, though a failure of the complaint to state a cause of action may be raised for the first time on review, it will not be entertained by the reviewing court, if the attention of the trial court was not specifically called to such defects therein as might have been obviated by a slight amendment upon the trial. The decision in that case must be taken in connection with its own facts. It is apparent that this court did not intend to abrogate the express provision of section 55 of the Code, or overturn many of its own previous decisions that the objection that the complaint does not state a cause of action may be taken for the first time on review, even though not interposed below. The *Malley Case* was a suit against a father for necessities furnished to his minor son, and defendant questioned the sufficiency of the complaint, because there was no allegation therein that the father had refused to supply the necessities, and also on the ground that it was not alleged that the son was at the time a minor. The court expressed no opinion as to whether it was necessary for the complaint to contain the first allegation, but in answer to the contention, made for the first time on appeal, that the complaint was silent as to the status of the son, said that the defect, if any, could have been cured by a slight amendment at the trial and was not a matter for reversal. The complaint in that case did contain an averment that "defendant was a minor, and supported by and at the expense of the defendant herein." This was unquestionably a slip of the pleader, who intended to say that the son, not the defendant (the father), was a minor. The context clearly shows it, and the court might well say that the mistake, after verdict, was cured. It was not an instance where the complaint lacked an essential allegation, but where the allegation was defectively or ambiguously stated when the thought of the pleader was clear, and the mistake could have been corrected by the change of a single word—by writing "son" instead of "defendant." Such is not this

case. The defect in the complaint here which is entirely silent with respect thereto, would require a distinct paragraph in such cause of action, expressly alleging presentment and notice of dishonor, or giving some excuse for their omission.

* * * It appears that defendant is in a position to question here the sufficiency of the complaint and lack of proof as to such essential matters.

* * * * *

⁷² *Accord*, whether so provided by statute or not,—*Cushing v. Pires*, (1899) 124 Cal. 663; *Daily v. Fitzgerald*, (1912) 17 N. Mex. 137; *Langford v. Issenhuth*, (1912) 28 S. D. 451; *Fritz v. Hathaway*, (1890) 135 Pa. 274; *Leforce v. Haymes*, (1909) 25 Okl. 190.

Contra,—*Travellers Indemnity Co. v. Fawkes*, (1913) 120 Minn. 353; *Schaffhauser Bros. v. Hemmer*, (1911) 152 Ia. 200; *Montgomery v. Robinson*, (1912) 93 S. C. 247 (holding that the statute providing that there shall be no waiver of the objection that no cause of action is stated by failure to demur, applies to the trial court only).

LOUISVILLE & NASHVILLE RAILROAD CO. v. BELL.

Court of Appeals of Kentucky. 1908.

132 Kentucky Law Reporter, 1312.

HOBSON, J. * * *

There was no reply filed to the answer. The affirmative part of the answer was an allegation that the plaintiff was a trespasser on the trestle and that her injury was caused wholly by her own negligence. But no question was raised in the circuit court on the ground that there had been no reply filed to the answer. The evidence was all heard without objection, and the instructions of the court submitted the case to the jury solely on the question whether the injury to the plaintiff might have been avoided by ordinary care on the part of the defendant's agents after her peril was discovered. No motion was made for a judgment for the defendant notwithstanding the verdict, and in the motion for a new trial no objection was made on the ground that there had been no reply filed to the answer. The parties having treated the answer as controverted in the circuit court, the question cannot be raised for the first time in this

court that no reply had been filed to the answer. *Judgment affirmed.*⁷³

⁷³ Same rule applied where no answer is filed.—Gray v. Blackwood, (1914) 112 Ark. 332. Compare Frederick v. Buckminster, (1909) 83 Neb. 135, where the court assumes that unless the answer can be held good by liberal construction, judgment for defendant may be attacked on that ground for the first time on appeal.

SHEARER v. MURPHY.

Supreme Court of Kansas. 1901.

63 Kansas, 537.

DOSTER, C. J. This was an action of injunction to restrain the collection of taxes on real estate. It was brought by defendants in error against plaintiff in error, as county treasurer, and also against the city of Empire. The board of county commissioners was not made a party. Subsequently defendants in error, plaintiffs in the court below, dismissed the action as to the city, leaving it to stand against the county treasurer alone. A demurrer to the petition on the single ground of the insufficiency of the facts alleged to constitute a cause of action was filed and overruled. The defendant the county treasurer elected to stand on his demurrer, whereupon a judgment of permanent injunction was rendered against him. From the order overruling the demurrer, and from the order of final judgment in injunction, error has been prosecuted to this court. However, no objection to the judgment was made in the court below, nor objection made in any form to the defect of parties. Notwithstanding this omission, the judgment must be reversed for the lack of that necessary party defendant upon whom, to be effectual, it must operate. *Jeffries-Ba Som v. Nation* (Kan. Sup.) 65 Pac. 226, was an action against the county treasurer and sheriff to enjoin the collection of personal property taxes. It was held that the proceeding could not be maintained because of the lack of the board of commissioners as a party defendant. In the opinion it was said, with a citation to many authorities, that: "While the treasurer and sheriff are proper parties to the suit, yet

they are mere nominal parties. The board of county commissioners of the county is the real party in interest. It has long been the settled law of this state that a permanent injunction will not be granted until all whose legal rights are to be directly affected are made parties to the action." However, in that case, and perhaps in all others, the defect of parties was specifically pointed out in the court below by demurrer or otherwise. In this case it was not so done. The objection is made for the first time in this court. Nevertheless, we are of the opinion that the lack in the court below of a party defendant so necessary to the rendition of a judgment enjoining the collection of taxes as is the board of county commissioners is a defect which would deprive a judgment of affirmance, should it be rendered, of any operative effect, and will therefore justify us in refusing to render such a judgment in this case, even though the demurrer to the petition on the ground alleged was rightly overruled. A judgment can operate only on the parties properly before the court, and, if an indispensable party is not before the court, so as to be bound by the judgment, it would be as futile for a reviewing tribunal to affirm it as it was for the trial court to render it. * * * Such being the case, the rule is quite plain. That rule is the one which prevailed in the equity practice before the adoption of the Code, and which has not been changed by the Code. It was quite well stated and explained by the supreme court of Alabama, which held that "the omission of one who is an indispensable party to the bill is a defect that will reverse the decree on appeal or writ of error, although the objection is taken for the first time in this court." *McMaken v. McMaken*, 18 Ala. 576. * * * The demurrer to the petition is not passed on, but the judgment of the court below is reversed, with directions for such proceedings as may be properly taken. All the justices concurring.⁷⁴

⁷⁴ Want of necessary parties is often called a jurisdictional defect. Thus, in *Hartley v. Langkamp*, (1914) 243 Pa. 550, 556, the court said: "It is a settled rule of equity jurisprudence that as the absence of an indispensable party goes to the jurisdiction of the court, an objection to the proceeding on that ground may be raised at any time, during the hearing or on an appeal from the decree of the trial court." But compare *Tod v. Crisman*, (1904) 123 Ia. 693, where the court said that this was not a jurisdictional defect in the true sense, for while it was good ground for dismissing the suit, because it rendered the adjudication ineffectual, yet the decree would be binding upon those present and therefore not void.

CHAPTER VIII.

PROCEEDINGS FOR TRANSFER TO REVIEWING COURT.

SECTION 1. TIME FOR OBTAINING REVIEW.

WILLIAMS v. LONG.

Supreme Court of California. 1900.

130 California, 58.

HENSHAW, J. This is a motion to dismiss defendants' appeal from the judgment, upon the ground that the appeal was taken after the statutory period had elapsed. This fact is not denied, but in resisting the motion it is shown that some 18 days before the expiration of the 6 months allowed for appeal the plaintiff, in whose favor the judgment was rendered, had died, and that only after the expiration of the 6 months was an administratrix of his estate appointed, upon whom service with due diligence was made. Under this showing, it is contended that the running of the statute of limitations should be held to have been suspended from the date of the death of plaintiff to the date of the appointment of his personal representative. The statutes limiting the time of appeal are jurisdictional and mandatory. *Henry v. Merguire*, 111 Cal. 1, 43 Pac. 387. In the absence of an express authorization in the statute itself, a court has no power to extend the time for taking an appeal, or to relieve an appellant from the effects of misfortune, accident, surprise, or mistake. No such authorization is found in the statutes of this state. In this case the statute had begun to run, and had been running against this appellant for more than five months before the death of the plaintiff. It is a well-settled rule and principle of law, except as modified by positive enactment, that when the statute of limitations has begun to run no subsequent dis-

(1013).

ability will suspend its operation. In *Pace v. Ficklin's Ex'r*, 76 Va. 292, the time in which an appeal should have been taken was limited to two years. Judgment was rendered against an assignee in bankruptcy, and during the two years the assignee died, and a successor was appointed. In support of the appeal it was urged that the period between the death of the first assignee and the appointment of his successor should be deducted from the statutory time. But the court said: "In answer to this it is sufficient to say that the statutes defining and limiting the right of appeal makes no such exception or restriction, and there is no rule or principle in law which authorizes the courts to do so. * * * In this case Pace was alive at the date of the decree. The limitation then commenced to run, and so continued, notwithstanding his death at a subsequent period." The motion to dismiss is granted.⁷⁵

⁷⁵ The rule as to the non-effectiveness of subsequently accruing disabilities, is established on a thorough review of the authorities in *McDonald v. Hovey*, (1883) 110 U. S. 619.

Many statutes allow the court—trial or appellate—to extend the time for taking an appeal under specified circumstances.—3 C. J. 1070. Such power of extension is often quite largely discretionary.—*Oakley v. Davidson*, (1899) 103 Wis. 98; *Klotz v. Circuit Judge*, (1910) 159 Mich. 639. Accident and mistake are frequently statutory grounds for extension.—*Matteson v. Smith Co.*, (1909) 30 R. I. 424; *McFeely v. Scott*, (1879) 128 Mass. 16; *Chase v. Bates*, (1889) 81 Me. 182.

"*Cross-appeals* must be prosecuted like other appeals, and therefore the cross-appeal is not taken until brought to the attention of the court whose decree it questions. Although the record may have been removed to this court upon appeal, yet the court below may allow a cross-appeal, sign a citation, and approve a bond within the two years prescribed. As in this case, the petition, order and bond were not filed in the Circuit Court until after the two years had elapsed from the date of the entry of the decree, the cross-appeal must be dismissed."—*Farrar v. Churchill*, (1889) 135 U. S. 609, 612.

Delay due to fraud of appellee. It has been held that the court has inherent power to relieve an appellant in such a case.—*Smythe v. Boswell*, (1888) 117 Ind. 365.

Delay due to the court.—"We cannot think the legislature intended to deprive a party of his right to an appeal because not taken within a time fixed from circumstances beyond his control. * * * Where the delay is caused by officers of the court over whom he has no control, and without fault or want of due diligence on his part, we are of opinion that a settlement made after the period of three months will be good."—*Cameron v. Calkins*, (1880) 43 Mich. 191. *Accord.*—*Burns v. Keas*, (1865) 20 Ia. 16; *Mount v. Van Ness*, (1881) 34 N. J. Eq. 523; *Clapp v. Graves*, (1859) 9 Abb. Pr. (N. Y.) 20; *Schmuck v. M. K. & T. Ry. Co.*, (1911) 85 Kan. 447.

GROENDYKE v. MUSGRAVE.

*Supreme Court of Iowa. 1904.**123 Iowa, 535.*

WEAVER, J. * * *

2. A motion to dismiss the appeal in this case presents a question of practice which is of considerable importance. It appears that, within a few days after the entry of judgment in the district court, an appeal to this court was perfected, but, for reasons not material to this opinion, the appellant on December 23, 1902, filed in the office of the clerk of the district court a dismissal of said appeal, and on the following day filed in this court a certified copy of the judgment below, and a voluntary dismissal of the appeal taken, as above stated. After the dismissal had been thus effected, the appellant at once, and (as claimed) still within six months after the date of the judgment in the district court, again served notice of appeal; and it is upon this latter service that the case is now before us. The appellee takes the position that the taking of the first appeal and the dismissal thereof exhausted the appellant's right to a review of the case in this court. Stated briefly, the question is, may an appellant voluntarily dismiss an appeal once perfected, and thereafter, and within six months from the date of the judgment sought to be reviewed, take a second appeal? We are inclined to hold in the affirmative. There would seem to be no good reason for denying such right, and, as we shall see, the practice finds much support in the decisions of the courts. The statute allows a party six months in which to take an appeal. Experience has demonstrated that lawyers are not wholly exempt from liability to mistakes, and if, having attempted to effect an appeal, counsel find that by some error or oversight their appeal is likely to be lost without a hearing upon its merits, and the statutory limitation has not yet run, why should they not be allowed to take advantage of this *locus pœnitentiæ* to dismiss the ineffectual appeal and begin anew? By analogy with the right freely exercised to dismiss an original action and to renew the same, it would seem that such practice is entirely legitimate. Among the cases in which this question has been directly or inferentially passed upon, see, *Harris v. Ferris*, 18

Fla. 81; *Sanders v. Moore*, 52 Ark. 376, 12 S. W. 783; *Garrick v. Chamberlain*, 97 Ill. 620; *Beller v. Stevens*, 40 Mich. 168; *Power v. Frick*, 2 Grant, Cas. 306; *Martinez v. Gallardo*, 5 Cal. 155; *Williams v. La Penotiere* (Fla.) 7 South. 869; *Roberts v. Tucker*, 1 Wash. T. 179; *Tex. R. Co. v. Hare* (Tex. Civ. App.) 23 S. W. 42; *State v. McFarland*, 38 Kan. 664, 17 Pac. 654; *Marshall v. R. R.*, 20 Wis. 644; *Long v. Emery*, 49 Ind. 200; *Ward v. Hollins*, 14 Md. 158; *Roebuck v. Duprey*, 2 Ala. 352; *Evans v. Bank*, 134 U. S. 330, 10 Sup. Ct. 493, 33 L. Ed. 917. This last case, with others cited in Rose's Notes thereto, is directly in point.

BLACKWOOD v. SHAFFER.

Supreme Court of Kansas. 1890.

44 Kansas, 273.

VALENTINE, J. * * *

* * * A preliminary question is presented in this court by the defendant in error. The defendant in error claims that this court cannot consider the question as to whether the ruling of the court below upon the demurrer was right or not, for the reason that the demurrer was sustained on May 8, 1886, and this proceeding in error was not brought to this court until July 6, 1888, more than one year—indeed, more than two years—after the ruling of the court below upon the demurrer. When the court below sustained the demurrer the defendant below might have immediately brought that order to the supreme court for review, (Civil Code, § 542); but he could not wait two years, nor more than one year, and then bring it to the supreme court, (Id. § 556.) As the ruling of the court below upon the third paragraph of the defendant's answer virtually swept such third paragraph out of existence, and as no amendment was ever made to such third paragraph, nor any leave asked for or given to so amend it, the ruling on the demurrer was a final order, and such ruling was not subsequently involved in any other ruling of the court below. When a case is brought to the supreme court for the purpose of having any judgment or order of the court below

reviewed, everything necessarily involved in such judgment or order is reviewable in the supreme court; but the order of the court below in this case, sustaining the demurrer to the third paragraph of the defendant's answer, is not involved in any other order, or in any judgment of the court below, and hence it is not reviewable upon this principle. If the demurrer had been overruled a different rule would apply. Also, if the trial of the case upon its merits had been had in a short time after the ruling on the demurrer, so that the entire case, the ruling on the demurrer, and all, could have been brought to this court within less than one year after the sustaining of the demurrer, and if the entire case had been so brought to this court within less than one year after the sustaining of the demurrer, then we could determine whether the order sustaining the demurrer was erroneous or not; but such is not this case. As every alleged error except the ruling of the court below upon the demurrer is now abandoned by the plaintiff in error, and as no error is shown to have been committed by the court below, unless such court committed error in sustaining the aforesaid demurrer, the order of the court below sustaining the demurrer is virtually the only action of the court below brought to this court for review; and it was brought here too late.

The judgment of the court below will be affirmed. All the justices concurring.⁷⁶

⁷⁶ Where all interlocutory orders are brought up for review on appeal from the final judgment the time for reviewing them on such appeal dates from the final judgment,—*Hess v. Hess*, (1908) 108 Va. 483; *Lesure Lumber Co. v. Fire Ins. Co.*, (1897) 101 Ia. 514. But where appealable interlocutory orders are not brought up on such an appeal, the time for review of each must be reckoned from the date when each was rendered or filed,—*Holland v. Beaver*, (1911) 29 Okl. 115; *Stout v. Philippi Mfg. Co.*, (1895) 41 W. Va. 339.

YOUNG v. ROSE.

*Supreme Court of Arkansas. 1906.**80 Arkansas, 513.*

RIDDICK, J. In his brief filed in this case counsel for appellant contends with much force that the chancellor erred in holding that the value of the stock of merchandise was only \$1,509.16 and the value of the lease was only \$100, and that he erred in holding that the defendant should be compelled to account only for those sums and the amount of cash on hand. But this judgment of the chancellor was rendered over a year before the appeal was taken and we have therefore no right to disturb it. Kirby's Dig. § 1199; *Moon v. Henderson*, 74 Ark. 181, 85 S. W. 237; *Cooper v. Ryan*, 73 Ark. 37, 83 S. W. 328.

It is true that the judgment confirming the report of the master was made less than a year before the appeal was taken, but this report only followed the decree which adjudged and fixed the amount which the defendant was to be charged for the property. A decree which settles the rights of the parties and leaves nothing to the master but a statement of an account on a basis fixed by the decree is a final judgment. As no appeal was taken from this judgment within the time allowed by statute, it must, on this appeal, be treated as the law of the case, and, that being so, the subsequent decree confirming the report of the master made in obedience to the first decree cannot be questioned. A report of a master is not subject to exceptions where it simply follows the decree directing the reference and makes a report based on finding contained in that decree, for, in such a case, if there be error, it is in the original decree and not in the report of the master whose duty it was to obey the decree. *Musgrove v. Lusk*, 2 Tenn. Ch. 576; 17 Enc. Plead. & Prac. 1050.

*Judgment affirmed.*⁷⁷

⁷⁷ Some statutes limit the time for appeal from the rendition, others from the actual entry, of the judgment or order.—3 C. J. 1055-57. And it is frequently provided that an appeal shall be taken within a specified time from the service of notice of the order or judgment by the appellee upon the appellant.—*Lawver v. Great Nor. Ry. Co.*, (1910) 110 Minn.

414 (order); *Falker v. N. Y., W. S. & B. Ry. Co.*, (1885) 100 N. Y. 86 (judgment or order); *Fisher v. Fisher*, (1913) 164 N. C. 105 (judgment rendered out of term); *Brooks v. Bigelow*, (1896) 9 S. D. 179 (order); *Ellis v. Barron County*, (1904) 120 Wis. 390 (order).

MUELLER LUMBER CO. v. McCAFFREY.

Supreme Court of Iowa. 1908.

141 Iowa, 730.

LADD, C. J. The appeal was not perfected within six months from the entry of judgment, and for this reason errors in the record other than disclosed in the motion for new trial cannot be considered. The order overruling the motion for new trial was within six months before the appeal, and for this reason is reviewable in this court. Section 4110 provides that: "Appeals from the superior and district courts may be taken to the supreme court at any time within six months from rendition of the judgment in any cause or order appealed from and not afterward." Section 4106 obviates the necessity of filing a motion in order to challenge any ruling in the record, and this even though such motion be pending at the time. *Hunt v. Railway*, 86 Iowa, 15, 52 N. W. 668, 41 Am. St. Rep. 473. The ruling by which a motion for new trial is overruled remains an appealable order, however, and the subject of review. *In re Estate of Bishop*, 130 Iowa, 250, 106 N. W. 637. The result is, a litigant may, but is not required to, challenge the correctness of the court's rulings a second time. Section 3755 of the Code expressly authorized a motion for new trial based on any or all of nine grounds. These need not be enumerated. It is enough for present purposes to say that one of these is "for error of law occurring at the trial, excepted to by the party making the application," and another that the verdict is not sustained by sufficient evidence. The manifest design of such motion is to enable the court to review its rulings entered during the trial at greater leisure and upon full investigation, to the end that, if errors are discovered, these may be corrected, rather than the parties be put to the trouble and expense of an appeal. The ruling on each point raised, though it may be but a repetition of a

previous ruling, is quite as decisive. The statute expressly authorizes either party to challenge the correctness of any ruling during the trial by motion for new trial, and he is entitled to a ruling thereon. This involves a decision covering each ground of the motion, and, as the order granting or denying a new trial, is appealable. This necessarily authorizes a review of each of the several grounds asserted. For this reason, separate assignments of error were exacted under a former statute requiring assignments of error. *Moffit v. Albert*, 97 Iowa, 213, 66 N. W. 162. Because errors asserted in a motion for new trial appear in the record and might be taken advantage of on appeal, had no such motion been filed, furnishes no ground for saying that they may not be reviewed when raised in a motion for new trial, if the appeal from the ruling thereon be timely, even though more than six months has elapsed since judgment. *Kendall v. Lucas County*, 26 Iowa, 395. Otherwise, the right to appeal from the ruling on a motion for new trial, save because of something transpiring subsequent to the verdict or decree, would be valueless. In the recent case of *McLaughlin v. Hubinger Bros. Co.*, 135 Iowa, 595, 113 N. W. 475, it appears to have been held in such a case that only errors not inhering in the judgment may be reviewed. The decision last above cited, in which the contrary was held, evidently was overlooked, and the authorities relied on do not appear, upon closer examination, to support the conclusion. * * * There are decisions in other jurisdictions to the effect that time of appeal may not be extended by delay in ruling on motions for new trial, but these are based on statutes limiting the period within which an appeal may be taken from the entry of judgment and not, as in this state, from the entry "of judgment or other orders." *Houser v. Hargrove*, 29 Cal. 90, 61 Pac. 661; *Vickers v. Tyndall*, 168 Ill. 616, 48 N. E. 214; *Hill v. Hill*, 114 Mich. 599, 72 N. W. 597; *Patterson v. Greenville National Bank*, 101 Tenn. 511, 48 S. W. 225. Other authorities are to the effect that, where a motion for new trial is essential to a review of errors assigned, there is no final judgment, within the meaning of the statute relating to appeals, until the ruling on the motion. *Atkinson v. Williams*, 151 Ind. 431, 51 N. E. 721; *Thompson, Trials*, § 2730; *Sharp v. Brown*, 34 Neb. 406, 51 N. W. 1030; *Snow v. Rich*, 22 Utah, 123, 61 Pac. 336.

The theory of these last decisions is that, though judgment

has been entered, if the motion is filed in proper time, the proceeding is *in fieri* until the motion is denied, and until then the judgment must be considered as in paper or as suspended as a role, in the common-law sense by the motion. All this is obviated by the statutes of this state, which authorize an appeal from the judgment or order entered on the motion for new trial. The appeal may be prosecuted notwithstanding the pendency of the motion. *Hunt v. Railway*, 86 Iowa, 15, 52 N. W. 668, 41 Am. St. Rep. 473. And there is no apparent reason for saying that the ruling on the different grounds set up in the motion for new trial may not be reviewed, even though the time has elapsed in which the original record might furnish the basis of review. Certainly, the errors alleged in the motion have not been waived, for the statute expressly authorizes presenting them in this way. The Code seems to contemplate the entry of judgment immediately upon the return of the verdict or announcement of its finding by the court, and, unless a litigant may rely on the correction of errors in an appeal from the order sustaining or overruling the motion for new trial, he will be driven in many cases to carry his case to the appellate tribunal before he can know whether the relief will be granted by the *nisi prius* court. If anything, the ruling on the motion for new trial is of greater significance than that originally made, being with greater deliberation and with an adequate perspective of the entire trial. Errors therein should be quite as available on appeal as when made during the previous trial or hearing. For the reasons stated, we are inclined to recede from the ruling in *McLaughlin v. Hubinger Bros. Co.*, 135 Iowa, 595, 113 N. W. 475, and follow the rule as announced in *Kendall v. Lucas County*, 26 Iowa, 395, more than 40 years ago.

SECTION 2. EFFECTING TRANSFER OF JURISDICTION.

OLD NICK WILLIAMS CO. v. UNITED STATES.

*Supreme Court of the United States. 1910.**215 United States, 541.*

FULLER, C. J. The rule has long been settled that a "writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly." Taney, Ch. J., in *Brooks v. Norris*, 11 How. 204, 13 L. ed. 665; *Polleys v. Black River Improv. Co.*, 113 U. S. 81, 28 L. ed. 938, 5 Sup. Ct. Rep. 369; *Credit Co. v. Arkansas C. R. Co.*, 128 U. S. 258, 32 L. ed. 448, 9 Sup. Ct. Rep. 107; *Farrar v. Churchill*, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771; *Conboy v. First Nat. Bank*, 203 U. S. 141, 51 L. ed. 128, 27 Sup. Ct. Rep. 50.

The same rule is applicable to appeals as to writs of error. Rev. Stat. § 1012, U. S. Comp. Stat. 1901, p. 716. As Mr. Justice Bradley said in *Credit Co. v. Arkansas C. R. Co.*, 128 U. S. 261, 32 L. ed. 449, 9 Sup. Ct. Rep. 107:

"An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought' until it is, in some way, presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court."

There the appeal was allowed by Mr. Justice Miller on the last day on which an appeal could be taken (Rev. Stat. § 1008), but was not presented to the court below nor filed with the clerk until five days after the prescribed time had expired. It was held that the appeal must be dismissed, and Mr. Justice Bradley added:

"The attempt made, in this case, to anticipate the actual time of presenting and filing the appeal, by entering an order *nunc pro tunc*, does not help the case. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which lim-

its the time within which an appeal can be taken would be a dead letter."

* * * * *

The delay in the present case in taking out the writ of error was not the act of the court, but of petitioner. At all events, petitioner might have brought its writ of error within the time prescribed by statute, and the court had no power to allow it after the time limited had expired.

Judgment affirmed.

PEOPLE v. ELDRIDGE.

Supreme Court of New York. 1852.

7 Howard's Practice Reports, 108.

[Application for a writ of prohibition to restrain the County Court from proceeding with an appeal, on the ground that the notice of appeal was not served on the respondent personally, but only upon his attorney.]

BARCULO, Justice. 1. The question is whether service of the affidavit and notice of appeal upon the *justice*, perfected the appeal so as to give the County Court jurisdiction of the cause. The Code, § 354, provides that "the affidavit and notice of appeal must within the like time (20 days), be served on the justice and a notice of the appeal on the respondent personally, or by leaving it at his residence with some person of suitable age and discretion." This constitutes, as I understand it, the appeal. I can not concur with the counsel for the defence in assuming that the service of notice is merely *directory*, and may be dispensed with; or that its absence may be supplied by other proof of information conveyed to the respondent. The section requires that certain things shall be done within the twenty days; and if they are not all done, *there is no appeal*. This is obvious from the context as well as the rule of construction which has been applied to superior courts. Thus section 359 declares that "when the affidavit and *notices* of appeal shall have been served, the respondent may supply or correct material omissions or misstatements therein, by an affidavit on his part, a copy of

which shall be served on the justice, and also on the attorney, if any, who prosecutes the appeal, or if there be none, on the appellant, within ten days after receiving notice of the appeal." "The court (§ 360) shall thereupon, after ten days, and *within thirty days* after the service of the notice of appeal make a return," etc. From these provisions it appears that the notice of appeal *must* be served on the respondent within the twenty days, to authorize him to supply or correct the affidavit of the appellant within the thirty days given to the justice to make the return. Otherwise the respondent loses the opportunity of furnishing an affidavit on his part, as the justice, in making his return, must be governed by the notice *served on him*. The case before us illustrates this matter. The affidavit and notice of appeal were served on the justice on the 4th of March, he makes his return the fore part of April, as he is required; and on the 19th April the appellant first serves notice of the appeal upon the respondent, so that the latter is cut off from his right to correct the affidavits of the appellant. It is not intended to be said that the County Court could not relieve a party under such circumstances, who should come in and submit to the jurisdiction and ask for an amended return; but these sections show that the notice to the respondent is a *part of the appeal*, without which it is imperfect.

2. We will now look at the analogous case of appeals in superior courts. Section 327 provides that "an appeal must be made by the service of a notice in writing, on the adverse party, and on the clerk," &c. In the case of *Tripp agt. De Bow* (5 Pr. R. 144), the notice of appeal from a judgment of the County Court to this court was served upon the *party* instead of his attorney. On a motion to dismiss the appeal made at the Ontario special term, the justice held that the notice should have been served on the attorney, and that the statute not having been complied with, nor the error waived by an appearance, the court had acquired *no jurisdiction*, and the appeal sought to be taken was a nullity. This decision was affirmed at the general term; the court declaring it to be a "jurisdictional question," which "the party has a right to take advantage of at any time, provided he has not appeared or answered, or proceeded in such a manner as to give the court thereby jurisdiction in the case."

Now the essential difference between the two provisions

of the statute is, that in regard to appeals in the superior courts, the notice must be served on the attorney, and in appeals from a justice of the peace, the notice must be served on the party personally, or by leaving it at his residence with some person of suitable age and discretion. If then it was correctly held, of which I have no doubt, in *Tripp agt. De Bow*, that a notice served on the party and not on the attorney in an appeal to the Supreme Court was a nullity, the converse, as applied to the present case, must also be true that the notice being served on the attorney and not on the party, as required by the statute, is a nullity, and consequently that there was no appeal by which the County Court could obtain jurisdiction. The county judge, therefore, in holding this to be a case of mere irregularity overlooked the broad distinction between a question of practice and a question of jurisdiction. The former may be waived by delay; but the latter can never be waived by mere lapse of time, but only by some positive act of submission to the tribunal whose jurisdiction is questioned.

3. But it is claimed that the affidavits show that the respondent had verbal notice of the appeal, or, in other words, that he admitted and stated in conversation, the judgment had been appealed. This, however, can not affect the question unless it can be shown that *a written notice is unnecessary*. But the section itself negatives the idea, by providing as an alternative, that it may be served "by leaving it at his residence."

Again, section 408 defines what is meant by a notice, by declaring that "all notices shall be in writing," and although that chapter may not be intended particularly to apply to these appeals, it furnishes a strong presumption that the Code makers intended by the term "notice," whenever used generally, to designate a written, and not an oral communication.

4. But it is contended that the defect is amendable. To this two answers may be given. First, the appellant has not applied to the County Court to amend, nor has any amendment been ordered. Secondly, there is nothing to amend, nor to amend by. If the notice had been served, and been defective in some matter of form, or perhaps, of substance, I could understand what is meant by "amending." But here is *no* notice, and the party, under the head of amendments, asks

to bring an appeal after the time limited by statute has expired. This no court has the authority to do in my judgment. We may just as well extend the time for bringing an action beyond the period fixed by the statute of limitations, or order an execution to run beyond the time fixed for the lien of a judgment.

* * * * *

The right of appeal is a *restricted* right. The legislature regulate and control it as they please. The presumption is that the first tribunal is competent to dispose properly of the matters submitted to it, and that its decisions are correct. The law, however, gives an opportunity to review the first adjudication, upon a compliance with certain conditions on the part of the party feeling aggrieved. Among those conditions is found a limitation as to time, which, while it gives a full opportunity to appeal, is designed to cut off that right forever if the parties do not avail themselves of it in season. The party who loses the privilege by his delay or negligence, has no one to blame but himself. The courts can not help him without abolishing the law and substituting themselves in the place of the legislature.

In the present case the County Court, unless restrained, will proceed to judgment on the return. In that event it is difficult to see how the relator can avail himself of this defect of jurisdiction. I am inclined to think he has no remedy if the application is denied. I shall, therefore, direct an alternative writ to be issued, that the question may be examined at the general term. Writ of prohibition granted.⁷⁸

⁷⁸ Statutes very commonly require both filing of notice with the clerk and service of the notice upon the adverse party as concurrent steps necessary to take or perfect an appeal.—Tyrrell v. Baldwin, (1887) 72 Cal. 192; Vollmer v. Estate of Read, (1904) 10 Ida. 196; Wedd v. Gates, (1905) 15 Okl. 602; Munk v. Anderson, (1896) 94 Wis. 27; Independent Dist. of Sheldon v. Apperle, (1888) 76 Ia. 238; Barkley v. Logan, (1875) 2 Mont. 296; Peran v. Monroe, (1865) 1 Nev. 408; Johnson v. Stephenson, (1885) 104 Ind. 368; Carr v. Kansas, (1863) 1 Kan. 331.

But there is considerable variety. Some statutes also require a bond as a condition precedent,—Munk v. Anderson, (1896) 94 Wis. 27; some require nothing but a bond,—Kimbrell v. Rogers, (1889) 90 Ala. 339; under some statutes failure to serve notice or failure to file a bond operates as a condition subsequent and relates back to destroy the appeal.—McDonald v. Ketchum, (1895) 53 Oh. St. 519; Lowell v. Lowell, (1880) 55 Cal. 316.

In some states an allowance of the appeal by order of court is required.—Carne v. Peacock, (1885) 114 Ill. 347; Squire v. McDonald, (1893) 138 N. Y. 554; Williamson v. Gayle, (1847) 4 Gratt. (Va.) 180; Graves' Com-

mittee v. Lyons, (1915) 166 Ky. 446; Drainage Dist. v. Stuart, (1912) 104 Ark. 113; McKnight v. Denouvion, (1870) 22 La. Ann. 373. Under the federal practice the acceptance of security operates as an order of allowance.—Sage v. Railroad Co., (1877) 96 U. S. 712.

In the absence of statute a writ of error needs no order of allowance, as it is a writ of right.—Van Antwerp v. Newman, (1825) 4 Cow. (N. Y.) 82; Anonymous, (1837) 16 N. J. L. 271; Ex parte Virginia Commissioners, (1884) 112 U. S. 177; 2 Tidd's Prac. 1141. But some statutes make such allowance necessary.—State of Florida v. Vinzant, (1905) 49 Fla. 130.

MONROE COUNTY v. STRONG.

Supreme Court of Mississippi. 1901.

78 Mississippi, 565.

ALEXANDER, Sp. J. * * *

* * * * *

ON REARGUMENT AND IN RESPONSE TO THE SUGGESTION OF
ERROR.

The objection first made here on reargument that the circuit court was without jurisdiction because no bond for appeal from the order of the board of supervisors was executed cannot be sustained. No bond was necessary. At common law, writs of error issued without bail or security, and so it has been held by this court as to writs of error where the statute providing for them does require a bond. *Swann v. Horne*, 54 Miss. 337; *Winters v. Claitor*, Id. 341. Appeals, both as to the right and the procedure, are statutory, and, unless the statute providing for and regulating an appeal requires a bond, none is necessary. Pow. App. Proc. 104, 396; 1 Am. & Eng. Enc. Pl. & Prac. 965, and cases cited. Section 79, Code 1892, giving the right of appeal to the circuit court from the board of supervisors, and prescribing the manner of perfecting the appeal, makes no provision for a bond. Other sections of the chapter regulating appeals to the circuit court and writs of *certiorari* to inferior tribunals expressly require a bond. It may be that, since section 79 gives the right of appeal to any person aggrieved, and is available in favor of taxpayers who appeal merely to vindicate private rights, but in the interest of the public, and since the county as such cannot ordinarily suffer pecuniary loss or damage as-

sessable on appeal against appellants, the legislature deemed their liability for costs a sufficient protection against ill-advised or vexatious appeals. Whatever may have been the reason, no bond is provided for by statute, and none was required. * * *

Affirmed.

DENNISON v. TALMAGE.

Supreme Court of Ohio. 1876.

29 Ohio State, 433.

[The plaintiffs in error were duly appointed executors of William Neil, deceased, by the Probate Court of Franklin county, Ohio, and qualified as such, but in accordance with the provisions of the will they filed no official bond as such executors. Talmage brought an action in the court of common pleas against Dennison and Neil as executors, and secured a judgment in his favor. The executors appealed to the district court, but filed no bond, and their appeal was dismissed. They then moved in the supreme court for leave to file a petition in error to the district court.]

WELCH, C. J. The right of appeal rests solely upon statutory provisions, and unless those provisions are complied with, the right can not be made available. The statute allowing appeals to the district court (2 S. & C. 1162, sec. 2) requires the appellant, in order to perfect his appeal, to give an undertaking within thirty days from the rising of the court. This is the general provision, and the only exception to it, or at least the only exception applicable to cases like the present where the executors or administrators were original parties, is contained in the 6th section of the same statute. By this latter section it is provided, that "in no case shall administrators or executors (and guardians), who may have given bond with security in this state according to law, be compelled to give bond and security in order to perfect their appeal." The same provision as to executors and administrators is found in section 243 of the statute for the settlement of estates of deceased persons (S. & C. 612), which ex-

empts from the necessity of giving appeal bonds executors and administrators "who may have given bond and security in this state according to law."

A simple reading of these provisions would seem to be all that is necessary to show that they were not complied with in this case by the executors. They gave no appeal bond, nor had they "given bond with security in this state," as such executors. They have neither complied with the general rule, nor have they brought themselves within the exception, if the apparently plain reading of the statute is to prevail.

* * * * *

But it is also claimed by counsel for the executors, that the court of common pleas had power to decide the question whether executors should be required to give an appeal bond, and that its journal shows that it duly exercised that power by ordering that no bond should be required.

* * * * *

* * * That the court had no such power we all agree. As we understand the law in such cases, after the court has rendered its final judgment its power in that respect is limited to two things—namely, fixing the *amount* of the bond, and deciding to which party it shall be made payable; and these powers can only be exercised in specified cases. Doubtless this was a proper case for the exercise of that power. But the court has no more power to dispense with the bond, where one is required by law, than it has to require a bond where one is not required by law. If the court can dispense with the bond in favor of executors and administrators, it can dispense with it in favor of individual parties in all cases where the court is authorized to fix the amount of the bond. To concede such a power to the court would be to nullify the plain provisions of the law requiring appeal bonds. It is the law, and not the court, that determines the cases in which bonds shall be given. The power of the court is merely to determine the *amount* and the *obligee* of the bond, and is limited in its effect to cases in which the *law itself* requires the bond. Whether, in a given case, the law requires an appeal bond is to be determined by the appellate court, when the case comes there, subject only to review on error; and parties must, at their own peril, and within the thirty days allowed by law, decide the question for themselves, just as they must

decide for themselves many other questions on which the jurisdiction of the appellate court is made to depend.

* * * * *

Motion overruled.

VANDYKE v. WEIL.

Supreme Court of Wisconsin. 1864.

18 Wisconsin, 291.

Appeal from the Circuit Court for Washington County.

This was an action founded upon an undertaking on appeal. The plaintiffs' intestate, in 1859, obtained in the circuit court for Milwaukee County, a judgment against Baruch S. Weil, Eliza Adelaide Weil, his wife, and others, foreclosing a mortgage and directing a sale of the mortgaged premises, and also that said Baruch S. and Eliza A. Weil should pay the amount of any deficiency in the proceeds of the sale. The defendants last named appealed from this judgment; and thereupon the defendants in this action, to wit, Baruch S. Weil, as principal, and Schleisinger and Pick as sureties, executed an undertaking by which, after reciting the pendency of such appeal, they undertake "that during the possession of said property by the appellants, they will not commit or suffer to be committed any waste thereon, and that if the judgment be affirmed they will pay the value of the use and occupation of the property from the time of appeal until the delivery of the possession thereof, pursuant to said judgment, not exceeding the sum of \$1,000, and the deficiency arising on the sale thereof pursuant to said judgment, and that the appellants will also pay all costs and damages which may be awarded against them on the appeal, not exceeding two hundred and fifty dollars." The judgment having been reversed in so far as it directed payment of the deficiency by Mrs. Weil, but affirmed in all other respects (12 Wis., 664), the sheriff sold the property and reported a deficiency of about \$10,000; and the court confirmed the report and sale, and rendered judgment against Baruch S. Weil for the deficiency.

The complainant, in his action, after alleging the above

facts, and also that Baruch S. Weil had had the use and occupancy of the mortgaged premises for one year during the pendency of the appeal, and that the same was worth \$1,000, demanded judgment against the defendants for that amount and for the deficiency above stated, with interest. A demurrer to the complaint as not stating a cause of action, was sustained by the circuit court. * * *

By the Court, DIXON, C. J. * * *

As to the undertaking, we think it would be deviating from the statute and violating the plain purpose of the legislature, to hold the sureties discharged in a case like this. Joint appeals and joint undertakings on the part of two or more plaintiffs or defendants are authorized by statute. Such has been the constant practice, and it has never been questioned by the profession. A strictly literal construction of the language of the undertaking in such cases, would defeat the main object of the law in requiring it to be given. In very few cases, where the words of the statute had been pursued, could a recovery be had upon the undertaking, if the makers thought proper to object. The intention of the legislature clearly was to make the undertaking effectual, to secure some benefit to the respondent, in case the judgment was affirmed in any part, or as to any of the appellants; and to attain that object, a liberal interpretation is allowable. Such is the language of the authorities, and, no doubt, the correct rule of law. We are to construe the undertaking in conformity to the intention of the act under which it was made, and with reference to which the makers must be supposed to have executed and delivered it, giving to both a fair and liberal interpretation to attain the end in view. If it be conceded, then, that it was a joint appeal and undertaking on the part of Mr. and Mrs. Weil, still the sureties are bound—bound for Mr. Weil individually, as they would have been for both, had judgment against both been affirmed. In legal effect, it is the same as if the words of the condition had been joint and several, or as if separate undertakings had been given for each.

The judgment of the circuit court must, therefore, be reversed, and the cause remanded for further proceedings according to law.

NATIONS v. JOHNSON.

*Supreme Court of the United States. 1860.**24 Howard, 195.*

CLIFFORD, J. This case comes before the court upon a writ of error to the District Court of the United States for the western district of Texas. It was a petitory suit, commenced by the present defendants, and was founded upon a certain final decree rendered at the April term, 1854, by the district chancery court, held at Carrollton, in the State of Mississippi, for the northern district of that State. Among other things, the petitioners allege that * * * they prosecuted a writ of error to the high court of errors and appeals in that State, and that the decree of the district court of chancery was there reversed, and a decree entered in their favor. * * *

* * * It is not now questioned that a writ of error, under the circumstances of the case, was the proper process, by the law of that State, for the removal of the cause into the appellate court; but it is insisted that the subsequent decrees are void, because the respondents were not legally notified of the pendency of the writ of error. Personal service was not made on either of the respondents, and they never appeared in the appellate court. On the contrary, it appears that the attorney of the complainants, on the eighteenth day of January, 1852, filed an affidavit in the cause, that the defendants in error were not residents of the State, and that they had no attorney of record on whom process could be served. Provision, however, is made by the law of that State for service by publication in cases of this description. By the act of the twenty-ninth of January, 1829, it is provided, that "whenever a cause shall be removed to the Supreme Court by writ of error, and the court is satisfied that the defendant in error is a non-resident, and has no attorney of record within this State, it shall be the duty of said court to cause notice of the pendency of said cause to be published for three weeks in some public newspaper, the first of which shall be at least three months before the sitting of the next term of the court in which the case is pending, within this State; on proof of which publication, the court shall proceed to hear and determine said cause, in the same manner as if process had been

actually served upon the said defendant." Hutchison's Dig., p. 931.

That regulation, by a subsequent act passed on the second day of March, 1833, is made applicable to the high court of errors and appeals, and it was conceded at the argument that the publication was made under that provision. * * * Personal service was made upon the defendants in this case by due process of law in the court of original jurisdiction, and the question here is, whether a party duly served with notice in a subordinate court, after he has appeared and answered to the suit, and secured an erroneous judgment in his favor, may voluntarily absent himself from the jurisdiction of the appellate tribunal, so as to render it impossible to give him personal notice of an appeal, and still have a right to complain that notice was served by publication, pursuant to the law of the jurisdiction from which he has thus voluntarily withdrawn. We think not. To admit the proposition, would be to deprive the other party of all means of removing the cause to the appellate tribunal, and would enable a party, who knew he had wrongfully prevailed in the court below, to secure the fruits of an erroneous judgment, by defeating the jurisdiction of the appellate court. Actual notice ought to be given in all cases where it is practicable, even in appellate tribunals; but whenever personal service has been rendered impossible by the removal of the appellee or defendant in error from the jurisdiction, service by publication is sufficient to give the appellate tribunal jurisdiction of the subject and the person, provided it appears in the record that personal notice was given in the subordinate court, and that the party there appeared, and litigated the merits of the controversy. Contrary to the views of the counsel for the present plaintiffs, we think there is some distinction between the notice required to be given to an appellee or defendant in error and the service of process in the original suit. A writ of error is said to be an original writ, because, at common law, it was issued out of the court of chancery; but its operation is rather upon the record, than the person. Under the judiciary act, says Marshall, Ch. J., the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record, by removing the record into the supervising tribunal. Suits can-

not, under the judiciary act, be commenced against the United States; and yet writs of error, accompanied by citations, have uniformly issued for the removal of judgments recovered in favor of the United States into this court for re-examination. Such cases are of daily occurrence, and the judgments are here reversed or affirmed, as they are with or without error; and it has never been supposed that the writ of error in such cases, though sometimes involving large amounts, was a suit against the United States. Plainly, therefore, there is a distinction between a writ of error and the original suit. According to the practice in this court, it is rather a continuation of the original litigation than the commencement of a new action; and such, it is believed, is the general understanding of the legal profession in the United States. *Cohens v. Virginia*, 6 Pet., 410; *Clark v. Matthewson*, 12 Pet., 170.

* * * Common justice requires that a party, in cases of this description, should have some mode of giving notice to his adversary; and where, as in this case, the record shows that the defendant appeared in the subordinate court, and litigated the merits there to final judgment, it cannot be admitted that he can defeat an appeal by removing from the jurisdiction, so as to render a personal service of the citation impossible. On that state of facts, service by publication, according to the law of the jurisdiction and the practice of the court, we think, is free from objection, and is amply sufficient to support the judgment of the appellate court. *Mandeville et al. v. Riggs*, 2 Pet., p. 489; *Hunt et al. v. Wickliffe*, 2 Pet., 214.

* * * * * * * * * * 79

79 There is the same necessity for service of notice in cases of appeals as in proceedings in error.—*Dayton v. Lash*, (1876) 94 U. S. 112.

The form and character of the notice or citation to be served upon the appellee is frequently provided by statute. At common law it was a *scire facias ad audiendum errores*.—*Rochester v. Roberts*, (1852) 25 N. H. 495.

Service on the adverse party's attorney of record is sufficient.—*Bacon v. Hart*, (1861) 1 Black (U. S.) 38; *Rose v. Mesmer*, (1901) 134 Cal. 459; *Kinney v. Hickox*, (1888) 24 Neb. 167; *Love v. Hall*, (1832) 3 Yerg. (Tenn.) 408. Although this is sometimes allowed only in case of non-resident or absent parties.—*Weston v. Bonney*, (1896) 37 Fla. 374.

The voluntary appearance of the appellee without service of citation is enough to give the appellate court jurisdiction of his person.—*Lane v. Soulard*, (1853) 15 Ill. 120.

Where an appeal is taken in open court, no notice or citation to the appellee is necessary.—*Brown v. McConnell*, (1887) 124 U. S. 489; *Wilson v. Bennett*, (1892) 132 Ind. 210 (taken in same term).

SECTION 3. ASSIGNMENTS OF ERROR.

HUTTON v. REED.

*Supreme Court of California. 1864.**25 California, 479.*

SAWYER, J. The respondent made a preliminary motion to dismiss the appeal, on the ground that the record contains no statement on appeal, and no assignment of errors, or statement of the grounds upon which appellant relies. The motion to dismiss was argued orally, and the case at the same time submitted on its merits on briefs, subject to the motion to dismiss.

We have frequently had motions to dismiss appeals from orders denying new trials, and from judgments, on the general ground that there was no assignment of errors in the record. But the term, "assignment of errors," seems to be used somewhat loosely and vaguely. The real difficulty to be reached—though frequently the point is not distinctly presented—is, that there is no such statement of the grounds intended to be relied on, on motion for new trial, or on appeal, as is required by the statute; and this is the point of the objection in this case. Notwithstanding the repeated decisions on the point, there still seems to be a misapprehension as to what is required, under the statute, to constitute a valid statement of the grounds relied on in such cases, and there is more or less discussion upon the subject whenever these motions are made. For this reason, we propose now to examine these questions, and, once for all, lay down the rule which we suppose to be contemplated by the statute, and established by the decisions.

The term assignment of errors is not used in our Practice Act. An assignment of errors, in the strict common law sense of the term, was in the nature of a pleading, to which there was a demurrer or joinder in error. (2 Tidd's Pr. 1168; 3 Steph. Com. 644; 2 Burr. Pr. 147.) It did not constitute a part of the transcript, but was founded upon it, and was filed in the appellate court at, or subsequent to the time of filing the transcript. It is hardly necessary to say, that the filing of such an assignment of errors was never required

under the system of practice in this State. Yet we find the term often used in our reports in a sense somewhat different from, but analogous to its common law sense. Thus, in *People v. Goldbury*, 10 Cal. 312; *People v. Comedo*, 11 Cal. 70, and *Sayre v. Smith*, 11 Cal. 129—generally cited in these discussions—the appeals were dismissed; and in *Squires v. Foorman*, 10 Cal. 298, the judgment was affirmed for want of “an assignment of errors.” * * * So far as we are able to ascertain the facts from the records, the appeals in these several cases were not dismissed, nor the judgments affirmed on motion of the respondents’ counsel, for defects existing in the statements or transcripts. But on the contrary, the Court, on taking up the cases for examination and decision, seems to have found no specific statement of the errors, or anything in the nature of a brief, or points on file on the part of the appellant to direct attention to the points relied on, or aid in the examination of the record. If anything was found—as in the case of *Squires v. Foorman*, in which a paper indorsed, “assignment of errors” was filed—the specification of the errors was in such general terms as to afford the Court no assistance.

In such cases the Court, (not feeling called upon to perform the duties of counsel,) upon its own motion—as this Court has also done in several similar instances—either affirmed the judgment, or dismissed the appeal for want of the aid of what was termed, an “assignment of errors;” that is to say, a specification of the points or particular errors relied on filed in the case, which seems to be the sense in which the term was used by the Court.

In *Squires v. Foorman*, the appeal was from a judgment on demurrer. The appellant filed a paper (which was no part of the transcript) purporting to be an “assignment of errors,” in the following words: “1. The Court erred in overruling the demurrer. 2. The Court erred in rendering judgment. 3. The Court erred in rendering judgment by default.”

There was no brief, and no other statement of the points. Mr. Justice Field, in deciding the case, said: “There is not, in the strict common law sense of the term, any assignment of errors required to be filed by the appellant. What is meant by the term as heretofore used by this Court is, that a specification must be filed of the errors upon which the appellant

will rely, with such fullness as will give aid to the Court in the examination of the transcript. The assignment in this case gives no such aid, but leaves the Court to grope its way through the record in search of possible errors. We have neither the time nor disposition to make such investigation."

* * * * *

The case of *Barrett v. Tewksbury*, 15 Cal. 354, presents a different question. The question in that case was, whether the document purporting to be a statement contained a sufficient specification of the grounds on which the appellant relied, to constitute a valid statement, and render it available on appeal. And this is the question which is, or should be presented, when objections are taken to statements on the motions so frequently made in this Court.

Section three hundred and thirty-eight of the Practice Act of eighteen hundred and fifty-one, in force at the time the statement in that case was prepared, provides, that the statement shall "contain the grounds upon which he (the appellant) intends to rely on the appeal, and shall contain so much of the evidence as may be necessary to explain the grounds, and no more."

In deciding the case Mr. Chief Justice Field says: "*The specification of the grounds is the essential element of a statement; the evidence is the mere incident. It is the statement 'of the case,' and not of the evidence, which is to be annexed to the record of the judgment or order appealed from. The case on appeal consists of the questions of law or of fact raised. These must be distinctly set forth and accompanied with only so much of the evidence as may be necessary to explain and show their pertinency and materiality, and no more.*" The specification is necessary, in the preparation of the statement, to enable the adverse party to suggest, intelligently, such amendments as he may deem important to the just determination of the case. Without it neither the adverse party, nor the Judge, can well know how much of the evidence should be set forth. It often happens that, of numerous points taken in the progress of the trial, the greater number, after mature consideration, are abandoned by counsel, and the appeal made to rest on one or two of them. In such instances, a large portion of the testimony actually given becomes entirely immaterial on appeal; but without a specification of the grounds on which the appellant intends to rely,

the adverse party will be ignorant of the materiality of that which is inserted or omitted in the statement." (15 Cal. 356-7.)

And again, p. 358: "In all future cases, the specifications must be made when the statements are originally prepared. Nor is there any difficulty in pursuing this course; but on the contrary, the labor of the parties, as well as their expenses, will be thereby greatly lessened. It is certainly a very simple matter for the party appealing to allege, either at the commencement or conclusion of his statement, that on appeal he will rely upon certain errors committed by the Court; as, for example, in admitting the testimony of a particular witness, or in excluding certain documents, or in giving or refusing certain instructions, or in making particular rulings upon the contract or subject in controversy. When the grounds are thus specified it will be an easy matter to state so much of the evidence as may be necessary to explain and point them, and the adverse party will be enabled to suggest readily and intelligently such amendments to the statements as he may deem important to their just determination. There may be cases where equitable relief is sought, as suggested by the learned counsel of the petitioners in which the general ground of appeal will be that the decree is not warranted by the evidence; yet, even then the general ground will be found, in a great majority of instances, subject to more particular specifications—as that the evidence does not establish a contract, or show a tender, or compliance with particular condition precedent, or the like, which will constitute the matters urged upon the Court." (For further illustrations see opinion in the case cited.)

* * * * *

The only statement of the grounds is an enumeration of the causes for new trial specified in the fifth, sixth, and seventh clauses of section one hundred and ninety-three, very nearly in the words of the statute, as follows:

First—Insufficiency of the evidence to justify the verdict.

Second—The verdict and judgment are against law.

Third—Excessive damages as given by the jury.

Fourth—Error in law occurring at the trial and excepted to by the defendants; without in the remotest degree indicating wherein the evidence was insufficient, the verdict against law, or the error in law at the trial occurred.

The third specification, as here stated, is not recognized by the statute as a cause for a new trial, for there is no averment or pretense that the damages were "given under the influence of passion or prejudice."

We do not think the grounds are "specifically set forth," within the meaning of the statute as before construed. There is nothing here that indicates the specific errors or grounds relied on. The specification affords to the other party no information that is of any service to him in suggesting amendments to the statement. * * * Such a statement affords no information whatever, and so far as any useful purpose is concerned, it might just as well be altogether omitted. We are disposed to carry out these provisions of the Practice Act according to the letter and spirit; and the construction given them, as we conceive, will accomplish that result. * * *

*Judgment affirmed.*⁸⁰

⁸⁰ In some jurisdictions the court will notice "plain errors" not assigned or specified.—*Columbia Heights Realty Co. v. Rudolph*, (1909) 217 U. S. 547; *Santaella v. Lange Co.*, (1907) 155 Fed. 719, 84 C. C. A. 145; *Weems v. United States*, (1909) 217 U. S. 349; *Lee v. Dozier*, (1866) 40 Miss. 477; *Canole v. Allen*, (1908) 222 Pa. 156; *Waxham v. Fink*, (1910) 86 Neb. 180.

In many jurisdictions "fundamental errors apparent on the face of the record" may be considered in the absence of assignment.—*State v. Balize*, (1886) 38 La. Ann. 542; *Houston Oil Co. v. Kimball*, (1910) 103 Tex. 94; *Maricopa County v. Jordan*, (1900) 7 Ariz. 4; *Windsor Reservoir & Canal Co. v. Ditch Co.*, (1908) 44 Colo. 214; *Crandall v. State*, (1834) 10 Conn. 339; *Prall v. Prall*, (1909) 58 Fla. 496; *Voorhees v. Arnold*, (1899) 108 Ia. 77; *Ullery v. Guthrie*, (1908) 148 N. C. 417.

Jurisdictional questions will usually be considered although not assigned.—*Bryan v. Norfolk & Western Ry. Co.*, (1907) 119 Tenn. 349; *Fore-River Shipbuilding Co. v. Hagg*, (1910) 219 U. S. 175; *Tuskaloosa Cotton-seed Oil Co. v. Perry*, (1887) 85 Ala. 158; *Robertson v. Robertson*, (1913) 178 Mo. App. 478; *Davis v. Council*, (1885) 92 N. C. 725; *Weissman v. Russell*, (1881) 10 Ore. 73.

Where assignment should appear. The assignments of error are generally prepared as a distinct and separate paper.—*Farrar v. Churchill*, (1889) 135 U. S. 609; *Central Trust Co. v. Trust Co.*, (1898) 86 Fed. 517; *Armstrong's Appeal*, (1871) 68 Pa. 409; *Cameron v. Roemele*, (1883) 59 Tex. 238.

Under the practice in other states the specification or assignment of errors is made only in the brief filed in the appellate court.—*Waxham v. Fink*, (1910) 86 Neb. 180; *Iowa Supreme Court Rules*, sec. 53, 128 N. W. xi; *McReavy v. Eshelman*, (1892) 4 Wash. 757.

In some states the errors are specified in a petition in error.—*Greenawalt v. Natrona Imp. Co.*, (1907) 16 Wyo. 226; *Moseman v. State*, (1900) 59 Neb. 629; *Homes v. Henrietta*, (1897) 91 Tex. 318; in others they are pointed out in the notice of appeal.—*Archbishop v. Hack*, (1893) 23 Ore. 536; *Ingraham v. County Treasurer*, (1895) 91 Hun (N. Y.) 53; in other

states the specification is made in the bill of exceptions,—*Later v. Haywood* (1908) 14 Ida. 45; *Patterson v. Beck*, (1909) 133 Ga. 701; *Talbott & Sons v. Padgett*, (1888) 30 S. C. 167; *Jones v. Atl. Coast Line RR. Co.*, (1910) 153 N. C. 419.

The necessity for a specification of errors is the same in equity cases as in actions at law. See *New Jersey Bldg. Loan Co. v. Lord* (1903) 66 N. J. Eq. 341; *Wood v. Wilbert* (1912) 226 U. S. 384; *Stephens v. Johnson* (1912) 255 Ill. 610; *Prosser v. Manley* (1913) 122 Minn. 448.

NATIONAL AUTOMATIC FURNACE CO. v. WILMER.

Supreme Court of Colorado. 1907.

41 Colorado, 313.

MAXWELL, J. This was an action by appellee, plaintiff below, against appellants and three others, upon a promissory note. It appears from the complaint that the note was the joint and several note of appellant corporation and three other defendants; that at the maturity of the note appellant Wilson, who was the president of the corporation, executed the note as a maker, in consideration of an extension of the time of payment, and agreed to pay the note at the expiration of the extension. Appellant's joint and several answer admitted the execution of the note by the corporation, substantially denied all other allegations of the complaint, and set up as affirmative defenses, a failure of consideration, and that the note was executed by the corporation in fraud of appellants' rights. A trial to the court without a jury resulted in a finding in favor of appellee and against appellants; no evidence having been offered in the court below by the appellants or either of them. A joint motion for a new trial was filed by appellants, which being denied judgment was rendered against appellants for the amount of the note and interest. A joint appeal was prayed by appellants and allowed. A joint appeal bond was filed by them, and they file their joint assignments of error.

The only assignments of error discussed by counsel for appellants are the second and fourth.

The second assignment of error is based upon the proposition that there was a material variance between the complaint and the evidence adduced at the trial, which sought to charge

appellant Wilson with liability as a maker of the note. It is evident that, if the error assigned was committed, it affects appellant Wilson alone. "Where several parties unite in one assignment of error, they will encounter defeat, unless the assignment is good as to all. If the errors affect the parties severally and not jointly, the proper practice is for each party to assign errors, for the rule is well settled that a joint assignment will not permit one of several parties to avail himself of errors alleged upon rulings which affect him alone, and not those with whom he unites in the assignment. The rule that a joint assignment of errors must be good as to all who unite in it is in harmony with the general principle of pleading which requires a demurrer, an answer, or a motion to be good as to all who join in it." Elliott, Appellate Procedure, 318; 2 Cyc. 1003, and cases cited; 2 Ency. P. & P. 933, and cases cited. The rule above stated is peculiarly applicable to this case. No attempt was made at the trial to establish a defense for the appellant corporation. There is no pretense upon the part of appellants, if error there be in the error assigned, of any injury thereby to the appellant corporation. Injury must result from the error complained of to the party complaining to affect a reversal of the judgment of the court below. Joining the corporation with himself in this appeal, appellant Wilson protected it against the execution of a just judgment against it. If he had felt aggrieved at errors committed against himself, the action being joint and several, the Code provides a method by which he might have had such errors reviewed and corrected, if they existed.

The fourth assignment of error is that the court erred in entering final judgment against appellants without having disposed of the issues raised by the answer of the other three defendants. This question was not presented to or passed upon by the court below, and under the well-settled practice of this court will not be considered. *Marean v. Stanley*, 21 Colo. 43, 39 Pac. 1086.

*The judgment will be affirmed.*⁸¹

⁸¹ In *Fisher v. Thirkell*, (1870) 21 Mich. 1, the court held that an assignment of error would be taken to be "joint and several or joint or several according to the nature of the error assigned."

DECKER v. MANN.

Supreme Court of Errors of Connecticut. 1907.

80 Connecticut, 86.

THAYER, J. The only errors claimed in the appellant's reasons of appeal are that the court erred in its charge, first, "in that it did not instruct the jury as to the legal effect of the evidence tending to show that the defendant, within six years before the commencement of the action, had disputed the claims of the plaintiff"; second, "in that it did not instruct the jury as to the legal effect of the evidence tending to show accord and satisfaction of the plaintiff's claim"; and, third, "in not charging the jury as requested."

The evidence referred to in the first assignment of error is not recited in the record. It does not appear that the court was requested to instruct the jury as to its legal effect, or that a proper consideration of the evidence by the jury called for such instruction. The assignment is clearly inadequate to raise the point, urged by the defendant's counsel that payments made upon a disputed claim within six years before the bringing of the action would not suspend the running of the statute of limitations.

The second assignment raises no question for consideration, because the record does not show that any evidence of an accord and satisfaction was offered upon the trial.

The third assignment of error does not comply with section 802 of the General Statutes of 1902, which requires that the precise error claimed shall be specifically stated in the reason of appeal. A mere general statement, as that the court erred in charging as it did, or in refusing to charge as requested, where as in this case, there were numerous requests covering a number of different subjects, is insufficient. This court has repeatedly refused to consider claimed errors which were attempted to be raised by such general assignments of error. * * *

There is therefore no question of law properly raised on the record for our consideration. There is no error.⁸²

⁸² In *Ferrier v. Ferrier*, (1883) 64 Cal. 23, the court said: "It does not appear that the defendant gave any evidence on the trial in support of the matters set up in the third defense. We observe that it is stated

by counsel in their assignment of errors, that such was the fact; but of course we cannot accept that statement as true. If such was the rule there would be few, if any, cases in which an assignment of errors appears, that would not have to be reversed."

WHIPPLE v. GEDDIS.

Court of Appeals of the District of Columbia. 1905.

25 Appeal Cases, District of Columbia, 333.

DUELL, J. * * *

It appears that the plaintiff originally brought suit in one of the justice courts of the District to recover the sum of \$150, a balance alleged to be due him upon the sale and purchase of certain real estate. A judgment for the full amount, with interest and costs, was rendered in favor of the plaintiff, which was thereafter assigned to Campbell. Thereafter a second trial was had in the supreme court of the District, and, under the instructions of the court, the jury found a verdict for the plaintiff-appellee for the full amount claimed, with interest and costs. A motion for a new trial was made, denied, and judgment upon the verdict ordered.

The assignment of errors other than the general one that the court erred in directing the jury to return a verdict for the plaintiff, are these: First. In refusing to permit the appellant to explain to what encumbrances the expression "certain existing encumbrances" mentioned in the deed, referred; second, in holding, as a matter of law, that the appellant was bound by the terms of the deed to assume the encumbrances including taxes and assessments.

In order to decide whether these assignments of error are well founded, or even warranted, we must turn to the record to learn what transpired at the trial. The plaintiff was the only witness called in his own behalf, and he testified that he sold the defendant certain houses for \$300; that the defendant paid one-half of this amount and refused to pay the balance; that there were two trusts upon each house. Upon cross-examination he was shown the deed which showed that he had made certain incorrect statements which, however, have no special bearing on the point in controversy. The

deed was delivered at or prior to the time of the payment of the \$150, but the examination of the title had not then been completed by the Columbia Title Company. The defendant, the only witness called in his behalf, gave his version of the transaction and testified, without objection, that the plaintiff assured him that the taxes were paid, but if anything was due he would pay. This, upon being recalled, and without objection, the plaintiff denied. The deed which was received by defendant, and by him promptly recorded, discloses that the property was sold subject to "certain existing encumbrances". The defendant was asked upon his direct examination "in what sense the words 'existing encumbrances' was used by them [the parties] in the deed for the houses." The court, of its own motion, refused to permit the witness to answer the question, on the ground that the understanding of the witness was incompetent, as the writing spoke for itself. The first assigned error purports to be based upon this ruling, but upon comparing it with the record it will be seen that there is a fatal variance between them. The appellant was asked to explain the sense in which the words "existing encumbrances" were used, while the error is predicated upon the court's refusal to permit the witness to explain the expression "certain existing encumbrances," quite a different expression, as admitted by appellant's counsel. * * *

The record fails to disclose that the attention of the court was called to what is contended to be a qualifying word, *i. e.*, "certain," and we have no right to assume anything which does not appear in the record. We must take it as presented, and decline to pass upon a question not raised below. The first assignment of error is not based upon anything appearing in the record, and is therefore found not to be well taken.

We find no ground for reversing the judgment of the court below, and it is therefore affirmed, with costs.

Affirmed.

PALMER v. NORTHERN PACIFIC RAILWAY CO.

*Supreme Court of Idaho. 1905.**11 Idaho, 583.*

SULLIVAN, J. This action was brought by the respondent against the appellant corporation to recover \$2,000 damages alleged to have been sustained because of the appellant's acts in temporarily blockading a certain logging road which crossed the appellant's railroad track in Kootenai county, and over which railroad track and crossing the respondent was hauling logs. The answer put in issue the main allegations of the complaint. The cause was tried by the court with a jury, and a verdict and judgment was rendered and entered in favor of the respondent for \$1,500. This appeal is from the order denying a new trial.

It is first contended by counsel for respondent that this court cannot consider the sufficiency of the evidence to support the verdict. It is contended that the specifications of the particulars in which the evidence is alleged to be insufficient to sustain the verdict are not sufficient specifications, and for that reason the evidence cannot be considered on this appeal. The specifications are as follows: "And assigns and specifies the following particulars in which said evidence was and is insufficient: (1) The evidence is undisputed that the road in question was a private road. (2) The evidence is undisputed that this road has not been built or used longer than the period of four years prior to the commencement of this action. (3) The evidence is undisputed that the crossing in question was not on the land of the plaintiff in this case." There are many of the early decisions in California that are very technical upon the point under consideration, but the more recent decisions are more liberal and have overruled some of the earlier cases. * * * See *Swift v. Occidental M. & P. Co.*, 141 Cal. 168, 74 Pac. 700. In that case the court said: "The substance of all these decisions is that the object of the rule requiring these specifications, is, first, to shorten the statement of the evidence by excluding everything irrelevant to the specified fact; and, second, to notify the opposite party of the particular finding called in question, in order that he may see that the state-

ment fairly and fully presents the evidence bearing upon that particular matter. This object accomplished, the statute is satisfied, and the more recent decisions of the court have shown a disposition to construe specifications liberally in favor, rather than strictly against, the right of the moving party to be heard." See *Stuart v. Lord* (Cal.) 72 Pac. 142. This court in *Bernier v. Anderson*, 70 Pac. 1027, said: "If the specifications designate some particular fact, and aver that it is not justified by, or not sustained by, or contrary to, the evidence, they are sufficient." In the case at bar the main point in question was whether the road in controversy was a public highway or a private road, and whether it had been traveled by the public for a period of five years, and whether the crossing in question was on the land of the plaintiff. The specifications of the insufficiency of the evidence on those points are clear and specific, and could not mislead any one. The specifications were sufficient.

* * * * *

⁸⁸ But a mere statement that the evidence is insufficient to sustain the verdict or findings is not a good specification.—*Reeves & Co. v. McGee*, (1914) 33 S. D. 276; *Grand Trunk Ry. Co. v. Ives*, (1891) 144 U. S. 408; *Bills v. Stevens Co.*, (1906) 146 Mich. 515; *Hamilton Buggy Co. v. Iowa Buggy Co.*, (1893) 88 Ia. 364; *Stroberg v. Merrill*, (1913) 67 Ore. 409; *Rousseau v. Cohn*, (1912) 20 Cal. App. 469; *Colo. & So. Ry. Co. v. Jenkins*, (1914) 25 Colo. App. 348.

DALE v. PURVIS.

Supreme Court of California. 1889.

78 California, 113.

WORKS, J. * * *

Appellant contends that certain of the instructions given by the court were erroneous. Counsel in their points and authorities object to the instructions, in the language of their specifications of errors of law: "The court erred in giving respondent's instruction 4." The only commendable feature of such a mode of attack is its extreme brevity; and, although brevity, in the argument of counsel, is pleasing to the court, we think, in the present instance, it has been a little over-

done. We respectfully suggest to counsel that, in order to call upon us to review the action of the court below, they should point out in what respect the instruction attempted to be brought in question is erroneous. Such a requirement is absolutely necessary to the proper dispatch of the business of this court, and should in fairness to opposing counsel be insisted upon if the point is seriously urged. We have, however, examined the instructions, and find no error in them. This failure on our part may further tend to convince counsel of the necessity of greater particularity in pointing out defects relied upon. We see no error in the record, and feel satisfied that a correct result was reached.

Judgment and order denying a new trial affirmed.

We concur: SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.; MCFARLAND, J.

BEATTY, C. J. (*dissenting.*) I dissent. * * * 84

84 Some courts, however, do not require a statement of reasons why an instruction is erroneous.—*Davis v. Missouri, etc., RR. Co.*, (1897) 17 Tex. Civ. App. 199; *Denver & Rio Grade RR. Co. v. Young*, (1902) 30 Colo. 349; *Hammer v. Chicago, R. I. & P. RR. Co.*, (1885) 70 Ia. 623.

PATTERSON v. BECK.

Supreme Court of Georgia. 1910.

133 Georgia, 701.

LUMPKIN, J. On May 2, 1908, Patterson, as receiver in bankruptcy of the Newcomer-Manry Company, under authority from the court of bankruptcy, instituted a suit in the city court of Atlanta against the Southern Construction Company, and caused summons of garnishment to issue and be served on the Fourth National Bank of Atlanta. The garnishee had funds of the defendant in its hands. On the same day the stockholders of the defendant company held a meeting and unanimously passed resolutions that, for certain reasons recited, "the charter of the Southern Electrical Construction Company and all its franchises and right thereunder, be now voluntarily surrendered to the state," and that attorneys be authorized in the name of the stockholders to

file a petition making known to the court the surrender of the charter, and asking that the court take charge of and administer all assets through a receiver. The Southern Electrical Construction Company and the Southern Construction Company were names of the same company. The attorneys, accordingly, filed the petition, to which the company, through its president, consented, and the judge of the superior court passed an order reciting that "the corporation has been dissolved by the surrender of its charter, which surrender is hereby accepted by the court, so far as is necessary under the law." He appointed a receiver, with instructions as to assets, operations, etc., and declared that "all the creditors of said Southern Construction Company may, by intervention, set up any valid claim against said company herein, and all such creditors are enjoined from proceeding on said claims in any other case or any other court." Patterson, as receiver in bankruptcy of the Newcomer-Manry Company, filed his petition setting out the facts, and praying that "an order be passed by this honorable court, either modifying the order heretofore passed in the above-entitled cause so as to allow your petitioner to proceed with the suit in the city court of Atlanta, or, if said order is not so modified, that it be allowed to foreclose its lien in this honorable court, and that an order be directed to the Fourth National Bank of Atlanta, ordering said Fourth National Bank of Atlanta to make answer to the summons of garnishment to this honorable court."

The case was submitted to the presiding judge on an agreed statement of facts. In addition to what appears above, it was recited that, by order of the court, the Fourth National Bank made answer to the garnishment to the superior court, admitting that it had certain funds on hand, but claiming the right to apply a part of them to an indebtedness by the corporation to it; that the balance admitted to be due was paid over to the receiver, and by order of the court held separately from other funds, "all parties agreeing that any issues arising out of the suit in garnishment should be heard in this court. * * * The question being left to determination as to whether the garnishing creditor obtained any right to the funds so caught under the garnishment proceeding, this question is now before the court." The court reserved the question as to whether the bank was entitled to

set off the claim held by it, and apply thereto a part of the fund which was on deposit. An order was passed declaring that "intervener has no lien upon the fund garnished in the hands of the Fourth National Bank, and is entitled to no priority over creditors in said fund." The previous order requiring receivers to hold the fund separately from the general fund was revoked. The intervener excepted. The assignment of error is set out in the first headnote.⁸⁵

1. A motion to dismiss the writ of error was made, on the ground that there was no sufficient assignment of error. It is denied. In support of the motion, counsel for defendant in error cited *Fidelity & Deposit Co. v. Anderson*, 102 Ga. 551, 28 S. E. 382; *Mayor, etc., of Brunswick v. Moore*, 74 Ga. 409; *Mutual Building & Loan Ass'n v. Glessner*, 99 Ga. 747, 27 S. E. 187; *Kimball v. Williams & McCurdy*, 108 Ga. 812, 33 S. E. 994; *Wheeler v. Worley*, 110 Ga. 513, 35 S. E. 639; *Collins v. Carr*, 111 Ga. 867, 36 S. E. 959; *Carter & Woolfolk v. Jackson*, 115 Ga. 679, 42 S. E. 46. We granted leave to review such of these cases and the cases cited in them as apparently might conflict with the ruling now made. When carefully considered, none of them essentially conflict with the present ruling, though a misapplication of certain expressions used in some of them might lead to such a conclusion. A statement in *Wheeler v. Worley*, and one in *Kimball v. Williams*, approach more nearly to adverse declarations than any of the others. Section 5527 of the Civil Code of 1895 provides that the "bill of exceptions shall specify plainly the decision complained of, and the alleged error." Section 5583 declares that "the Supreme Court shall not decide any question unless it is made by a special assignment of error in the bill of exceptions, and shall decide any question made by a specific assignment of error in the bill of exceptions." Both of these sections have long been in force. In 1893 (Acts 1893, p. 52) the Legislature passed an act, which is now codified in section 5569 of the Civil Code of 1895, whereby it is declared that "it shall be unlawful for the Supreme Court of Georgia to dismiss any case for want of technical conformity to the statutes or rules regulating the practice in carrying cases to that court, where there is enough in the bill of exceptions or transcript of the record presented, or both together, to enable the court to ascertain substantially the real questions in the case which the parties seek to have

decided therein." Construing these sections together, they furnish a rule for bringing before this court questions for decision. The last-mentioned act was evidently intended to liberalize somewhat the former ones, or at least the construction which had sometimes been given to them. Rules of this character are made for a substantial purpose, not as mere technical pitfalls to catch the unwary. The decision complained of and the error alleged to exist therein ought to appear plainly. This is fair to the judge whose judgment it is sought to reverse, so that he can make such facts appear, or require such evidence and record to be brought to this court as may be necessary for a proper consideration of the errors complained of. Civ. Code 1895, § 5528. To allow a mere general assignment which, without more, would not direct the attention of the judge to the real question, and then to hunt for something covered up in such generalities as a ground for reversal, would be very much like allowing him to be ambushed. It is fair to the adverse counsel or party, in order that he may know what he must meet in this court. It is fair to this court, in order that there may be clearcut questions for them to decide, and not an indefinite complaint for them to wander through in search for questions to determine and errors to reverse.

This is not a court of appeals, but a court for the correction of errors; and in order for it to deal with alleged errors intelligently the questions to be decided should be made to appear. Let us take a few illustrations, that the necessity and propriety of such a rule duly applied, may be shown. Suppose that a case were submitted to a judge without a jury, in which there were various issues of law and of fact, and that he should render a general judgment in favor of the plaintiff for a sum of money. What question would a mere general exception that this was error present to this court for decision? Would it mean that the judgment on the facts was contrary to the evidence, or without evidence to support it, or that the judgment was far too large a sum? Or that, without complaining of the finding on the facts, there was some error of law? And what error? Thus in *Wade v. Watson*, 66 S. E. 922, the judge passed on issues both of law and fact, and there was a mere general exception. Even where there was an agreed statement of facts, it has sometimes been held that a mere exception to a general judgment

by the judge without a jury was insufficient, as the real complaint might be that the judgment was too large or too small, or bore interest, or that the rate of interest used was wrong, or that there should be no recovery at all under the law, or perhaps other matters. Other instances might be added, but these will suffice. Where there are several things involved in a judgment, the thing complained of ought to be made to appear. This rule, however, is one of substantial practice, rather than a Procrustean rule of words. When this is borne in mind, and the language used in the various decisions is considered in the light of the facts of the respective cases before the court, if not all apparent conflict, at least most of it, practically disappears. Where a motion for a new trial has been overruled and exception taken to such judgment, one assignment of error in the bill of exceptions is sufficient to reach all of the grounds of the motion which themselves contain sufficient assignments of error. Supreme Court Rule 6 (57 S. E. v.).⁸⁶ Taking the motion with the bill of exceptions, the error complained of is apparent, and the assignment need not be repeated. So of an exception to an assignment of error on overruling or sustaining a demurrer, where the grounds themselves show the points made and ruled on, and in connection with the bill of exceptions clearly show the errors assigned. *Huxford v. Southern Pine Co.*, 124 Ga. 181, 52 S. E. 439; *Johnson v. Porter*, 115 Ga. 403, 41 S. E. 644. Again, where a verdict was directed and the bill of exceptions excepted to such overruling and assigned it as error, this was held to be sufficient, as meaning that the judge committed error in holding that the evidence, viewed in the light of the pleadings, demanded a finding against the plaintiff in error. *Howell v. Pennington*, 118 Ga. 494, 45 S. E. 272. So likewise as to an exception to the grant of a nonsuit. *Randolph v. Brunswick & B. R. Co.*, 120 Ga. 969, 48 S. E. 396. And where a single distinct question was raised in regard to a motion to dismiss an appeal, on the ground that it was not entered by the adverse party in the justice's court, but by a third party, and over objection an amendment was allowed changing the name of the appellant, a bill of exceptions reciting the specific ruling of law made, excepting to the judgment and assigning the ruling as error, was held sufficient. *Head v. Marietta Guano Co.*, 124 Ga. 983, 53 S. E. 676.

In *Mutual Building & Loan Ass'n v. Glessner*, 99 Ga. 747, 27 S. E. 187, where a case involving questions both of law and fact was tried by the judge without a jury, and a judgment was rendered for the plaintiff, and direct exception taken without a motion for a new trial, a mere statement that the defendant excepted and assigned the judgment as error was held insufficient. It was said that it ought at least to have been stated whether the judgment was complained of as contrary to the evidence or to law, or to both, and that "it was never contemplated that this court should search around in a loose and general way to discover errors not brought to its attention with, at least, a reasonable degree of certainty." In *Hart v. Phenix Ins. Co.*, 113 Ga. 859, 39 S. E. 304, in an action on promissory notes, the court, on general and special demurrer, struck an answer, rejected an amendment, and rendered judgment for the plaintiff. The bill of exceptions specifically assigned error on the order in regard to the amendment, and also in general terms complained of the judgment. Under this general assignment it was argued that the judgment was not correct as to the amount, that the contract was not unconditional, and that the court had no authority to render a judgment without a jury. This court decided the question raised by proper assignment of error, but declined to pass on the points thus sought to be set up under the general assignment, saying that there was nothing in the bill of exceptions to show that any such points were made or passed on by the trial court. In *Carter & Woolfolk, v. Jackson*, 115 Ga. 676, 42 S. E. 46, it was said that if the bill of exceptions meant to allege that the general judgment was based on certain specified "holdings," and that these were erroneous, this was sufficient; and, construing the bill of exceptions in the light of the record, it was held that such was the meaning. We think what has been said will serve to show the propriety of the rule, but at the same time that it is a rule of substance, not of words—a requirement based on sound reason, not a mere filigree of technical formula. See, also, discussion in *Lyndon v. Georgia Ry. & El. Co.*, 129 Ga. 353, 58 S. E. 1047; *Crossley v. Leslie*, 130 Ga. 782, 61 S. E. 851.

Applying these principles to the present case, it is clear that the motion to dismiss must be overruled. It is distinctly shown that there was no controversy about facts, that only

one question of law was submitted to the court, that the court decided it adversely to the contention of the plaintiff in error, and entered a judgment against him, and that the latter excepted and assigned this as error. Good practice required no more. Nothing more could well be said, except that the ruling as to this question of law was error because it was wrong. The law requires no such repetition. The main line of decision involved in the cases reviewed is right, when properly applied. Only such expressions as may conflict with what is here ruled are modified. In regard to cases of injunction, where the question usually is whether a judge abused his discretion in granting or refusing the writ, a somewhat more general assignment of error has been held sufficient to withstand a motion to dismiss. *Anderson v. Newton*, 123 Ga. 512, 51 S. E. 508; *Kirkland v. Atlantic & Birmingham Ry. Co.*, 126 Ga. 246, 55 S. E. 23. But even in such cases, under a general assignment alone, such special questions as the constitutionality of an act, the legality of time of the hearing, whether there was sufficient service, or the like, not shown to have been passed on, do not arise for decision. We are aware that this is a long discussion of a rule of practice, but we trust that it will not be unprofitable. The point is raised in this court again and again. Like Banquo's ghost, it will not down.

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85 The bill of exceptions stated that "the plaintiff in error excepts to said order of December 5, 1908, and assigns the same as error."

86 But a frequently approved rule requires more than this, and the specific grounds upon which it is claimed that the motion was erroneously overruled must be stated in the assignment even when the motion itself specifies fully the grounds upon which it is based.—*Lytle v. Prescott*, (1894) 57 Minn. 128; *Sisson v. Kaper*, (1898) 105 Ia. 599; *Charouleau v. Shields & Price*, (1904) 9 Ariz. 73; *Louisville, C. & L. RR. Co. v. Sullivan*, (1884) 81 Ky. 624; *Walker v. Allen*, (1899) 58 Neb. 537.

So where error is assigned to the overruling of a motion to direct a verdict, and the motion is based upon several grounds, the assignment should specify the particular ground or grounds in respect to which error is claimed.—*Hamilton Buggy Co. v. Iowa Buggy Co.*, (1893) 88 Ia. 364. The same principle applies to motions in arrest of judgment.—*Sanford v. Ainsa*, (1911) 13 Ariz. 287; *Reeves & Co. v. Lamm Bros.*, (1903) 120 Ia. 283.

FEDER v. FIELD.

*Supreme Court of Indiana. 1889.**117 Indiana, 386.*

ELLIOTT, C. J. The appellees assigned cross-errors, and gave notice to the parties who did not join in the appeal. After the assignment of cross-errors was filed, the appellants moved to dismiss the appeal, and obtained an order dismissing it. Very soon after this order was entered, the appellees moved to reinstate the appeal upon their assignment of cross-errors, and their motion was sustained. The appellants now move to vacate the order reinstating the appeal of the appellees.

The contention of the appellants is that the dismissal of the appeal by them carried the entire case, while the appellees contend that the appellants' dismissal did not carry the appeal, so far as it is affected by the assignment of cross-errors. It is true, as appellants contend, that our Code makes no provision for the assignment of cross-errors by the appellee. But the practice has been so long and so often recognized as an appropriate one that it must be regarded as one of the unwritten rules of procedure. *Johnson v. Culver*, 19 N. E. Rep. 129; *Rochester v. Levering*, 104 Ind. 562-575, 4 N. E. Rep. 203; *Railroad Co. v. Mosier*, 114 Ind. 447, 17 N. E. Rep. 109; *Thomas v. Simmons*, 103 Ind. 538, 2 N. E. Rep. 203, and 3 N. E. Rep. 381; *Kammerling v. Armington*, 58 Ind. 384; *Jenkins v. Peckinpugh*, 40 Ind. 133; *Adler v. Sewell*, 29 Ind. 598; *Nutter v. Railroad Co.*, 13 Ind. 479; *White v. Allen*, 9 Ind. 561. A rule of this court which has long been in force recognizes the right to assign cross-errors. See rule 14. The rule has so long and so steadily prevailed that it falls within the operation of the maxim that "the practice of the court is the law of the court." *Broom*, Leg. Mex. 133. The rule has much to commend it. Under its operation one appeal brings to the appellate court the entire controversy. By the one appeal as much can be accomplished as by two distinct appeals. If separate appeals were taken, then the only method of avoiding confusion would be to consolidate the cases; and this, while it would accomplish no more than a single appeal, would greatly increase the record, and augment the costs.

The rule is in harmony with the spirit of our Code, since it tends to bring the merits of a controversy before the court in a short and simple method. It is consistent with the leading purpose elsewhere manifested in our system of procedure, to bring all the parties concerned in a controversy, and all the questions growing out of a legal dispute, into court in one proceeding, so that by one judgment or decree the whole controversy may, if possible, be forever put at rest.

In many cases the appellant may not bring such a record to this court as will present other questions than those arising on his assignment of errors, and in such a case the assignment of cross-errors would be unavailing. We do not mean to hold that the appellant is always bound to bring here a record that will benefit his adversary as well as himself, but there are many cases, and this is one of them, in which the whole record, with all the material questions, is necessarily brought before this court. With such a record before us, all questions should be decided, for otherwise the assignment of cross-errors would be an idle ceremony. It is a general rule that if a court acquires jurisdiction for one purpose it will retain it for all purposes. *Field v. Holzman*, 93 Ind. 205; *Wood v. Ostram*, 29 Ind. 177. We can conceive no reason why this familiar rule should not apply to appellate proceedings. If a cause is in this court for the purpose of having an adjudication upon the questions presented by the appellant's assignment of errors, there is no reason why it should not be held here for the purpose of adjudicating upon the questions properly presented by the record and the appellee's assignment of cross-errors. Our Code means that this court shall decide upon the substantial merits of a controversy, where it can be properly done; and it can, we believe, be properly done where there is a sufficient record, a proper assignment of cross-errors, and all the parties are before the court in due course of law. The motion to vacate the order reinstating the appeal is overruled.

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⁸⁷ The practice in many states permits the assignment of cross errors.—*Pelouze v. Slaughter*, (1909) 241 Ill. 215; *Page v. People*, (1881) 99 Ill. 418 (held to be a cumulative remedy, and a separate appeal is also permitted); *Wickliffe v. Buckman*, (1851) 12 B. Mon. (Ky.) 424 (cumulative, not exclusive); *Kindel v. Colo. & So. Ry. Co.*, (1914) 57 Colo. 1; *Long v. Campbell*, (1901) 133 Ala. 353; *Gay v. Whidden*, (1912) 64 Fla. 295. See *Elliott App. Prac.* § 418.

But generally the appellee cannot be heard to complain of adverse rulings unless he takes out a separate writ of error or appeal.—*Bottles v. Outing Co.*, (1899) 175 U. S. 262. See many cases cited in 4 C. J. § 2598.

SECTION 4. RECORD AND BILLS OF EXCEPTIONS.

SUYDAM v. WILLIAMSON.

Supreme Court of the United States. 1857.

20 Howard, 427.

[The record brought up on writ of error showed the pleadings, suggestion of death and substitution of other parties, empanelling of jury, verdict and judgment for plaintiff, and a document entitled in the cause and signed by the judge, as follows:

“This is an action of ejectment for two lots in the 16th ward of the city of New York. The declaration is in the usual form; the plea is not guilty. Either party may refer to the pleadings as part of this case.

“The plaintiffs gave in evidence an exemplified copy of the will, etc., etc.

“The plaintiff’s then rested.

“The defendant’s counsel then proved [specifying various matters]; these were all objected to by the plaintiffs’ counsel, and were read subject to the objection.

“The defendants’ counsel then offered in evidence a deed [specifying it].

“The plaintiffs’ counsel then offered to prove—[specifying 6 different matters.]

“The defendants’ counsel objected; the objections were sustained. The plaintiffs’ counsel excepted.

“A verdict was then by direction of the court, taken for the plaintiffs for the premises claimed, subject to the opinion of the court upon the questions of law, with liberty to either party to turn this case into a special verdict or a bill of exceptions.”]

CLIFFORD, J. This was a writ of error to the Circuit Court of the United States for the southern district of New York.

The view we have taken of this case, as it is exhibited in the record, renders an extended statement of the facts entirely unnecessary. It was an action of ejectment brought in the court below to recover the possession of a certain parcel of land, with the appurtenances, situated in the sixteenth ward of the city of New York, and described as lots sixty-four and sixty-five, according to a certain map made by George B. Smith. The declaration, which was in the usual form, was filed in the Circuit Court for the southern district of New York on the 15th day of August, 1845, and the defendant, James H. Suydam, appeared, by his attorney, and pleaded that he was not guilty of unlawfully withholding the premises claimed by the plaintiffs, as was alleged in the declaration, and tendered an issue, which was duly joined by the plaintiffs. * * * The declaration contained on its face a good cause of action, and the general issue and joinder were regularly filed in the cause, and were entirely sufficient to make up a valid issue between the parties to the suit; and the verdict, which was strictly formal and legal, was in every respect responsive to the issue formed. It appears that the jury found, in the very words of the issue, that the defendant was guilty of unlawfully withholding the premises claimed by the plaintiffs, as alleged in the declaration; and the judgment followed the verdict, and was founded upon it, for the premises as they set forth and described in the pleadings. Every step in the cause, from the filing of the declaration to the issuing of the writ of possession, was in exact conformity to the most approved practice and precedents in the Federal courts.

We do not understand that the pleadings or the regularity of the proceedings are in any manner called in question, except as the foundation of a judgment, which it is insisted was erroneous, for reasons altogether aside from any connection with mere matters of form. The real controversy between the parties has reference more especially to the right of possession, and consequently extends to the title of the premises described in the declaration, and necessarily involves the principal questions which were presented to this court at the December term, 1850, in the case of *Williamson v. Berry*, 8 How., 495; and we regret that the facts of the case, and the rulings of the court below, are not now exhibited in a manner to justify this court in giving the sub-

ject a re-examination * * *. The difficulty, however, in the way of any such examination at this time, is insurmountable, for the reason that the record does not contain either a bill of exceptions, special verdict, or an agreed statement of facts. Some of the questions discussed at the bar might have been satisfactorily presented in a special verdict, or by an agreed statement of facts, while in respect to others, apparently regarded as important, such as the rulings of the court, in admitting or rejecting evidence, it is proper to remark that they could only be brought to this court for revision by a bill of exceptions. Such rulings are never properly included in a special verdict, any more than in an agreed statement of facts. A special verdict is where the jury find the facts of the case, and refer the decision of the cause upon those facts to the court, with a conditional conclusion, that if the court should be of opinion, upon the whole matter thus found, that the plaintiff has a good cause of action, they then find for the plaintiff; and if otherwise, they then find for the defendant; and it is of the very essence of a special verdict, that the jury should find the facts on which the court is to pronounce the judgment according to law, and the court in giving judgment, is confined to the facts so found; and every special verdict, in order to enable the appellate court to act upon it, must find the facts, and not merely state the evidence of facts; so that, where it states the evidence merely, without stating the conclusions of the jury, a court of error cannot act upon matters so found. In practice, the formal preparation of such a verdict is made by the counsel of the parties, and it is usually settled by them, subject to the correction of the court, according to the state of facts as found by the jury, with respect to all particulars on which they have passed, and with respect to other particulars, according to the state of facts which it is agreed they ought to find upon the evidence before them. After the special verdict is arranged, and it is reduced to form, it is then entered on the record, together with the other proceedings in the cause, and the questions of law arising on the facts found are then decided by the court, as in case of a demurrer; and if either party is dissatisfied with the decision, he may resort to a court of error, where nothing is open for revision, except the questions of law inferentially arising on the facts stated in the special verdict; and we here

remark, for the purpose of illustration, that it is not so much because the proceeding is denominated a special verdict, that the party by virtue of it is authorized to invoke the aid of a revisory tribunal, as it is because it has the effect to incorporate the facts of the case into the record, which otherwise would have rested in parol, and therefore could not have been reached on a writ of error; and the same remark applies to a bill of exceptions, which is a still more comprehensive method of enlarging the record by incorporating into it not only the facts of the case, but the rulings of the court in admitting and rejecting evidence, and the instructions given to the jury; and after it is signed, sealed, and filed in the case, it becomes a part of the record, and the matters therein set forth can no more be disputed than those contained in any other part of the same record, and are alike subject to revision in a court of error. It is a mistake, however, to suppose that in such cases the writ of error operates only on the bill of exceptions. Such is never the fact, unless the whole record is set forth in the bill of exceptions; as the operation of the writ of error addresses itself to the record as an entirety, and not to any separate portion of it as distinct from the residue; and when the cause is removed into the appellate court, any error apparent in any part of the record is within the revisory power of such tribunal. The rule is, that whenever the error is apparent on the record, it is open to revision, whether it be made to appear by bill of exceptions, or in any other manner. (*Bennett v. Butterworth*, 11 How., 669; *Slacum v. Pomeroy*, 6 Cranch, 221; *Garland v. Davis*, 4 How., 131; *Cohen v. Virginia*, 6 Wheat., 410.)

When a party is dissatisfied with the decision of his cause in an inferior court, and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the questions of law to be revised, and put the facts on the record for the information of the appellate tribunal; and if he omits to do so in any of the methods known to the practice of such court, he must be content to abide the consequences of his own neglect. Evidence, whether written or oral, and whether given to the court or to the jury, does not become a part of the record, unless made so by some regular proceeding at the time of the trial and before the rendition of the judgment. Whatever the

error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdiction according to the course of the common law. A bill of exceptions undoubtedly is the safest method, as it is the most comprehensive one in its operation; and where the facts are disputed, and cannot be arranged except from evidence admitted under the ruling of the court as to its admissibility, oftentimes it becomes the only effectual mode by which all the rights of the complaining party can be preserved. On the other hand, where there is no dispute in regard to the facts, and consequently no necessity for any ruling of the court in admitting or rejecting evidence, the same purpose may be safely accomplished by a special verdict, or, according to the rule established in this court, by an agreed statement of facts. (*United States v. Ellason*, 16 Pet., 291; *Stimson v. Railroad Company*, 10 How., 329; *Graham v. Bayne*, 18 How., 60.) Where the facts are without dispute, and agreed between the parties, a statement of the same may be drawn up and entered on the record, and submitted directly to the court, for its decision, without the intervention of a jury; or a general verdict may be taken, subject to the opinion of the court upon the facts so agreed; and in either case, the aggrieved party may bring error after final judgment, and have the questions of law, arising upon the facts thus spread upon the record, re-examined, as in the case of a special verdict. (*Faw v. Bordeaux*, 3 Cran., 174; *Brent v. Chapman*, 5 Cran., 358.)

It should be observed, however, that the rulings previously made by the court, in admitting or rejecting evidence during the progress of the trial, are no more revisable on a special case, as it is called, when the verdict is taken subject to the opinion of the court on an agreed state of facts, than where the agreed statement is submitted directly to the court, without the intervention of the jury; and for the obvious reason that, in the one case as much as in the other, the foundation laid for the action of the revisory tribunal is based upon the consent of the parties to the suit, and consequently the action of the appellate court must be confined to the facts as they were agreed, and as they appear in the record of the case. * * *

Other modes are known to the practice of this court, by

which the evidence produced against a party may in certain cases be put on the record either in whole or in part, according to the circumstances, so as to secure the right to have the questions of law arising upon it revised on a writ of error; but every proceeding of that kind is either so limited in its application or so tied up by conditions, that they are seldom of much practical importance, and are only referred to on the present occasion to confirm the proposition already advanced, that no ancillary step in the cause is of any avail to a party as laying the foundation to support a writ of error, any farther than it has the effect to place on the record what otherwise would rest in parol. Formerly it was considered that a party might always demur to the evidence produced against him, as a matter of right; and while that was so, a demurrer to evidence was equally effectual with a bill of exceptions to the extent of its operation. (4 Chitt. Gen. Prac., 7; 2 Inst., 427.) The bill of exceptions was always the more comprehensive remedy, because it extended, as it still does, not only to the facts in the case, but also to the rulings of the court in admitting or rejecting evidence, and to the instructions given to the jury upon its legal effect. A demurrer to the evidence, while its operation in one respect is nearly the same as that of the bill of exceptions, in another is very different. It extends only to the evidence produced, as the term imports, and has no effect at all upon the rulings of the court by which it was received; and as a necessary consequence, where the error of the court consists in having admitted improper evidence, the effect of a demurrer to it would be to waive the objection to the ruling, instead of laying the foundation to correct the error.

* * *

Another method by which certain evidence may be incorporated into the record at the *nisi prius* trial is by oyer, which occurs where the plaintiff in his declaration, or the defendant in his plea, finds it necessary to make a profert of a deed, probate, letters of administration, or other instrument, under seal, and the other party prays that it may be read to him, which in such a case cannot, as a general rule, be denied, by the court; and the effect of the proceeding, in certain cases, is to make the instrument a part of the pleadings, and, consequently, to place it within the operation of a writ of error, which, in every case where the proceeding is

according to the course of the common law, brings up the whole record; and in all these cases, as well as in the one first named, it is because the evidence, whatever it may be, is made a part of the record by the proceeding, that the questions of law arising upon it become a proper subject of revision on the writ of error. (1 Chitt. on Plead., 10th Am. ed., 431; 1 Tidd. Prac., 3d Am. ed., 586.) And the same effect is produced and the same object is attained when the defendant demurs to the declaration, or when either party demurs to a material portion of the pleadings on which the cause depends; and so it must have been understood by this court in *Gorman et al. v. Lenox*, 15 Pet., 115, where it was held, in accordance with the principle here advanced, that the action of the Circuit Court of this District, in sustaining a demurrer to a plea of performance in a suit on a replevin bond, was the subject of revision on a writ of error; and the rule adopted in that case was undoubtedly correct, as the effect of the demurrer was to make the error apparent in the record; and when that is so, it becomes the subject of revision just as much as when it is made to appear by a bill of exceptions or a special verdict.

We have now adverted to the several methods acknowledged by courts of error, by which matters resting in parol at the trial in the subordinate tribunal may be put on the record, so as to lay a proper foundation for revision of the legal questions arising out of them in the appellate court, and there are no others which can be recognized in this court in cases where the proceedings are required to be according to the course of the common law. (*Dougherty v. Campbell*, 1 Blackf., 24; *Cole v. Driskell*, 1 Blackf. 16.)

A writ of error is an original writ, and lies only when a party is aggrieved by some error in the foundation, proceedings, judgment, or execution, of a suit in a court of record, and is defined to be a commission, by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and, on such examination, to affirm or reverse; and it was expressly held by this court, in *Cohens v. Virginia*, (6 Wheat., 410,) that the writ of error operated upon the record, and that its effect, under the judiciary act, was to bring it into this court, and submit it to a re-examination; and it is also laid down by the best writers on pleadings, that nothing will be error in law

that does not appear on the face of the record, for matters not so appearing are not supposed to have entered into the consideration of the judges. (Steph. on Plea., 121.)

The writ of error in this case was issued on the eighteenth day of December, 1854, and on the twenty-ninth day of January, 1855, an additional paper was filed, which in the transcript is denominated the "case," and is the one which furnished all the materials for the discussion at the bar. It purports to contain all the evidence introduced at the trial in the court below, as well that given by the defendant as that given by the plaintiffs, and certain offers of proof on the part of the plaintiffs, which were objected to by the defendant, and excluded by the court. This mass of evidence, with the exhibits, filling sixty pages of the transcript, has respect, on the one said or the other, to the title and right of possession to the premises described in the declaration, and comprises all the evidences of title which were before this court on the former occasion; and, in addition thereto, certain admissions of the parties and other parol evidence. It is now drawn up in the form of a report of the judge who presided at the trial, and is signed by him, and is under seal; and, as we understand the endorsement, is certified to be correct by the counsel of the plaintiffs. The conclusion of the report is as follows:

"A verdict was then, by direction of the court, taken for the plaintiffs, for the premises claimed, subject to the opinion of the court upon the questions of law, with liberty to either party to turn this case into a special verdict or bill of exceptions."

Whatever might have been the right of the parties under that report, it is too plain for argument, that no one connected with its preparation could have regarded it either as a special verdict or a bill of exceptions. All that it professed to do was to give either party the liberty to turn the case into one or the other of those forms of proceeding; and it is a sufficient answer to any pretensions under the report to say, that the change has not been made; that, for some reason unknown to this court, the right to make the change, if such it was, has never been exercised; and that it is now presented here in the form in which it was prepared when it is too late to make the alteration. And we also say, that this court cannot so far depart from the settled practice and

regular course of proceeding as to give an effect to the paper which neither its contents nor terms would warrant; nor can we attempt to do for the plaintiff in error what it was his duty to have done at the trial, and before the writ of error was sued out; nor are we prepared to admit that the option given to turn the case either into a special verdict or a bill of exceptions could have been exercised by either party under the concluding portion of that report, without the assent of the judge who presided at the trial, and irrespective of his authority. On the contrary, we conclude that, "where a case shall be made with leave to turn the same into a special verdict or bill of exceptions, the party shall not be at liberty to do either, at his election, but the court may, if they think proper, prescribe the one which he shall adopt." (Conk. Trea., 3d ed., p. 444.)

Nothing less than the presence and assent of the court, we think, can give any legal validity to a special verdict; and in respect to a bill of exceptions, it must always be signed and sealed by the judge, or else it would be a nullity. (*Phelps v. Mayer*, 15 How., 160.) A special verdict ought always to be settled under the correction of the judge who presided at the trial, and, whether prepared at the time or subsequently, it should be filed as of the term when the trial took place. (*Turner v. Yates*, 16 How., 14; *Shappard v. Wilson*, 6 How., 275.) The necessary effect of the proceeding, where the verdict is taken subject to the opinion of the court, would be to postpone the preparation of the special verdict till after the parties were heard, and the opinion given; and to that extent the delay is allowable, though we are by no means prepared to admit that it may be done after the cause has been removed into this court. The result is, we have come to the conclusion, on this branch of the case, that the paper in the transcript denominated the "case" must be considered merely as a report of the judge who presided at the trial; that it is not a part of the record, and, consequently, must be wholly disregarded by this court, in determining whether the judgment of the court below ought to be reversed or affirmed. Having come to that conclusion, it becomes unnecessary to notice any of the rulings of the court in admitting or excluding evidence, as no part of that report can be taken into consideration. * * *

It is certain, therefore, that there is no error in the record;
* * *

The judgment of the Circuit Court is therefore affirmed,
with costs.⁸⁸

⁸⁸ Compare *Pomeroy's Lessee v. Bank of Indiana* (1863) 1 Wall. (U. S.) 592, where a similar case was criticized.

Bill of Exceptions of Statutory Origin.—"At common law a writ of error lay for an error apparent in the record, or for an error in fact, where either party died before judgment. It did not lie for an error of law not appearing in the record, and hence where the plaintiff or defendant alleged anything *ore tenus*, which was overruled by the judge, this could not be assigned. It was not an error appearing upon the record, nor an error in fact, but in law, and the party aggrieved by it was without a remedy. Bacon's Abr. Title, "Bill of Exceptions," vol. 1, 788. To obviate this evil the statute of Westminster, 13 Edw. I, was passed, authorizing the parties to allege exceptions, and requiring the justices to allow and put their seals to them when they became a part of the roll. The practice of allowing exceptions had its origin under that statute of which all subsequent statutes have been substantially copies."—*Dunbar v. Hollinshead*, (1860) 10 Wis. 505.

"The statute of Westminster (13 Edw. I, c. 31) as an ancient statute, has become a part of the common law of this country, and under it the right to a bill of exceptions in civil cases at law and in superior courts has been firmly established." *Duncan v. Landis*, (1901) 106 Fed. 839, 45 C. C. A. 666.

FORM OF BILL OF EXCEPTIONS.

(Taken from *Puterbaugh's Pl. & Pr. (Com. L.) Ninth Ed.*, p. 990.)

In the _____ Court. _____ Term. 19____.

A. B.

v.

Assumpsit.

C. D.

Be it remembered, that on the trial of this cause, in this term, the plaintiff gave in evidence on his behalf as follows, that is to say:

J. K., being duly sworn, testified: My name is J. K.; I am acquainted with, etc. (*Objections made and exceptions taken in the course of the examination may be set forth in this manner:*) Thereupon the counsel for the plaintiff asked the witness this question: What, etc. To which question the defendant, by his counsel, then and there objected, for the reason, etc.; but the court overruled the objection, and permitted the witness to answer the question, which he thereupon did as follows: I heard, etc. To which ruling and decision of the court, in permitting this question to be so asked and answered, the defendant, by his counsel, then and there excepted. (*Proceed with the testimony thus:*) And thereupon the witness further testified: I acted for the plaintiff, etc.

On cross-examination by the counsel for the defendant, this witness testified: I was not present, etc.

(*Proceed in like manner with the testimony of any other witness for the plaintiff.*)

And thereupon the defendant gave in evidence on his behalf as follows, that is to say:

(*Here insert the testimony for the defendant, with any objections made and exceptions taken by him.*)

The foregoing was all the evidence introduced on the trial of this cause.

And thereupon the court gave to the jury, on behalf of the plaintiff, the following instructions, to wit:

(Here insert the instructions for the plaintiff.)

To the giving of each and all of which instructions the defendant, by his counsel, then and there excepted.

And thereupon the court gave to the jury, on behalf of the defendant, the following instructions, to wit:

(Here insert the instructions given for the defendant.)

And the defendant, by his counsel, then and there asked the court to also give to the jury the following instructions, to wit:

(Here insert the refused instructions.)

But the court refused to give these instructions to the jury; to which rulings and decision of the court in refusing to give the same and each of them, to the jury, the defendant, by his counsel, then and there excepted.

* * * * *

And thereupon the jury rendered a verdict against the defendant; whereupon the defendant, by his counsel, then and there moved the court to set aside the verdict so rendered, and grant a new trial of this cause, and filed the following reasons in writing for his motion, to wit:

(Here insert the reasons filed.)

But the court denied the motion, and gave judgment on the verdict against the defendant; to each of which decisions of the court, in denying such motion, and in rendering such judgment, the defendant by his counsel, then and there severally excepted.

And forasmuch as the matters above set forth do not fully appear of record, the defendant tenders this his bill of exceptions, and prays that the same may be signed by the judge of this court pursuant to the statute in such case made; which is done accordingly, this _____ day of, etc.

STATUTORY EQUIVALENTS FOR BILL OF EXCEPTIONS.

Statutes often provide for substitutes for the bill of exceptions, but they are very similar in their form and purpose.

Case on Appeal. "The 'transcript or record on appeal' consists of the 'record proper,' i. e., summons, pleadings and judgment and the 'case on appeal' which last is the exceptions taken and such of the evidence, charge, prayers and other matters occurring at the trial as are necessary to present the matters excepted to, for review."—*Cressler v. Ashville*, (1905) 138 N. C. 482.

Statement of the Case. "Counsel for the appellants say the paper relied upon may be treated either as a statement of the case, or as a bill of exceptions. This is strictly true. * * * We have never been able to understand why a statement was provided for in the code, and having been provided for, we are equally at a loss to know why it should ever be resorted to in practice. A bill of exceptions has always been a well-known means of preserving exceptions and bringing up the evidence on appeal. * * * If attorneys could be induced to abandon entirely the practice of using or attempting to use a statement of the case, and resort exclusively to a bill of exceptions, much of the uncertainty and confusion that has crept into the practice on appeal to this court might in time be removed."—*Brandt v. Clark*, (1889) 81 Cal. 634, 638.

Transcript of Evidence. A statutory record in lieu of a bill of exceptions.—*Christenson Lumber Co. v. Seawell*, (1910) 157 Cal. 405.

Statement of Facts. "Sec. 4. In all cases and proceedings in which

an appeal lies to the supreme court, any party feeling himself aggrieved may have any material fact or facts, not already a part of the record, made so by a statement of facts. * * * 'Sec. 5. In cases of equitable cognizance where the appeal is from the final judgment, the said statement of facts shall contain all the testimony on which the cause was tried below, together with any exceptions or objections taken to the reception or rejection of testimony. In cases at law the statement of facts need contain no more than was necessary or proper in a bill of exceptions.' 'Sec. 6. In actions at law * * * the appellant, instead of settling a statement of facts * * * may have his exceptions and such facts as are material to the same made a part of the record by bill of exceptions. * * * It is not contemplated that the facts of the same case should in part be presented by bill of exceptions and partly by a statement of facts, although there is now little or no difference between them, except in the manner of the settlement.'—*Jones v. Jenkins*, (1891) 3 Wash. 17.

Statement on Appeal. "There is no statement on appeal. * * * Where there is no statement properly authenticated, only errors appearing on the face of the judgment roll can be considered on the appeal."—*Quinn v. Quinn*, (1903) 27 Nev. 156, 174.

Case. "No mention is made of a bill of exceptions in the Code. * * * But it is quite evident * * * that the proposed case for which provision is made in the Code, embraces what was formerly known as a bill of exceptions."—*Hubbard v. Chapman*, (1898) 28 N. Y. App. Div. 577.

Settled Case. "The office of a bill of exceptions or a settled case is to place in the record matters showing alleged errors which do not appear upon the face of the record proper, which consists of the summons, pleadings, verdict and judgment."—*Peach v. Reed*, (1902) 87 Minn. 375.

Case-made. "The office of a case made is certainly no broader than that of a writ of error and bill of exceptions, and perhaps the scope our statute at present gives to it will enable it to be carried no farther than to bring under review such actual rulings involving questions of law as might be presented by a bill of exceptions and writ of error."—*Earle v. Fire Ins. Co.*, (1874) 29 Mich. 414.

In some states a case-made includes both the record proper and a bill of exceptions.—*Shumaker v. O'Brien*, (1878) 19 Kan. 476.

Statement of the Evidence and Exceptions. "This statement took the place of the bill of exceptions under our former system of practice, and the provision for it was general in its application to all causes under the code, whether of a legal or equitable nature."—*Blatchley v. Coles*, (1881) 6 Colo. 82.

Abstract. While it is said that under the Iowa practice the complete transcript of the stenographer's notes constitutes a bill of exceptions,—*Howerton v. Augustine*, (1911) 153 Ia. 17,—the abstract prepared by the attorneys is in form and contents much more closely analogous to a bill of exceptions. See 3 Deemer's Iowa Pl. & Pr. 2002-2005.

UNITED STATES v. TAYLOR.

*Supreme Court of the United States. 1892.**147 United States, 695.*

This was a petition by the clerk of the Circuit Court of the United States for the Eastern District of Tennessee for fees earned between July 1, 1887, and December 23, 1889, which had been disallowed in the settlement of the accounts rendered by him to the Treasury Department. The court directed judgment to be entered in his favor for \$1066, (45 Fed. Rep. 531,) and the United States appealed.

BROWN, J. The government objected to the allowance by the court below of the following items:

* * * * *

5. Item 9 includes charges for papers entered by the clerk upon the final record of the cases, and disallowed by the Comptroller as forming no proper part of the judgment record, and unnecessarily burdensome to the government. When the practice of a particular State or district requires a judgment record to be made up in each case, of course the clerk is entitled to his fees for services actually and necessarily performed in that connection. *United States v. Van Duzee*, 140 U. S. 169, 176, ¶ 9. But as to what shall be incorporated in such record, there is no settled practice and some diversity of opinion.

A record is substantially a written history of the proceedings from the beginning to the end of the case, but nothing which is not properly matter of record can be made such by inserting it therein. In several of the States the matters properly incorporated in judgment rolls are enumerated by statute. New York Code of Civil Procedure, § 191; California Civ. Code, § 670.

In *Mandeville v. Perry*, 6 Call, 78, the Court of Appeals of Virginia, in answering the question "what this court will consider as constituting the record of which it is to take notice in cases of common law," says: "I answer, the writ for the purpose of amending by, if necessary, the whole pleadings between the parties. Papers of which a profert is made, or oyer demanded. And such as have been specially submitted to the consideration of the court by a bill of exceptions, a

demurrer to evidence, or a special verdict, or are inseparably connected with some paper or evidence so referred to. These, with the several proceedings at the rules or in court, until the rendition of the judgment, constitute the record in any common law suits, and are to be noticed by the court, and no others." * * * Perhaps the most satisfactory definition of a common law record in a criminal case under the American practice is found in *McKinney v. People*, 7 Illinois, 540, 551, wherein it is said: "In a criminal case, after the caption stating the time and place of holding the court, the record should consist of the indictment properly indorsed, as found by the grand jury; the arraignment of the accused, his plea, the impanelling of the traverse jury, their verdict, and the judgment of the court. This in general is all that the record need state." And in *Dyson v. State*, 26 Mississippi, 362, 383, it is stated that "the record must affirmatively show those indispensable facts, without which the judgment would be void—such as the organization of the court; its jurisdiction of the subject-matter and of the parties; that the cause was made up for trial; that it was submitted to a jury sworn to try it, (if it be a case proper for a jury); that a verdict was rendered, and judgment awarded."

Mr. Freeman, in his work upon Judgments, section 79, thus summarizes from the authorities "the matters which are not (unless made so by bill of exceptions or by consent, or by order of the court) matters of record," namely: "Matters of evidence, written or oral, including note, bond or mortgage filed in the case, and upon which suit is brought; an agreed statement of facts not in nature of special verdict; all motions, including motions to quash the writ, to amend the pleadings, for extensions of time, for continuances, for bonds, for prosecution, for bills of particulars; pleas stricken from the files, notices of motions, affidavits of claimants; bonds for trial of rights of property, affidavits in relation to conduct of jurors; all affidavits taken during the progress of the cause, memorandum of costs; power of attorney to confess the judgment, and affidavit in relation to the death of the maker thereof; report of judge of proceedings at the trial, reasons for his opinion in rendering judgment or in deciding application for a new trial; rulings of the court upon the admission of evidence; the instructions to the jury; statement of facts made by the judge for the purpose of taking the advice of the

appellate court; and the ruling of the court upon an application to strike out a portion of the pleadings."

The extent to which a judgment record should go in its recital of the proceedings depends largely upon the purpose for which it is to be used. If it is designed for use in the review by the appellate court of the rulings of the court below, upon the introduction of testimony, or of the validity of the charge to the jury, it must contain in a bill of exceptions so much of the testimony or charge as is necessary to a clear understanding of the questions involved. But if, upon the other hand, it be designed only for the purpose of preserving a record of the conviction *in perpetuam rei memoriam*, little more is necessary than to set forth the process and return thereto, the pleadings, journal entries, verdict and judgment. All the authorities agree that, in a criminal case, it should show what the prisoner is charged with, that the court had jurisdiction of the case, that the defendant was duly convicted and the sentence. It may be said, in general, that anything which is not necessary to support the validity of the judgment is, presumptively at least, no part of the record, however material it may have been in the progress of the case.

* * * * *

This disposes of all the questions raised upon the assignment of errors, and the judgment of the court below is, therefore,

*Reversed, and the case remanded for further proceedings in conformity with this opinion.*⁸⁹

⁸⁹ "Record proper" is a term of somewhat uncertain meaning, and is differently defined in different states. It always includes the pleadings, summons, verdict and judgment,—*Pickel v. Pickel*, (1913) 176 Mo. App. 673; *Grand Pac. Hotel Co. v. Pinkerton*, (1905) 217 Ill. 61; *Williams v. Boise Basin, etc., Co.*, (1905) 11 Ida. 233; *Putnam v. Putnam*, (1890) 3 Ariz. 182; *Tribal Dev. Co. v. White Bros.*, (1911) 28 Okl. 525; *Cressier v. Ashville*, (1905) 138 N. C. 482; *Reed v. Gardner*, (1873) 17 Wall. (U. S.) 409. Statutes often enlarge it.

Exhibits attached to pleadings are often held to be no essential parts thereof and not to be part of the record proper.—*Majors v. Maxwell*, (1906) 120 Mo. App. 281; *Hippach v. First Nat. Bank*, (1897) 169 Ill. 515; *Commonwealth v. Chandet*, (1907) 125 Ky. 111. A bill of particulars has been held to be no part of the record proper.—*Edelman v. McDonell*, (1899) 126 Cal. 210; *Saxton v. Musselman*, (1903) 17 S. D. 35; *Fryer v. Breese*, (1891) 16 Colo. 323; *Eggleston v. Buck*, (1860) 24 Ill. 262; *State St. M. E. Church v. Gordon*, (1865) 31 N. J. L. 264.

The bill of exceptions, when made up, is "not a part of the record of the trial court but of the supreme court,"—*State v. Brewer*, (Ala. App. 1923) 97 So. 160.

STATE EX REL. MALIN v. MERRIAM.

*Supreme Court of Missouri. 1901.**159 Missouri, 655.*

MARSHALL, J. This is a suit to collect back taxes alleged to have been levied and assessed upon 36 different tracts of land in various townships and ranges in Ozark county, of which the defendants are alleged to be the owners, which taxes are averred to be \$153.64 "for interest and sinking fund tax for the year 1895," and \$156.57 for the same purpose for the year 1896; and judgment is prayed for this amount, with interest and costs. The petition alleges that the lands were returned delinquent by the collector, and that the county clerk made out and delivered to the collector a back-tax book, as provided by law, and that the lands described in the back-tax book remain unredeemed, and the taxes unpaid. The answer is a general denial, with an admission that the defendants own the land. The transcript in the case before this court consists of the petition; a paper consisting of eight pages, and purporting to be a certificate that the back taxes on the property remain delinquent; the answer; a stipulation signed by the attorneys and filed in the cause, as follows: "It is hereby stipulated and agreed that the taxes on which this suit is based were levied for the purpose of creating a sinking fund for the payment of certain bonded indebtedness of Ozark county, Mo., issued in August, 1889, and an interest fund for the payment of the interest thereon, and said taxes constitute no part of the taxes levied for ordinary county expenses; that the county court of Ozark county did not prior to the levy of said taxes for either year, through the county attorney or otherwise, ask for or receive from the circuit judge of the Twentieth judicial circuit an order authorizing the levy of said taxes or any part thereof;" and the judgment, as follows: "Now, on this day this cause coming on to be heard, the parties appear and announce ready for trial, and all and singular the matters in issue being submitted to and by the court seen; and the court, after hearing the evidence, finds that the taxes for which this suit is brought are illegal and void, and that plaintiff is not entitled to recover herein. It is therefore considered and adjudged that the lien for said taxes be set

aside, and for naught held and esteemed (description of land omitted). It is further considered and adjudged that the plaintiff take nothing by its suit, and that defendants recover their costs." There was no bill of exceptions or motion for new trial filed, and no appeal taken, but the matter remained in this shape from the date of the judgment on August 12, 1897, until May 3, 1898, when this writ of error was sued out.

It is contended by plaintiff that the stipulation herein set out constitutes an agreed case, or agreed statement of the case, and occupies the same footing as, and stands in lieu of, a special verdict; that it stands precisely as if a jury had found a verdict in that form, and that when filed it became a part of the record proper, and hence no bill of exceptions was necessary to make it a part of the record; and that, as it is a part of the record proper, no motion for new trial was necessary, but that it is the duty of this court to examine the case so made, and if error is apparent on the face of the record proper, so constituted, to reverse the judgment below, and enter such judgment as the trial court ought to have entered. It is manifest that this is not an agreed case, within the meaning of section 793, Rev. St. 1899, which authorizes parties to a question of difference, without action, to agree upon a case containing the facts upon which the controversy depends, and submit the same to a court of competent jurisdiction for decision; for such an agreed case is "without action," which means without filing a suit, having summons issued, and the defendant brought into court against his will, followed by the usual steps in a suit. It is clearly a suit regularly begun, issues made up, and, to save the trouble of introducing testimony to support all or any of the questions at issue, the parties stipulate as to the existence or nonexistence of the facts in issue. Such a stipulation is commonly called an "agreed statement of facts," and does not constitute an agreed case under the statute or at common law. The primary question in this case is whether such an agreed statement of facts becomes a part of the record proper by being filed with the clerk of the trial court, or whether it constitutes matters of exception, which can only be made a part of the record by a bill of exceptions. The exact question was decided by this court in *Kennerly v. Merry*, 11 Mo. 214; and Napton, J., disposed of the matter very briefly, as follows: "This is a petition for dower in a lot in St. Louis. There is

no bill of exceptions in the case, and no motion for a new trial. A statement of facts agreed on by the counsel is copied by the clerk in the record, but it is not made a part of the record by bill of exceptions. The judgment will therefore be affirmed." Thus as early as 1847 it was distinctly held that "a statement of facts agreed on by counsel," and "copied by the clerk in the record," is not a part of the record, unless made so by a bill of exceptions. Such is the exact condition in this case. The decision cited has never been overruled. Many times since it has been said that such an agreed statement dispenses with proof of the facts therein stated. *City of St. Charles v. Hackman*, 133 Mo. 634, 34 S. W. 878. No declarations of law are necessary to secure a review of the case, but upon the agreed facts this court will apply the true law, and enter such a judgment as the trial court ought to have entered. *City of St. Charles v. Hackman*, 133 Mo. 634, 34 S. W. 878; *Carr v. Coal Co.*, 96 Mo. 149, 8 S. W. 907; *Gage v. Gates*, 62 Mo. 412. It has also been held that such an agreed statement of facts "occupies the same footing and stands in lieu of a special verdict." *Carr v. Coal Co.*, 96 Mo., loc. cit. 155, 8 S. W. 907; *Gage v. Gates*, 62 Mo. 412; *Munford v. Wilson*, 15 Mo. 540. But it has never been held, since *Kennerly v. Merry*, *supra*, that the rule therein stated is not still the law, nor that such an agreed statement of facts becomes a part of the record proper by simply filing it with the clerk, or by having the clerk copy it into the transcript, nor that it can be made a part of the record in any other way than by a bill of exceptions. It is like any other agreement or stipulation of counsel, and can only be made a part of the record by a bill of exceptions (*Eystra v. Capelle*, 61 Mo. 578; *State v. Bachelor*, 15 Mo. 208); or like instructions, which the clerk copies into a transcript, but which are not made a part of the record by a bill of exceptions (*State v. Shehane*, 25 Mo. 565; *Thompson v. Russell*, 30 Mo. 498; *Sturdivant v. Watkins*, 47 Mo. 177); or like exhibits attached to a petition, which are copied into a transcript without being made a part of the record by a bill of exceptions (*State v. Eldridge*, 65 Mo. 584; *Kearney v. Woodson*, 4 Mo. 114); or like a motion for execution against a stockholder (*Kohn v. Lucas*, 17 Mo. App. 29).

The statement of facts agreed upon by the counsel is not a part of the record proper, and has not been made a part of the record by bill of exceptions, and it cannot, therefore, be

considered by this court. This leaves only errors apparent on the face of the record proper to be reviewed. The record proper consists of the petition, summons, and all subsequent pleadings (in this case the answer), including the verdict and judgment. *Bateson v. Clark*, 37 Mo., loc. cit. 34; *Railway Co. v. Carlisle*, 94 Mo., loc. cit. 169, 7 S. W. 102. The petition is in proper form, the answer is a general denial, and the judgment is that parties appeared, the court heard the evidence, and declared the taxes illegal and void, set aside the lien for the taxes on the land, and entered a decree that plaintiff take nothing by his suit, and that defendants recover their costs. No error is apparent on the face of this record, and nothing in the way of exception having been incorporated in the record, showing any error in the trial, the judgment of the trial court is affirmed. All concur.⁹⁰

⁹⁰ Statutes in many states provide for an "agreed case" which is not merely a statement of facts shown in evidence or admitted by way of proof, but the sole basis for the action of the court. Under such statutes the agreed case is a part of the record. See Indiana, Code Civ. Pro. §§ 579, 580; California, Code Civ. Pro. §§ 1138, 1139; Michigan, C. L. 1915, § 12754; Montana, Rev. Codes 1921, § 9372; Nebraska, Comp. St. 1911, §§ 7140, 7141; Washington, R. & B.'s Codes, §§ 378, 379; and other similar statutes.

In *Burr v. Des Moines RR. & Nev. Co.*, (1863) 1 Wall. (U. S.) 99, 102. the court said:—"The agreed statement of facts must, in some manner in the court below, be made a part of the record in the case. The case of *United States v. Eliason*, 16 Pet. 291, shows that it was strongly urged upon this court that it had been laid down by Sir Wm. Blackstone in his Commentaries, and by Stephen in his Treatise on Pleadings, that error did not lie on such a statement. The court, however, said that the reason for this was, that in the English practice, the agreed statement was not like a special verdict entered on the record, and the appellate court could not therefore notice it. But that in the practice of our courts such agreements are signed by 'the counsel, and spread upon the record at large as part thereof.' And thus they become technically a part of the record, into which the appellate court look, with the other parts of it, to ascertain if there be error."

The English practice also failed to make a special case part of the record when a general verdict was rendered subject to such special case (2 Tidd's Prac. 898) but the practice of the United States Supreme Court was *contra*, as the cases above cited show.

SMITH v. NEWLAND.

*Supreme Court of Illinois. 1865.**40 Illinois, 100.*

This was a writ of error to reverse a decree in chancery. A deposition, which was suppressed on the hearing in the court below, having been copied into the transcript of the record, a motion was made in this court to strike that deposition from the record. The question is presented, whether the deposition, notwithstanding its suppression, did not still remain a part of the record, and herein, of the necessity or propriety of the use of bills of exceptions in chancery practice.

PER CURIAM: This is a motion to strike from the record the deposition of a witness. It was suppressed on the hearing in the court below. This order of the court is assigned for error; but, inasmuch as the deposition is merely copied into the record by the clerk, without being preserved in a bill of exceptions, and inasmuch as no exception was taken to the ruling of the court below suppressing it, it is urged that the deposition is improperly in the record. The proceeding, however was in chancery. The rules of chancery practice do not require that exceptions should be taken to the various decisions of the court made in the progress of the cause. The entire proceedings are matter of record, and are all subject to review in this court without the taking of technical exceptions. The twenty-first section of the practice act has been always understood to apply only to the common law side of the court.

There seems to be some misapprehension as to what the court has said in various cases in regard to the preservation of the evidence by bills of exceptions in chancery proceedings. We have merely mentioned them as one of the modes by which the oral testimony may be preserved since the passage of the law allowing such evidence, without intending to intimate that they are to be introduced into chancery practice for any other purpose, or with a view of alleging exceptions to the rulings of the court. Indeed a certificate of evidence signed by the judge is, as a matter of form, preferable to a bill of exceptions, because more in harmony with chancery practice. But when the evidence is presented by a deposition

or by a master's report, they are as much a part of the record as before the passage of the law above named. If a certificate of evidence is taken it need contain only the oral testimony. The depositions or the master's report will properly come to this court with the record, and as a part of it, without being incorporated into the certificate of evidence signed by the judge, or the bill of exceptions, if the oral evidence is preserved in that mode. If a deposition is suppressed and the party against whom such order is made desires to bring the record to this court for the purpose of taking its opinion as to the propriety of such order, and as to the effect of the deposition, if such order was erroneous, he has a right to have such deposition incorporated into the record. Although suppressed at the hearing, it remains a part of the proceedings in the cause, together with the order suppressing it. *Maccabe v. Hussey*, 5 Bligh. 758; 1st Sect. of Chancery Act, R. S. 93.⁹¹

⁹¹ "It is said by Ch. J. Taney, in *Ex parte Story*, 12 Pet. 343, 'A bill of exceptions is altogether unknown in chancery practice.' This is certainly true. Bills of exception were unknown to the common law. They were introduced by the Statute of Westminster 2, 13 Edw. I, c. 31, the principles of which have been generally adopted in this country. *State v. Ned*, 7 Port. 187; *Bourne v. State*, 8 Port. 458. The English statute, in terms, confined them to civil causes at common law. The statute of this state, authorizing bills of exceptions, is framed evidently with a view to trials at law, and not to trials in chancery."—*Barnett v. Railroad Co.*, (1874) 51 Ala. 555. See also *Dodge v. Norlin*, (1904) 133 Fed. 363, 66 C. C. A. 425.

Statutes often require a statement of the case or bill of exceptions in chancery as in law cases. *Blatchley v. Coles*, (1881) 6 Colo. 82. "The modern equity practice largely permits the hearing of oral evidence, and the mode of preserving the evidence in the record for purposes of review has approached the practice in actions at common law, and while some cases hold that such testimony need not be made part of the record by bill of exceptions or otherwise, it is becoming the general rule, following the statutory changes in procedure, that such evidence must be duly incorporated into the appeal record by bill of exceptions, by recitals in the decree, or by certificate of the judge, embodying all the evidence relating to the matters in issue."—4 C. J. 188.

EATON v. OREGON RAILWAY & NAVIGATION CO.

*Supreme Court of Oregon. 1892.**22 Oregon, 497.*

BEAN, J. This is an action to recover from defendant \$710 for certain stock alleged to have been killed by its trains, and for damages, caused by fires, alleged to have originated from sparks escaping from its engines. The complaint contains six separate causes of action, three of which are for stock killed, and the remaining three for damages done by fire. At the close of the plaintiff's testimony the defendant moved for a nonsuit as to all the causes of action, and its motion was granted as to the sixth cause of action, and denied as to each of the others. The jury found a verdict in favor of plaintiff for \$693.50, upon which judgment was entered, and the defendant appeals.

As appears from the brief of counsel for appellant, the errors relied on here are in overruling a motion for nonsuit, in the admission of a certain letter in evidence, and the giving of a certain instruction to the jury. These assignments of error are claimed to be presented by what counsel terms a "bill of exceptions," but which is nothing more nor less than the whole testimony and proceedings of the trial as it took place, extended from a stenographer's notes. The testimony alone covers more than 100 pages of typewritten matter, the larger proportion of which has no relevancy or applicability to the question sought to be presented for our consideration. Scattered through this mass of testimony are the objections of counsel, the enterings of the court, and the exceptions taken thereto. The whole proceedings of the trial have been certified up here as a bill of exceptions, and we are expected to labor through this voluminous record, segregate and classify it, and out of it to construct a bill of exceptions, and then determine whether the assignments of error are well taken. This practice is in utter disregard of the plain provisions of the Civil Code, which requires that the exception should be stated with so much of the evidence or other matter as may be necessary to explain it, and nothing more, (section 232,) and has repeatedly received the disapproval of this court.

* * *

The provisions of our statute introduce no new rule in this matter, but are merely declaratory of the law, as it already existed. In *Pennock v. Dialogue*, 2 Pet. 15, Mr. Justice Story condemned the irregularity, inconvenience, and expense of putting the entire evidence of a case into the bill of exceptions, and expressed the regret of the court that such a practice should prevail. * * * Again, in *Lincoln v. Claflin*, 7 Wall. 136, Mr. Justice Field, in delivering the opinion of the court, uses this language: "A bill of exceptions should only present the rulings of the court upon some matter of law,—as upon the admission or exclusion of evidence,—and should contain only so much of the testimony, or such a statement of the proofs made or offered, as may be necessary to explain the bearing of the rulings upon the issues involved. If the facts upon which the rulings were made are admitted, the bill should state them briefly, as the result of the testimony. If the facts are disputed, it will be sufficient if the bill alleges that testimony was produced tending to prove [them]. If a defect in the proofs is the ground of the exception, such defect should be mentioned without a detail of the testimony. Indeed, it can seldom be necessary for the just determination of any question raised at the trial to set forth the entire evidence given; and the practice in some districts—quite common of late—of sending up to this court bills made up in this way—filled with superfluous and irrelevant matter—must be condemned."

The object of a bill of exceptions is to bring into the record the particular matter excepted to, and which the record would otherwise not disclose. It should therefore be drawn up concisely, but as explicitly as possible, with a view to the stating of all the facts and circumstances necessary to the statement of the point of law intended to be raised. *State v. Drake*, 11 Or. 396, 4 Pac. Rep. 1204; Pow. App. Proc. 225; Green, Pl. & Pr. § 1140. The object is to present the naked, legal question, and only such facts as are necessary to explain its relevancy to the particular case should be stated. With such a record it is only necessary for this court to consider and determine the question of law presented, and not be compelled to labor through a voluminous record, to ascertain the facts upon which the question is based, and, having done so, to meet with a petition for rehearing, as is not unfrequently the case, in which the legal conclusions are not controverted, but "respect-

fully but earnestly insisting that the court is mistaken as to the facts." If counsel desire the entire proceedings of the trial to be made a part of the record, there perhaps can be no objection; but ordinarily it should be attached to and made a part of the bill of exceptions, as an exhibit, or in some other appropriate way, and not massed together, entitled a "bill of exceptions," and certified here for us to examine, and ascertain whether the trial court erred. Cases may, and often do, arise, in which it is necessary for this court to examine the evidence upon the entire case, or upon some particular point. In such cases the bill of exceptions must, of course, contain the evidence; but there should be embodied in it only the evidence bearing upon the particular point presented. We do not desire or intend to enforce any technical or refined rule in this matter, and when the question sought to be presented is clearly stated, and readily understood, we shall examine and decide it, although the same may contain much irrelevant and immaterial matter. But where, as in this case, the questions of law depend entirely upon facts which are in dispute between counsel, we cannot be expected to examine the entire record of the trial, separate the material from the immaterial matter, and undertake to decide with whom the facts are. It was the duty of counsel, in the preparation of the bill of exceptions, to have segregated the evidence, and brought here only such as is applicable to the point raised, and then we could have determined the question intelligently. If the practice adopted in this case is to prevail, the statute becomes meaningless, and the office of a bill of exceptions entirely abrogated, and it is only necessary, in all cases, to embody in the record a copy of the stenographic report of the trial as and for a bill of exceptions. Such a labor-saving process cannot receive the approval of this court.

This case is an apt illustration of the vice of such a practice. In support of the motion for a nonsuit, it is concluded that no evidence was introduced in the trial tending to prove ownership or operation by the defendant of the railroad mentioned in the complaint, or the engine or cars used thereon. In place of this point being stated with only the facts or evidence bearing upon it, if any, and if not, a statement to that effect, the record contains, embodied in the bill of exceptions, the whole of the evidence, as given at the trial, upon all the issues, including not only the evidence upon the five causes of

action submitted to the jury, but also upon the one to which the court sustained the motion for a nonsuit.

The objection urged to the instruction is that "it omitted any reference to the contributory negligence of the plaintiff or his servants as to the fire mentioned in the fifth cause of action, as clearly shown to exist by the evidence." Here again the facts, if any, tending to show contributory negligence, are not stated, nor is the evidence upon this question separated or segregated from the mass of testimony, but we are expected to hunt through the entire record of a long and protracted trial, to see whether there is any such evidence. So also, in relation to the letter of Mr. Smith, admitted in evidence, the objections are (1) it does not relate to the fire mentioned in the complaint; (2) there is no evidence that Smith was an agent of the defendant; and, (3) if he was an agent of defendant, there is no evidence that he was authorized to make the admission said to be contained in the letter.

It will thus be observed that all the questions sought to be presented in this appeal depend largely upon questions of fact or inferences to be drawn from certain portions of the testimony. The point of each exception should have been particularly stated, complete within itself, accompanied with so much of the evidence or other matter necessary to explain it, and no more, and not all thrown together in one indiscriminate mass, as was done in this case. We conclude, therefore, that the bill of exceptions points no question for our consideration, and the judgment must be affirmed. * * *

⁹² In *Michigan Ins. Bank v. Eldred*, (1891) 143 U. S. 293, Gray, J., said: "The duty of seasonably drawing up and tendering a bill of exceptions, stating distinctly the rulings complained of and the exceptions taken to them, belongs to the excepting party, and not to the court; the trial court has only to consider whether the bill tendered by the party is in due time, in legal form, and conformable to the truth; and the duty of the court of error is limited to determining the validity of exceptions duly tendered and allowed. *Hanna v. Maas*, 122 U. S. 24. Any fault or omission in framing or tendering a bill of exceptions, being the act of the party and not of the court, cannot be amended at a subsequent term, as a misprision of the clerk in recording inaccurately or omitting to record an order of the court might be."

A literal transcript of the evidence, by question and answer, is seldom necessary, and it is usually preferable to reduce it to narrative form. *Willey v. Herrett*, (1913) 66 Ore. 348; *Whaley v. Vidal*, (1910) 26 S. D. 306; *Boyett v. Standard Chem. Co.*, (1906) 146 Ala. 554; *Cole v. Ingham Cir. Judge*, (1889) 77 Mich. 619; *District of Columbia v. Frazer*, (1903) 21 App. (D. C.) 154; *Cornell-Andrews Smelting Co. v. Boston & Prov.*

idence RR., (1913) 215 Mass. 381; Karasich v. Hasbrouck, (1871) 28 Wis. 569.

Since an appeal in equity is a rehearing upon the whole case, all the evidence should usually be set out in the case, certificate, bill of exceptions or statement on appeal. Johnson v. Johnson, (1855) 4 Wis. 135; 1 Whitehouse Eq. Pr. § 514; Nickey v. Leader, (1911) 235 Mo. 30; Wallick v. Wallick, (1897) 102 Ia. 746.

If counsel disagree, judge must decide upon bill. "Counsel should make an effort immediately after the trial of a case, to agree upon a proper bill of exceptions; and if they are unable to reach such an agreement the matter should speedily be brought to the attention of the trial justice, whose plain duty it will then be to adjust the differences of counsel and settle a bill of exceptions in conformity with the rules of this court." Geo. A. Fuller Co. v. McCloskey, (1910) 35 App. D. C. 595.

COPPER RIVER & NORTHWESTERN RAILWAY CO. v.
REEDER.

United States Circuit Court of Appeals, Ninth Circuit. 1914.

211 Federal Reporter, 280; 127 Circuit Court of Appeals, 648.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. The plaintiffs in error were defendants below. A judgment was rendered against them, and in favor of the defendant in error, from which this writ is prosecuted. The action was for damages on account of personal injuries sustained by plaintiff, occasioned by the breaking down of the roof of the tunnel in which he was at work, thus permitting the timbers and earth and gravel to be precipitated upon him.

The complaint alleges that the defendants were doing business as common carriers; that plaintiff was in their employ at the time, namely, August 7, 1911, and was at work upon the line of railway extending from Cordova up the Copper river into the interior of Alaska. It is then further alleged that the accident by which plaintiff was injured as aforesaid was caused by the negligent failure of the defendants to furnish the plaintiff with a reasonably safe place to work; that said place was unsafe and dangerous by reason of the negligent failure of the defendants to suitably timber said tunnel and protect the workmen employed therein from the danger of cave-ins, and the falling of material constituting the roof

of the bore thereof, all of which was known to the defendants, or by the use of reasonable diligence could have been so known, but was unknown to the plaintiff.

Defendants answered separately. The Copper River & Northwestern Railway Company admits that at the time it was doing business as a common carrier, but denies that the plaintiff was in its employ. The Katalla Company denies that it was doing business at the time as a common carrier, but admits that plaintiff was in its employ. Both deny the allegations of negligence. Both interpose two separate defenses: First, that the plaintiff assumed the risk; and, second, that the injury was caused by the negligence of a fellow servant.

The record as it comes here contains what are denominated "Minutes of Trial." Under this head are found minutes of the impaneling of the jury, of the swearing of certain witnesses, naming them, of the introduction of certain exhibits, of the filing of a motion for nonsuit at the close of plaintiff's case on the part of the Katalla Company, and also on the part of the Copper River & Northwestern Railway Company, and at the close of all the testimony a motion on the part of each for a directed verdict, of the denial of each of these motions and allowance of exceptions to the ruling of the court. These motions are then set out in full, and all appear to have been filed April 25, 1913. Under the same title, "Minutes of Trial," it appears that on April 26th arguments of counsel were had, and the jury, having retired for deliberation, in due time returned a verdict, which verdict is set out in the record.

Thereafter the record contains what is styled "Transcript of Testimony," etc. After entitling the cause, the record recites:

"Be it remembered that the above-entitled cause came on duly and regularly to be heard * * * on Thursday, the 24th day of April, 1913, at 10 o'clock a. m., before the Honorable Peter D. Overfield, Judge of said court and a jury"—in the usual form of introduction to a bill of exceptions. Thereafter the record contains the examination of some of the jurors and the ruling of the court touching their competency to sit, some exceptions being reserved. Then follows what appears to be the testimony of the witnesses. At the close of plaintiff's testimony, and when the plaintiff had rested his case, the record shows that the defendants each filed a separate motion for a nonsuit, which motions were argued,

and nonsuit refused by the court, and exceptions were allowed. Thereafter follows the testimony of the defendants. At the close of the case the record shows that the defendants filed separate motions for a directed verdict. These motions, after argument, were denied, and exceptions allowed. Then follow the instructions of the court, and thereafter are appended, as appears from the record, two certificates of Fred M. Brown, Judge, one settling, allowing, and certifying the bill of exceptions, and the other entitled "Certificate to Bill of Exceptions." Thereafter the transcript of record contains plaintiff's requests for instructions in two items of the same designation, instructions requested by Copper River & Northwestern Railway Company, instructions requested by Katalla Company, and defendants' exceptions to the court's instructions to the jury. Under this head there appear 21 exceptions, and at the foot thereof this recital:

"Exceptions allowed this the 5th day of May, A. D. 1913. Peter D. Overfield, Judge."

Following this are the verdict and motions for a new trial on the part of each of the defendants, order denying motions for new trial, and the judgment. Then follow the usual orders attending the allowance of a writ of error, including the assignments of error and citation. To all this are again appended the two orders, one allowing, settling and certifying bill of exceptions, and the other entitled "Certificate to Bill of exceptions." Thereafter appear transcripts of exhibits, supposedly such as were introduced in evidence.

The defendant in error has filed a motion here to strike from the transcript the motions of the Katalla Company and the Copper River & Northwestern Railway Company for nonsuit and directed verdict, for the reason that they are not embodied in the bill of exceptions, and, further, for the same reason, to strike from such transcript plaintiff's requests for instructions, instructions requested by both the Copper River & Northwestern Railway Company and the Katalla Company, and their exceptions to the court's instructions, also the motion for a new trial made on behalf of each of said companies. The defendant in error also moves the court to strike from the transcript the document or paper entitled "Transcript of Testimony," etc., for the reason that said transcript, although intended as a bill of exceptions, is not signed by the judge of

the court below, or otherwise properly authenticated so as to become a part of the record on writ of error.

The first questions to be disposed of arise upon the motion to strike parts of the transcript of record because not incorporated in the bill of exceptions. The motions for a nonsuit and for a directed verdict are clearly not so incorporated. While they appear to have been filed with the proceedings during the course of the trial, the verity of the court's rulings respecting them, and the allowance of the exceptions, is not authenticated by the judge, and they cannot within themselves be termed a bill of exceptions, or treated as such. Furthermore, standing by themselves, they are wholly futile in bringing error to this court because no testimony accompanies them, and, without the testimony, no error can be made to appear touching the ruling of the court concerning them. The motion to strike as to these motions must be allowed.

Neither is any part of the record following the first two certificates of the judge, settling, allowing, identifying, and certifying the purported bill of exceptions, the first contained in the record, a part of such bill. We say "purported" to distinguish this from the supposed bill of exceptions contained further on in the record, now to be noted.

It seems to be the contention of counsel for plaintiff in error that the requested instructions of the two defendant companies, together with the 21 exceptions noted thereto, and the allowance of such exceptions by the judge, constitute within themselves a bill of exceptions, and should be so treated. This contention is based upon the provisions of the Alaska Code, citing sections 1053 and 1055 of the Compiled Laws of the territory of Alaska. These statutes are sections 221 and 223 of the Civil Code of Procedure adopted by Congress. 1 Federal Statutes Annotated, page 92. Section 221 provides that:

"The point of the exception shall be particularly stated, and may be delivered, in writing, to the judge or entered in his minutes, and at the time or afterwards be corrected until made conformable to the truth."

And section 223 that:

"The statement of the exception, when settled and allowed, shall be signed by the judge and filed with the clerk, and thereafter it shall be deemed and taken to be a part of the record of the cause."

In this relation it should be noted that "an exception" is defined by section 220 as:

"An objection taken at the trial to a decision upon a matter of law, whether such trial be by jury or court, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to the jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision."

These sections are taken bodily from the Oregon Code, and contemplate that the exceptions shall be taken at the trial and may be delivered in writing to the judge or entered in his minutes. Such a statement and exception, when settled and allowed by the judge and signed by him and filed with the clerk, shall be deemed and taken to be a part of the record. Such a statement, made in conformity with the Code, would by statutory intendment constitute a bill of exceptions. Under this Code, as under the Revised Statutes of the United States, a bill of exceptions is to be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried. Section 1932, Rose's Code of Federal Procedure. The seal of the court or judge is therefore no longer necessary for proper authentication, as it seemed to be formerly. *Pomeroy's Lessee v. Bank of Indiana*, 1 Wall. 592, 17 L. Ed. 638.

A bill of exceptions may be perfected, settled, and allowed involving but a single point in the controversy, or more than one bill of exceptions may be allowed in a single case, or, as is usually the case, all the points relied upon as error may be incorporated in a single bill of exceptions. *Pomeroy's Lessee v. Bank of Indiana*, *supra*; *Lees v. United States*, 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150. In order, however, that a party may avail himself of an alleged error committed at the trial of an action at law in an appellate tribunal, it is essential that the objection be made, the ruling of the court be had, and the exception saved, all at the time of the trial. Such is the holding of the Supreme Court of Oregon.

"If a party desires to raise a question in this court," says the court [*State v. Foot You*, 24 Or. 61, 67, 32 Pac. 1031, 1033], "as to the competency of evidence offered in the trial court, or of any other supposed irregularity of that court, either of omission or commission, he must, at the time, make his objection, and thereby obtain a ruling of the court, and,

if adverse, he must save an exception, and bring it here by a proper bill of exceptions."

Such is also the practice in the federal courts. Bates on Federal Practice, § 1140; *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 298, 12 Sup. Ct. 450, 36 L. Ed. 162.

Now, turning to this supposed bill of exceptions. The authentication in the form "Exceptions allowed this the 5th day of May, A. D. 1913," and signed by the judge, may be sufficient, but this we need not determine now. The printing of the court's certificates and allowance of the purported bill of exceptions again in the record subsequent to this supposed bill of exceptions adds nothing to its authentication. Such certificates found in such a place in the record are worthless for any purpose. The trial of the case was had extending from April 24, to 26, 1913, inclusive, and defendants' exceptions to the instructions of the court were not allowed, and presumably not saved, until May 5th. They were not filed until that date, and there is no statement in the record whatever indicating when such exceptions were saved—manifestly not at the time of the trial. It is also a rule of practice in the federal courts that objections and exceptions to the instructions given a jury, or requested and refused, must be made and reserved before the jury retires. Bates, Federal Procedure, § 1144. For the reason, therefore, that it does not appear that the objections and exceptions to the instructions of the court were made and saved at the time of the trial and prior to the retirement of the jury, this supposed bill of exceptions is wholly nugatory. Another vital objection to such supposed bill of exceptions is that it contains no evidence taken at the trial from which the court may determine whether the instructions given or refused were proper or improper, and hence it presents no alleged errors for this court to consider. Manifestly this separate bill of exceptions cannot be considered in connection with that which precedes it in the record for the purpose of aiding its statement. Each bill of exceptions must stand upon its own statement, and will not be aided by another separate bill of exceptions, although both are settled and allowed in the same case. The motion, therefore, as it relates to the items designated "Plaintiffs' request for instructions," "Instructions requested" by each of the defendants, and "Exceptions to court's instructions," must also be allowed.

As it pertains to the motions for a new trial, they are addressed to the sound discretion of the trial court, and no question of the court's abuse of that discretion is presented here for our determination. The Code of Alaska relative to the subject, being section 1058 of the Compiled Laws, and section 226 of the Code of Civil Procedure as adopted by Congress, is taken again from the Oregon Code, and under the decisions of the state court a motion for a new trial, based upon insufficiency of the evidence or excessive damages, is addressed to the sound discretion of the trial court, and its decisions respecting the same are not reviewable except for a manifest abuse of such discretion. *State v. Foot You, supra*; *State v. Gardner*, 33 Or. 149, 152, 54 Pac. 809; *Coos Bay Navigation Co. v. Endicott*, 34 Or. 573, 578, 57 Pac. 61. And it is the doctrine of the Supreme Court of the United States that the refusal of the trial court to grant a new trial cannot be assigned for error in that court. *Addington v. United States*, 165 U. S. 184, 17 Sup. Ct. 288, 41 L. Ed. 679; *Erie Railroad Co. v. Winter*, 143 U. S. 60, 75, 12 Sup. Ct. 356, 36 L. Ed. 71.

The paper entitled, "Transcript of Testimony," etc., should not be stricken. This document is sufficiently certified by the judge to entitle it to the dignity of a bill of exceptions. True, the bill of exceptions was settled, allowed, and certified by a judge other than the person who presided at the trial, but we will assume that there existed sufficient reason for that. The record does not show what the reason was.

This disposes of the last 26 of the 35 assignments of error, being all of such assignments which have relation to alleged errors of the trial court in giving and refusing instructions to the jury and in denying the motions for a new trial.

It is strenuously urged notwithstanding the motions for nonsuit and directed verdicts in the transcript of record may not be considered to be incorporated in the bill of exceptions, yet that the bill of exceptions contains a sufficient statement concerning them to bring up the questions relating thereto for consideration by this court. The bill of exceptions shows that at the close of plaintiff's testimony, and when he had rested his case, the defendants each moved the court for a nonsuit, which motions were overruled and exceptions allowed. The motions themselves are not set out. The same thing is shown with reference to the motions for a directed

verdict, which were interposed at the close of the entire testimony. The insuperable objection to our considering these motions in any event is that the certificate of the judge in settling the bill of exceptions and certifying the same contains no statement that such bill of exceptions contains all the testimony given at the trial, or bearing upon the question of nonsuit or directed verdict. Such is the rule both in the Oregon state court and the federal courts. *Keady v. United Railways Co.*, 57 Or. 325, 333, 100 Pac. 658, 108 Pac. 197; *Sternenberg et al. v. Mailhos*, 99 Fed. 43, 39 C. C. A. 408. There is found in the bill of exceptions a statement by the stenographer, occurring at the close of the testimony, to the effect that the above is a full and correct transcript of the shorthand notes taken by him at the trial. This statement may be all true, and yet the shorthand notes taken by him at the trial may not comprise all the testimony in the case. At any rate the certificate of the stenographer to the verity of the extended transcript is not enough. The trial judge must indicate his approval of its correctness by due authentication under his own hand. 3 Encyc. Pld. & Prac. 437.

We come the more readily to this conclusion having carefully read and digested the entire evidence contained in the record, and finding that the questions predicated upon the motions for nonsuit and directed verdict are without merit. This disposes of assignments of error Nos. 8 and 9.

Assignments of error 1 to 4, inclusive, are not insisted upon here. Assignments 5 to 7, inclusive, relate to the admission in evidence, over objections, of certain bills of lading introduced for the purpose of showing that the Katalla Company was a common carrier by railway in Alaska. They have a tendency in some measure, though slight it may be, to establish that alleged fact, and were therefore pertinent.

The judgment of the trial court will be affirmed.

ATCHISON & NEBRASKA RAILROAD CO. v. WAGNER.

*Supreme Court of Kansas. 1877.**19 Kansas, 335.*

BREWER, J.: This was an action in the district court of Atchison county to recover damages for personal injuries, in which judgment was rendered in favor of defendant in error. The contest in this court has been conducted with vigor and bitterness. There has been that irritation and suspicion on the part of counsel which is both unfortunate and unpleasant.

Passing by all the personal allusions and complaints in the briefs, we shall consider simply the legal questions involved. And at the threshold we find on the part of the defendant in error a challenge of substantially the whole record. In the transcript filed with the petition in error appear three bills of exceptions; and a motion was made to strike them out, on the ground that they are not copies of the bills as signed and now on file in the district court. Upon this motion the original bills were produced and offered in evidence, together with much other testimony. The bills when signed were what are sometimes called "skeleton bills"—that is, with blanks containing directions to the clerk, "here insert," etc. Such bills it is claimed are nullities, and the clerk has no power in copying to make the insertions, but must follow the very letter of the bill as signed. It is not disputed that the allowance of a bill of exceptions is the act of the trial judge. A paper purporting to be a bill of exceptions, if unsigned by him, will not be noticed in the supreme court; *Waysman v. Updegraph*, McCahon, 89; *Couse v. Phelps*, 11 Kas. 445; *Kshinka v. Cawker*, 16 Kas. 63. The agreements of counsel are insufficient: *Hogden v. Comm'rs of Ellsworth Co.*, 10 Kas. 637; *The State v. Bohan, ante*, 28. The certificate of the clerk will not answer: *McAuthur v. Mitchell*, 7 Kas. 173; *The State v. Bohan, supra*. The language of the statute is plain: "The party excepting must reduce his exceptions to writing and present it to the judge for his allowance. If true, it shall be the duty of the judge to allow and sign it." Gen. Stat., p. 686, code, 303.

It would seem to follow from this that when the bill receives the signature of the judge it should be complete, and

this we understand to be the substance and spirit of all the decisions. There is to be no further discussion, no further discretion; the record is made. "The office of a bill of exceptions is to bring upon the record some portion of those proceedings which do not of right and of course go upon the record." (*Stoner v. Jackson*, 17 Kas. 607.) It is itself a part of the record. But a record must speak for itself. It must show upon its face all that it is. It must be its own evidence of all that it contains. No part of its contents may rest upon the discretion of the clerk, the recollection of the judge, or the testimony of counsel. But to insure this certainty, is it essential that everything be written out in full, every document and writing copied into the bill before signature? Such appears to be the import of some of the authorities cited; but that seems to us unnecessary stringency, and to impose needless clerical labor. Where a deposition or other writing is to be made a part of a bill it can be referred to with such marks of identification as to exclude all doubt. That surely ought to be sufficient; and so we think the better authorities hold. But these things must exist to exclude all doubt:

1st. The bill in referring to such extrinsic document must purport to incorporate it into and make it a part of the bill. A mere reference to the document, although such as to identify it beyond doubt, or a statement that it was in evidence, is not sufficient, for such reference and statement do not make it certain that judge or counsel intended that it should be copied into and made a part of the bill.

2d. The document itself must be in existence, written out and complete at the time of the signature of the bill; otherwise the door is open for dispute as to its language, and the bill may not in fact be allowed by the judge within the statutory time. A reference to the testimony of some witness to be thereafter written out by him and as written out to be inserted, is improper; and such testimony, though written out and inserted, must be disregarded; for that in effect places in the bill the witness's statement of the testimony, and not the judge's. So also, if a document has been totally or partially destroyed, it must be restored before the signature, and the paper as restored clearly identified. And again: Suppose a paper in a foreign language is received in evidence and translated to the jury by some witness on the stand; it

will not do to refer to that paper in the original, leaving the translation to be thereafter written out by any one, not even the witness who translated it to the jury; but the translation must be written out and properly referred to, so that the judge may approve it as the one given on the trial. The same principle renders it proper that short-hand notes be written out before the signature; for the notes of the stenographer are not a record; they are not conclusive as to what in fact was the testimony; they are not good against the certificate of the judge, and are no substitute for it. Whatever reliance the judge may place upon such notes, he after all must determine what was and what was not the testimony; and until those notes are written out, neither he nor counsel can determine what they will show as the testimony.

3d. And in this we appropriate the language of the supreme court of the United States in the case of *Leftwich v. Lecann*, 4 Wall. 187, in which the court says: "If a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions." And these means of identification must be obvious to all. No mere memorandum, intelligible it may be to a single person, even the clerk, but indicating nothing to any one else, will be sufficient. They must be such that any one going to the record can determine what document is to be inserted, or, after insertion, that the clerk has made no mistake. The record must prove itself, and not the record *and* the testimony of the clerk. The clerk changes; the record endures. And long after judge and clerk are both gone, the record, if good must carry on itself the evidence of its own integrity.

* * * * *

Applying the rules above given to the case at bar, and what is the result? Bill of exceptions No. 3 is the one purporting to preserve the testimony taken on the trial. In the original bill of exceptions, as allowed and signed by the trial judge, the only identification of the evidence offered by plaintiff is as follows—quoting from the bill:

"As will appear from a stenographic record thereof as follows: (Here copy record of testimony as kept by stenographer, down to resting of plaintiff's case.) The said deposi-

tions taken by plaintiff, to-wit: (Here copy names of witnesses, and depositions, as read.)”

And the only identification of evidence offered by the defendant to be inserted in said bill of exceptions is as follows:

“Defendant, to maintain the issue upon its part, offered evidence which was received by the court of the kind and in order as follows, as also kept by such stenographer: (Here copy defendant’s evidence.)”

And the evidence of plaintiff in rebuttal is not even identified by the stenographic record, but it is stated that, “The plaintiff offered evidence in rebuttal which was received by the court as follows: (Here copy evidence in rebuttal.)” Among the papers brought from the office of the clerk of the district court, and offered in evidence on the motion, is a large roll which upon examination reads as the testimony of witnesses given upon this trial, and which appears to have been copied into the transcript filed in this court as the testimony referred to in the original bill. But upon this roll we find no filemarks, or other marks of identification. From an examination of this roll no one could tell when it was placed among the papers of the clerk’s office, or even when it was written out; and if the clerk had produced any other roll or paper reading as testimony given upon that trial, no one could from inspection have told which was correct, or which was intended to be inserted, or which (if either) was written out by a stenographer. Indeed, the only means of identification which appear are, the facts that it reads as testimony given upon the trial and that it is found among the papers of the case. To hold such means sufficient, would open the door to the loosest practice. Again, as a part of plaintiff’s evidence the original bill directs—“(Here copy names of witnesses and depositions as read.)” Who is to decide what depositions were read? The court certainly by signing such a bill does not determine. It is a matter to be thereafter settled, and by whom? Still again: The only identification of rebutting testimony is—“(Here copy evidence in rebuttal.)” Whence is the clerk to get it? Who is to decide what was then given in evidence? Such a direction settles nothing. It does not even purport to settle anything. We have refrained thus far from noting anything outside of that which appears upon the face of the papers, for we think as indicated heretofore, that the identification should be apparent from the record itself, and

obvious to all. In reference to the extrinsic testimony of which we received quite an amount on the hearing of the motion subject to further consideration as to its competency, we simply say this—that its contradictions only enforce the conviction that the record must be tried by itself, that the marks of identification must be on the papers, and in the record; and that such contradictions make it painfully certain that it would be in the highest degree dangerous to trust to the recollections of clerk, or counsel or court. So far then as the motion refers to that portion of the bill of exceptions No. 3 which purports to give the testimony on the trial, it must be sustained.

* * * * *

We cannot forbear noticing at this point a matter which seems to have escaped the attention of counsel, and which tends to show how uncertain “skeleton bills” of exceptions are, even in their best estate. The skeleton bill, after referring to the motions to suppress depositions, states, that in support thereof defendant read “two certain affidavits as follows: (Here copy two first affidavits made by W. W. Guthrie and F. M. Pierce.)” The transcript filed with us shows at this place two affidavits of these gentlemen, of date November 10th. Further on the skeleton bill reads, “Plaintiff then read *contra* the certain affidavits of B. P. Waggener, P. S. Noble, and A. H. Horton, which are copied as follows: (Here copy such affidavits.)” The transcript here shows three affidavits of these three gentlemen respectively. The bill then further reads, “Defendant then read *contra* the certain other affidavits of Guthrie and Pierce, which are copied as follows: (Here copy such affidavits.)” And the transcript shows two such affidavits of date November 12th. Then according to the bill come the depositions themselves which were sought to be suppressed; but in the transcript there appear two more affidavits of P. S. Noble and one of B. P. Waggener, and which upon their face refer to the matters in the motion, and which are also verified on the 12th of November. Now, were these last affidavits really read upon the motion? Was it intended that they should be inserted in the bill of exceptions as copied for this court? Or was this simply the act of the clerk, or copyist, thinking they ought to be in? So also, where it is said that plaintiff read the certain affidavits of B. P. Waggener, etc., and the direction was to copy such affidavits, was

it intended that the clerk should copy one affidavit apiece of these gentlemen? or, all affidavits of theirs he might find on file before the date of the motion? or, only such as upon examination he might deem pertinent to the matters in the motion? or, such as according to his memory were actually read? These questions find no satisfactory answer in the record. The transcript as it comes before us is doubtless correct, at any rate we may presume it to be so, as no question is made; but if it were challenged we should be at a loss from anything in the original bill to determine how many affidavits were properly copied into the record by the clerk.

* * * * *

The judgment will be affirmed. VALENTINE, J., concurring.
HORTON, C. J., not sitting, having been of counsel in the case.

HILL v. HILL.

Supreme Court of Michigan. 1897.

112 Michigan, 633.

MONTGOMERY, J. * * *

It appears that the case was tried before Judge Simpson, sitting at the time in the Wayne circuit court, and the bill of exceptions was settled before Judge Hosmer. The statute (2 How. Ann. St. § 7613) provides that the bill of exceptions shall be settled before the judge who tried the case, except in case of his death, resignation, expiration of term of office, or vacancy in office from other cause. It is assigned as a reason for the settlement of the bill before Judge Hosmer that Judge Simpson was absent from Wayne county, and his attendance could not be procured there. But the case might have been settled before him at his home. See *Oliver v. Town*, 24 Wis. 512; *Ex parte Nelson*, 62 Ala. 377. It appears that the attorneys for plaintiff assented to the settlement of this bill of exceptions before Judge Hosmer. But it has been repeatedly held that parties cannot stipulate to a bill of exceptions. As the time has once been extended beyond the term, we have no doubt that Judge Simpson will, upon application, settle the bill, and, if the proper showing can be made, this court pos-

sesses the power to extend the time for suing out a writ of error for six months beyond the one year fixed by statute. This motion will be granted, without costs to either party. The other justices concurred.⁹³

⁹³ *Accord*, that another judge cannot settle the bill of exceptions by stipulation of the parties. *State v. Weiskittle*, (1883) 61 Md. 48; *Maher v. Renshaw*, (1909) 45 Colo. 567. *Contra*, *Philadelphia Fire Ass'n v. Ruby*, (1896) 49 Nebr. 584; *Brethold v. Village of Wilmette*, (1897) 168 Ill. 162.

Statutes frequently provide for other methods for the settlement of the case or bill of exceptions in the event of the death, sickness or absence of the judge who tried the case. In the absence of such provision parties may in such cases lose their right to appeal.—*Davis v. Menasha*, (1865) 20 Wis. 194. The cases are in conflict as to whether the retiring judge who tried the case, or his successor, should sign the bill of exceptions.—4 C. J. 252.

At common law where the settling of a bill of exceptions became impossible by reason of the death, sickness or absence of the trial judge, a new trial was the proper remedy.—*Maloney v. Adsit*, (1899) 175 U. S. 281.

Certification by bystanders. It is quite commonly provided by statute that if the judge neglects or refuses to sign a bill of exceptions, such bill may be authenticated by the certificate of bystanders, who are not interested in the suit and who are actually cognizant of the facts stated in the bill.—*Williams v. Pitt*, (1896) 38 Fla. 162; *Wright v. Nichols*, (1808) 1 Bibb (Ky.) 298; *St. John v. Wallace*, (1868) 25 Ia. 21; *Bowen v. Lazalere*, (1869) 44 Mo. 383; *Gay Oil Co. v. Akins*, (1911) 100 Ark. 552; *Diamond Tunnel, etc., Co. v. Faulkner*, (1891) 17 Colo. 9.

A bystanders' bill is sometimes allowed in case of the death of the judge.—*Mercer County Board v. Rankin*, (Ky. 1911) 132 S. W. 1026.

Filing. After being settled and signed by the judge or other authorized person, the bill of exceptions must usually be filed with the clerk of the trial court. The place and time for filing are generally fixed by statute, and unless these are observed the appellate court will not consider the bill of exceptions. *London v. Hutchens*, (1906) 80 Ark. 410; *Adkins v. Adkins*, (1874) 48 Ind. 12; *Louisville Ry. Co. v. Wellington*, (1910) 137 Ky. 719; *Cartwright v. Telephone Co.*, (1907) 205 Mo. 126; *Robinson v. N. Y., N. H. & H. RA. Co.*, (R. I. 1907) 67 Atl. 424.

CROWE v. CORPORATION OF CHARLES TOWN.

*Supreme Court of Appeals of West Virginia. 1907.**62 West Virginia, 91.*

SANDERS, P. The plaintiff, M. A. Crowe, brought an action of trespass on the case against the corporation of Charles Town in the circuit court of Jefferson county, for the purpose of recovering damages alleged to have been sustained by her by reason of a change in the grade of one of its streets, upon which certain property owned by her abutted, and which resulted in a verdict and judgment for the plaintiff, and the defendant applied for and obtained a writ of error.

* * * * *

There are many other assignments of error, but we are precluded from passing upon them, as their determination involves a consideration of the evidence, which we find has not been made a part of the record. Prior to the passage of our statute (section 9, c. 131, Code 1899 [section 3979, Code 1906], bills of exceptions were required to be taken at the term at which the trial was had and judgment pronounced; but by this statute it is provided that they may be taken, signed, and certified to the clerk, and made a part of the record within 30 days from the adjournment of the term. But for this enactment no bill of exceptions after the term ended could be signed and made a part of the record, and the only authority that a judge has for doing so now is by virtue thereof. This court has repeatedly held that it must be done in the 30 days provided for, and cannot be done after that time; but this case now presents a different question to any that has been before this court for consideration, in this: It is claimed that the attorneys for the plaintiff and defendant agreed in writing that the bill of exceptions could be signed and certified after the expiration of 30 days, and be made a part of the record the same as if done within the 30 days. In disposing of this question, it may be well to review the decisions and statutes of this state and Virginia, and of some of the other states.

* * * In *Winston v. Giles*, 27 Grat. 530, an action at law was submitted to the judgment of the court without a jury. and the court rendered judgment, to which one of the

parties excepted. It being near the end of the term, the court gave counsel time until the first day of the next term to prepare a bill of exceptions; but judgment was rendered, and it was held that the court could not give the leave, and that the bill of exceptions could not be made a part of the record. There is no expression in any of the adjudicated cases which would indicate that, even under the practice which existed prior to the passage of the act giving time after the term within which bills of exceptions could be signed, the parties could agree that such bills could be signed after the adjournment of the term, * * * If the time is extended beyond the period specified in the statute, it is clear that the court loses control of the matter, just as it formerly lost control by the lapse of the term. * * *

In the courts of the United States, owing to the fact that there is no express statutory provision governing the signing of bills of exceptions, the rule as to signing such bills is much more elastic than in those jurisdictions where statutes have been enacted limiting the time within which such bills may be signed; and, while the circuit courts may adopt the practice of the state courts as to the signing, yet, when so adopted, the rule is not absolutely binding, as in the case of *United States v. Breitling*, 20 How. 252, 15 L. Ed. 900, the judge of the Circuit Court of the United States in Alabama, by a general rule, adopted the practice of the state courts, which is regulated by a statute providing that no bill of exceptions can be signed after the adjournment of the term, unless with the consent of counsel; but where the judge holding the Circuit Court in Alabama signed a bill of exceptions under special circumstances, after adjournment, and without the consent of counsel, the Supreme Court of the United States considered the exceptions as properly before it, it being said: "It is in the power of a court to suspend its own rules, or except a particular case from them, to subserve the purposes of justice." While the general rule in these courts is that the bill should be given to the judge for his signature during the trial, yet the judges may, and often do, sign bills of exception *nunc pro tunc* after the trial, which, it is said in *Shepard v. Wilson*, 6 How. 260, 12 L. Ed. 430, is the English practice, under the statute (Westminster 2), which gave the right to bills of exceptions, and the practice recognized in the Supreme Court of the United States. * * *

The practice in Illinois, while there is no statute allowing it, is to allow time within which to present bills of exceptions, by an order entered of record, or by a written stipulation of parties filed in the case, and this practice is recognized by the Supreme Court of that state. But by an unbroken line of decisions it is held that such bills must be signed within the time limited in the order or stipulation. In *Hake v. Strubel*, 121 Ill. 321, 12 N. E. 676, the judge trying the case entered an order giving 60 days in which to prepare and have signed a bill of exceptions, and it was held that he had no power, even within the 60 days limited, to extend the time, and, if he approves and signs a bill after the 60 days, the act of so approving and signing will be treated as a nullity. *Village of Mar-seilles v. Howland*, 136 Ill. 81, 26 N. E. 495; *Hawes v. People*, 129 Ill. 123, 21 N. E. 777. But while there is no provision under the statute of that state expressly authorizing the court to extend the time beyond the term, yet the statute is silent as to just when the bills are to be signed, unlike ours, wherein the act of doing so is limited to a certain time.

We find that the Supreme Court of Kansas holds that a bill of exceptions must be reduced to writing, presented for signature, and signed before the expiration of the term at which final judgment was given, and that even by consent the time for signing cannot be extended beyond that term. *State v. Bohan*, 19 Kan. 28. * * *

The Supreme Court of Alabama holds that the bill of exceptions may be signed in term or within a certain time thereafter, pursuant to written consent of parties for that purpose, but there they have a statute providing that no bill of exceptions can be signed after the adjournment of the term during which the exception was taken, unless by consent or agreement of counsel in writing, except in such cases as is otherwise provided for, and the decisions say it must affirmatively appear that the bill was signed in term time, or if after the adjournment, then pursuant to an agreement in writing of counsel. *Stephens v. State*, 47 Ala. 696; *Rubber Co. v. Mitchell*, 37 Ala. 314; *Stein v. McArdle*, 25 Ala. 561; *Markland v. Albes*, 81 Ala. 433, 2 South. 123; *Maddox v. Broyles*, 42 Ala. 436. * * *

In Missouri, it is competent for the parties to stipulate that bills of exceptions may be signed and filed on or before a given date after the expiration of the term. *Swank v. Swank*,

85 Mo. 198. But this is by virtue of a statute which expressly authorizes it to be done by agreement. Thompson on Trials, § 2813, says that bills of exceptions may be signed and made a part of the record by stipulation of the parties after the expiration of the term, but no authority is cited to support this text except the case of *Swank v. Swank*, *supra*, the decision of which, as we have observed, is based upon a statute expressly authorizing the extension by consent of parties.

* * * * *

There can be found many decisions of other states, which are fully in accord with the ones herein cited and referred to, but we hardly deem it necessary to multiply decisions upon this subject. In so far as we have attempted to review the decisions of other states, we have endeavored to refer to the statutes of those states, because, in estimating the value of adjudications of other states as authority, it is needful to understand the statutes and the practice under them, and my search has led me to believe that no case can be found which authorizes the signing and making a part of the record a bill of exceptions after the time given by statute to do so has passed, where the statute makes such provision, and where it is not provided that the court may, by consent of the parties, further extend the time. In fact, where the statute gives a certain time within which to prepare bills of exceptions, without qualification, it seems that all the courts hold that the bill of exceptions must be signed by the court within this time, otherwise it is a nullity, and cannot be considered a part of the record. When final judgment is rendered, and the court adjourns finally for the term, it thereby loses jurisdiction of the person and of the subject-matter, unless such jurisdiction is in some way reserved by law. Our statute does reserve to the court the right, within the limited time of 30 days after the adjournment, to sign and make bills of exceptions a part of the record; but beyond this limit the court cannot go, either by its own act or the act of the parties. Our conclusion is: That the court was without power or authority to sign the bills of exceptions after the expiration of the time given in the statute. That there was no jurisdiction for so doing; the court having lost jurisdiction of the subject-matter, as well as the parties, at the expiration of that time. * * *

We find that the bills of exceptions were not signed and certified and made a part of the record within 30 days, and,

this not having been done, they cannot be treated as a part of the record, and we therefore affirm the judgment of the circuit court.⁹⁴

⁹⁴The federal practice is fully discussed in *Western Dredge & Imp. Co. v. Heldmaier*, (1902) 116 Fed. 179.

TIGHE v. MARYLAND CASUALTY CO.

Supreme Judicial Court of Massachusetts. 1914.

216 Massachusetts, 459.

RUGG, C. J. This is a motion presented to the full court, signed by counsel representing all parties, that a bill of exceptions regularly allowed by a judge of the superior court be amended by the addition of a material statement. It is urged that power to grant petitions of this nature is conferred by St. 1913, c. 716, entitled "An act to simplify legal procedure." It is provided by section 3 that "the Supreme Judicial Court, upon any appeal, bill of exceptions, report, or other proceeding, in the nature of an appeal in any civil action, suit or proceeding, shall have all the powers of amendment of the court below." The word "amendment," when found in statutes relating to procedure and practice, commonly refers only to pleadings and process. * * *

There are inherent obstacles in giving the statute any other construction. The word "amendment" does not easily lend itself to an interpretation applicable to bills of exceptions, reports or appeals. These constitute the record of the action of the trial judge. Facts upon which his conduct, rulings and decision were founded cannot in the nature of things be changed justly without his consent. Allowance of a bill of exceptions by a judge is a certificate by him of its truth. So long as he is alive and not incapacitated, he alone with propriety can determine whether a modification is needed to express the full truth. A report presents for the consideration of this court a definite question or questions of law. This is the act of the judge. It is difficult to conceive of a change in such a matter made by any one other than the judge who has framed and signed the report.

The proper way to accomplish that which this petition prays for—since the enactment of St. 1913, c. 716, as well as before—is to ask that the exceptions may be discharged for purpose of correction by the trial judge. *Ashley v. Root*, 4 Allen, 504. Petition dismissed.⁹⁵

⁹⁵ It is commonly held that after the time for settling the bill of exceptions has expired, the trial court may allow an amendment to show the truth,—*Knights of Pythias v. Bond*, (1913) 109 Ark. 543; *Ross v. K. C., Ft. S. & M. RR. Co.*, (1897) 141 Mo. 390; *Harris v. Tomlinson*, (1891) 130 Ind. 426. Such amendment may be allowed even after an appeal has been taken, by direct application to trial court,—*Matter of Lamb*, (1892) 95 Cal. 397; *North Chillicothe v. Burr*, (1899) 178 Ill. 218; *Ferrari v. Beaver Hill Coal Co.*, (1909) 54 Ore. 210; or the appellate court may allow the bill of exceptions to be withdrawn for amendment by the trial court,—*Catlin, etc., Land Co. v. Burke*, (1886) 22 Colo. 419; or the appellate court may remand the bill of exceptions for amendment,—*Brennan-Love Co. v. McIntosh*, (1898) 56 Neb. 140; or the appellate court may, on motion, order the parties to add to the copy of the record when the fault is with the copy and not with the original,—*Suchocki v. Calumet Ins. Co.*, (1909) 158 Mich. 62. In *Richardson v. Bohnney*, (1910) 18 Ida. 329, it was said that the trial court had no jurisdiction to allow an amendment until the remand of the case.

An amendment of a bill of exceptions cannot be effected by consent.—*State v. Libby*, (1907) 203 Mo. 596; *Shepard v. Hull*, (1856) 42 Me. 577.

A few cases hold that after the bill of exceptions has been signed and delivered it cannot be amended.—*Bridges v. Kuykendall*, (1881) 58 Miss. 828, citing several cases.

SECTION 5. THE TRANSCRIPT.

WHITNEY v. HARRIS.

Supreme Court of Kansas. 1878.

21 Kansas, 96.

VALENTINE, J.: At the time that this case was instituted in the supreme court, the following statute was in force, to wit: "That in all actions hereafter instituted by petition in error in the supreme court, the plaintiff in error shall attach to and file with the petition in error the original case-made, filed in the court below, or a certified transcript of the record of said court." (Laws of 1877, pages 243, 244.) Prior to the passage of this statute, the following statute was

in force, to wit: "The plaintiff in error shall file with his petition a *transcript of the proceedings*, containing the final judgment or order sought to be reversed, vacated or modified, or the original case-made as hereinafter provided, or a copy thereof." (Code, 546 as amended, Laws of 1870, page 169.) The plaintiff in error in this case has not complied with either of these statutes. She has not filed with her petition in error "the original case-made," "or a copy thereof," nor "a certified transcript of the record of said (district) court," nor "a transcript of the proceedings, containing the final judgment or order sought to be reversed, vacated or modified;" but all that she has filed therewith is only a copy of a mere bill of exceptions, certified to the clerk of the district court of Mitchell county, as follows: "I certify that the foregoing is a correct copy of the bill of exceptions in the above entitled cause now on file in my office." This bill of exceptions does not purport or profess to give the full "record" of the case in the court below, nor does it profess to give all the "proceedings" had in such case. Therefore, how much of the "record" or how much of the "proceedings" is not brought to this court, we cannot tell. And that portion of the "record" or "proceedings" not brought to this court may be very essential. It may be necessary to any correct understanding of the case, and might explain all the supposed errors complained of by the plaintiffs in error. It is true that the bill of exceptions contains many things which ought not to be put into a bill of exceptions: for instance, it purports to contain copies of the pleadings, or, at least, copies of a portion of the pleadings; but, of course, these supposed copies are not properly authenticated. The clerk, who is the custodian of the pleadings, and who is the only person who can properly certify to the correctness of copies thereof, does not certify that these copies are true copies of the original pleadings. At most, he only certifies that they are true copies of *copies* of such of the pleadings as are copied into the bill of exceptions. It is well said, in the case of *Shumaker v. O'Brien*, 19 Kans. 476, 477, that "the object of" a bill of exceptions "is generally to bring upon the record for review a decision of the court upon a matter of law which the record would not otherwise show, in which case it must be reduced to writing, allowed, signed and filed at the term the decision complained of is made. Nor is it correct prac-

tice to set out the pleadings in the action in the bill of exceptions; neither should the judgment nor orders of the court be embraced in it. They tend to burden that record and increase the expense of the transcript without any benefit. The bill of exceptions is only a portion of the record," etc. In order for us to review the proceeding of the court below, as we have not received a "case-made" we should have "a certified transcript of the record"—a "transcript of the proceedings." But, instead of that, we have a transcript of only a portion of the record. If it be said that this portion of the record shows what the other portion is, it may be answered, that we cannot know that such is the case. There may be much of the proceedings that this bill of exceptions does not contain. Besides, we are entitled to copies of the *original* proceedings, to copies of the original pleadings, process, motions, orders, journal entries, and judgment; but we have not obtained them. We have only copies of supposed copies of a portion of these things. A portion of these things is erroneously copied into a bill of exceptions, and then we get only copies of these copies. But how are we to know that these original pleadings and proceedings are correctly copied into the bill of exceptions? The party drawing the bill copies these things into the bill of exceptions himself. The other side does not necessarily see the bill until after it is allowed and signed. The judge signing and allowing the bill does not have the custody of the records, and cannot conveniently know what they contain; and what is already in the record should not again go into the record by placing it in a bill of exceptions. Parties have no right to duplicate or triplicate the record by placing things already of record in the bill of exceptions, and thereby needlessly incur the record, and increase the costs and expenses of the case. Besides, the judge does not have authority to certify to the correctness of copies of the record, or copies of any of the proceedings which are already of record. It is the duty of the judge only to see that the *original record* is made up properly, and that it speaks the truth; and the clerk then certifies to the correctness of copies thereof, or to copies or portions thereof. But the clerk does not, and has not in this case, certified to the correctness of the copies of the pleadings copied into this bill of exceptions. That is, while the clerk certifies that the copy of the bill of exceptions brought to

this court is a correct copy of the original bill of exceptions, yet he does not certify that the original pleadings or proceedings, or any of them, were correctly copied into the original bill of exceptions, and he does not certify that the copies of pleadings and proceedings found in the copy of the bill of exceptions brought to this court are true copies of the original pleadings and proceedings.

We think it will be seen from the foregoing, that this court could not reverse a judgment upon a mere bill of exceptions. The judgment of the court below, we think, however, was right, and if any error did intervene, it was mere technical error.

Said judgment will therefore be *affirmed*.⁹⁶

⁹⁶ A complete precedent for a record in a criminal case may be found in 4 Bl. Comm. Appendix, reprinted in Bishop's Directions and Forms, § 1070.

In some states the original record, rather than a transcript of the same, is sent up to the appellate court.—*State v. Paxton*, (1905) 75 Neb. 214 (original bill of exceptions and copy of the record proper); *Becker v. Becker*, (1899) 24 Nev. 476 (optional to send up transcript or original record); *Superior Consol. Land Co. v. City of Superior*, (1899) 104 Wis. 463; *Michigan, C. L.* 1915, sec. 13759 (in chancery appeals).

In case the transcript of the record is incomplete, a diminution of the record may be suggested and a *certiorari* asked and issued to supply the defect. *Flannery v. Kansas City, St. J. & C. B. Ry. Co.*, (1886) 23 Mo. App. 120; *Thomas v. O'Brien Lumber Co.*, (1900) 185 Ill. 374; *O'Kane v. West End Dry Goods Store*, (1898) 79 Ill. App. 191; *Price v. Huddleston*, (1906) 167 Ind. 536; *Atkinson v. People's Nat. Bank*, (1893) 85 Me. 368.

Abstracts. In a number of states the full transcript of the record is not submitted to the reviewing court, but the parties prepare so-called abstracts of the record or transcript, and counter abstracts, and the case is reviewed upon these abstracts, and only in case of controversy as to the actual record will it be looked into.—*O'Neal v. Simonton*, (1895) 111 Ala. 176; *St. L. & S. F. RR. Co. v. Newman*, (1912) 105 Ark. 63; *Files v. Tebbs*, (1911) 101 Ark. 207; *Haley v. Elliott*, (1891) 16 Colo. 159; *Lake v. Lower*, (1889) 30 Ill. App. 500; *Johnson v. Hartman*, (1905) 119 Ill. App. 206; *Williams v. Nottingham*, (1867) 27 Ind. 461; *Allen v. Lewis*, (1896) 38 Fla. 115; *Western Storage & Warehouse Co. v. Glasner*, (1899) 150 Mo. 426; *Keen v. Keen*, (1907) 49 Ore. 362; *Ollar-Robinson Co. v. O'Neill*, (1914) 80 Wash. 1; *Atchison, T. & S. F. Ry. Co. v. Conlon*, (1908) 77 Kan. 324.

"The commingling of record entries with the bill of exceptions so that matter of the one class could not be differentiated from matter of the other, led this court to affirm a sentence of ten years in the penitentiary on a conviction of murder in the second degree."—*Lamm, P. J.*, in *Kolok as v. Railroad*, (1909) 223 Mo. 455, 461.

SECTION 6. BRIEFS.

CITY OF LINCOLN v. SUN VAPOR STREET-LIGHT CO.

United States Circuit Court of Appeals, Eighth Circuit. 1894.

59 Federal Reporter, 756; 8 Circuit Court of Appeals, 253.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. The city of Lincoln, Neb., the plaintiff in error, insists that the circuit court for the district of Nebraska erred in rendering judgment against it for damages for the breach of a contract between that city and the Sun Vapor Street-Light Company of Canton, Ohio, the defendant in error. The contract was for lighting the city of Lincoln. The case was tried to a jury, and the judgment is upon the verdict. In this court it was not argued orally, but was submitted on briefs. When the writ of error was sued out, counsel for the city assigned 21 errors.

The twenty-fourth rule of this court provides that the brief of the plaintiff in error in this court "shall contain, in order here stated:

"(1) A concise abstract or statement of the case, presenting succinctly the questions involved, and the manner in which they are raised.

"(2) A specification of the errors relied upon which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specifications shall state the exception to the report and the action of the court upon it.

"(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a ref-

erence to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length. * * *

"(4) When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified." 47 Fed. xi.

The entire rule is a copy of the twenty-first rule of the supreme court. 3 Sup. Ct. xii. Only the portion of it material in this case is quoted here. In our opinion, the strict and careful observance of this rule directs the attention of counsel and the court to the merits of the case presented, to the vital questions at issue, and excludes from their consideration frivolous and immaterial questions. If the rule is observed, the arguments of counsel and the consideration of the court are concentrated upon the important questions in controversy, instead of being scattered and dissipated by the argument and consideration of numerous side issues, that, if at all material, are generally governed by the decision of the main questions, and in this way a just result is more speedily and certainly attained. It often occurs that, through abundance of caution, counsel assign many errors, when they obtain their writ of error, which they find it entirely unnecessary to refer to, and themselves abandon upon reflection, and after an examination of the authorities upon which they intend to rely in the presentation of their case to this court. Every gentleman of the bar understands and appreciates the necessity of concentrating and confining his own attention and investigation, as well as the attention and consideration of the court, to the crucial questions in his case. This rule enables him to accomplish this result after he has carefully examined the authorities and considered the reasons which support his position, and when he is best prepared to select the errors he deems of importance. The rule should be carefully observed.

The brief of counsel for the plaintiff in error contains 23 printed pages. The record contains pleadings, evidence, instructions given and instructions refused, the verdict, judgment, assignment of errors, and writ of error, and covers

62 printed pages. No specification of the errors relied on which sets out separately or particularly each error asserted and intended to be urged in a separate subdivision of the brief is found. After the statement of the case, and before the argument, the following statement appears, which is the nearest approach to such a specification found in this brief:

"In discussing the law of this case we desire to urge the following points, on each of which we think the record shows that reversible error was committed in the trial court:

"(1) That under the law of the state governing the city it was necessary for the city, by its proper officers, to have first passed an ordinance authorizing such a contract before the contract could have been entered into by the city officers, and there could be no ratification of a contract made by the officers of a city without authority. The contract being void, no ratification was possible.

"(2) That before any valid and binding contract can be made by city officers, it is necessary that an appropriation shall first have been made to meet the expenses incurred, or to be incurred, under such contract.

"(3) That, in order to maintain a suit for unliquidated damages against the city, the plaintiff must have first filed with the city clerk a statement of his claim, giving his full name, the time, place, nature, circumstance, and cause of injury or damages complained of, and that such statement must have been filed within three months of the time when his cause of action accrued.

"(4) That the verdict is contrary to, and in direct violation of the instructions of the court as given to the jury."

Whether the reversible error here complained of was in the admission or rejection of evidence, or in the charge of the court, does not appear from this specification, nor does the substance of any evidence admitted or rejected, or any portion of the charge of the court, appear from it, nor is there any reference to the pages of the record where any of this may be found. Argument follows the statement we have quoted. But there is only one reference in the entire brief to any page of the record in support of any of the assertions or points contained in it, and that is to page 161, while the entire record contains but 62 pages. The rule declares that "errors not specified according to this rule will be disregarded;" and it is the intention of this court to en-

force this rule. This is the first case in which we have so sharply called attention to it, and, that no injustice may be done, we have carefully read this record, considered the four points urged in the statement in this brief, and are satisfied that neither of them can be sustained. * * *

* * * * *

The judgment of the circuit court is accordingly *affirmed, with costs.*⁹⁷

⁹⁷ Parties will not be permitted to submit cases without briefs by stipulation,—Disse v. Frank, (1873) 52 Mo. 551; and the penalty for failure of an appellant to file a brief will usually be the affirmance of the case or dismissal of the appeal,—Ryan v. Koch, (1872) 17 Wall. (U. S.) 19; Smith v. Stilwell, (1905) 9 Ariz. 226; Drexler v. Tobacco Co., (1889) 78 Cal. 624; Beams v. Crawford, (1892) 86 Ia. 753; Clarke v. Express Co., (1894) 33 Fla. 617; Busch v. Fisher, (1891) 89 Mich. 192; Killhomic v. Nuss, (1900) 24 Mont. 292; Hazard v. Wood-working Co., (1911) 78 N. J. Eq. 568; Chicago, R. I. & P. Ry. Co. v. Board of Commissioners, (1914) 42 Okl. 618; Steiger v. Fronhofer, (1903) 43 Ore. 178; Dakota Nat. Bank v. Klienschmidt, (1913) 31 S. D. 35; Saltzstein v. Nahmens, (1913) 153 Wis. 272.

CHAPTER IX.

EFFECT OF TRANSFER TO REVIEWING COURT.

SECTION 1. EFFECT ON JURISDICTION OF TRIAL COURT.

CRAWFORD v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO.

Supreme Court of Missouri. 1902.

171 Missouri, 68.

GANTT, J. * * *

The facts of record are that on December 18, 1900, Thomas Crawford filed his petition in the circuit court of Buchanan county, alleging that by the negligence of defendant he received personal injuries and was damaged in the sum of \$2,000. At the January term, 1901, defendant filed its answer, and the said Crawford his reply. The cause came on for trial at the January term, 1901, and resulted in a verdict for said plaintiff, Crawford, for \$2,000; and judgment was rendered accordingly on the 12th day of February, 1901. Afterwards, on the 15th of February, 1901, the defendant moved the court for a new trial. * * * This motion was sustained, and a new trial awarded defendant. * * *

To the action of the court in granting a new trial the said plaintiff, Crawford, then and there duly excepted, and then and there, on March 6, 1901, filed his affidavit for appeal from the order granting a new trial, and his appeal was allowed, and a transcript of the judgment and the order allowing the appeal was duly certified to this court by the clerk of the circuit court on the 15th of March, 1901; and the docket fee having been paid March 23, 1901, the said transcript was filed in the office of the clerk of this court. On March 30, 1901, said plaintiff, Crawford, died; and on April

(1109).

25, 1901, his death was suggested on the record of this court, and no further step was taken at the April term of this court in the cause. After the death of Thomas Crawford, Lewis C. Gabbert was appointed administrator of his estate in the probate court of Buchanan county, and qualified as such; and thereafter on May 4, 1901, and during the same term at which the judgment had been rendered in favor of said Crawford, and the motion for new trial sustained, the said Lewis C. Gabbert entered his appearance to said action in the circuit court of Buchanan county, and the defendant herein entered its appearance, and said Gabbert was made party plaintiff; and thereupon, by the agreement of both parties, said administrator was granted leave to file his bill of exceptions during the May term, 1901, of said Buchanan circuit court. And afterwards, and during said May term, said administrator filed his bill of exceptions, which was signed by the judge of said court, and made a part of the record of this cause; and thereupon, on October 8, 1901, said administrator moved this court as aforesaid to entitle this cause as "*Lewis C. Gabbert, Adm'r of Thos. Crawford, Dec'd, Appellant, vs. The Chicago, Rock Island & Pacific Railroad Company, Respondent,*" and his right to have the same done presents the question for decision at this time.

The objection by the defendant is that the order of the circuit court purporting to revive the suit in the name of Gabbert, the administrator, was void, and said court was without jurisdiction to do so, because by the allowance of the appeal that court lost jurisdiction of said case, and had no power to permit such revivor. In the determination of this controversy, we must call to our aid certain fundamental principles. Thus, it is settled law in this state that during the whole of the term in which any judicial act is done the proceedings are considered to continue *in fieri*, and even after a judgment has been rendered the record remains in the breast of the judges of the court, and is therefore subject to amendment or alteration as they may direct, but they cannot, after the lapse of the term, further than by *nunc pro tunc* entries, make the record speak the exact truth of what did occur.

And it is equally well determined that this power of the court over its own records, and its right to amend, correct,

and complete the same, is not affected by the fact that an appeal has been taken from its judgment.

* * * * *

Proceeding a step further: By statute law, since the admission of this state into the Union, whenever, in the progress of any trial in any civil suit pending in any court of record, either party shall except to the opinion of the court, and shall write his exceptions, and pray the court to allow and sign the same, the person composing the court, if such bill be true, shall sign the same, and every bill of exceptions so signed by the judge, and filed in court or with the clerk by order of the court, shall form a part of the record of the cause in which it is filed. * * *

Coming now to the record before us, it appears that the record was not complete when the original plaintiff, Thomas Crawford, took his appeal. A trial had occurred, in which he had recovered judgment, and a new trial had been granted, to which action he had excepted. He had the right to appeal from that order granting a new trial by virtue of the amendment of 1891 to section 2246, Rev. St. 1889. See Laws 1891, p. 70. And in order to present his appeal in an intelligible form to this court, he was entitled to have his exceptions taken in the circuit court made a part of the record of that court; and it was a part of the inherent jurisdiction of that court to complete the full record of the trial in that court, and cause its rulings therein to be embodied in a bill of exceptions approved and signed by the judge thereof, and filed in said court. This right it had irrespective of any appeal that might be taken from its said order, or any writ of error that might issue to it from this court, without in any manner infringing upon the jurisdiction of this court to determine said case on appeal. In so doing it would merely be completing its own record. And it had the power to do this at any time during the term, or could by its order of record extend the time beyond the term. * * * It was the practice of this court to refuse to affirm a judgment for failure to file the transcript where the term of the circuit court extended beyond the time allowed to file the transcript in this court, on the theory that the circuit court might modify or set aside its judgment at any time before the final adjournment of the term at which it was rendered. What, then, results? If the original plaintiff, Crawford, had lived until the

end of the January term, 1901, no doubt whatever could exist that he could have filed his bill of exceptions at any time before its adjournment. He had perfected his appeal, as we now hold he should have done, by the short method, without prejudicing his right to have his exceptions incorporated into the record, and the circuit court still retained jurisdiction for that purpose. This being true, did his death forever cut off his right? Could not his administrator have those exceptions made part of the record? We think he could, by having the cause revived in his name during that term of court. This we say, assuming that it was a cause of action which survived to the personal representative, which we will discuss later on. The court made the order substituting the plaintiff without a *scire facias* to defendant to show cause against it, and the defendant, as the record shows, voluntarily entered its appearance, and agreed with said administrator that he should have until the May term to file the bill of exceptions. When the defendant thus entered its appearance and made this stipulation, the cause stood revived without further process. This has been the rule for many years in this state. * * *

We have, then, a court of record, with the unquestioned right to correct, amend and perfect its record, with full power to set aside its judgment during the term, with a coincident right in the plaintiff to have his bill of exceptions filed and the record completed; and, this being so, when both parties consent, we cannot see why this revivor, had in this way, is not an incident of that court's jurisdiction to perfect its own record; and, the cause having been revived once, it is not necessary to do a useless thing, and revive it again in this court. Holding, then, as we do, that, in reviving the cause to enable the administrator to file the bill of exceptions taken in the lifetime of his intestate, the circuit court, during the term at which the judgment was taken, was proceeding within its own jurisdiction, and in no manner infringing upon any prerogative of this court, it is plain that this court was without jurisdiction to complete said record, or allow for that court a bill of exceptions to its rulings. * * *

But we are here confronted with a long list of cases to the effect that after the appeal was taken the cause was pending in this court, and the circuit court could take no step. We have seen that this in no sense interferes with the power

of the circuit court over its own records to amend and perfect the same; but, as to the statement that after appeal taken the cause is pending in the appellate court, it will be found, in every one of the cases cited, this was said of the effect of the appeal after the close of the term of the circuit court; and it will be found that none of these cases denies the power of the circuit court during the term to set aside the order granting the appeal itself, or denies that during the term the circuit court had plenary jurisdiction of the case, and until the term ended it did not lose the right to correct or set aside its own judgments. * * *

Accordingly we hold that the mere taking of the appeal from the order granting a new trial, and filing the short transcript in this court, did not deprive the circuit court of its original jurisdiction to make any and all proper orders to perfect its own record during that term; and, as an incident of that jurisdiction, it had the power to permit the cause to be revived in order to let the administrator file the bill of exceptions already taken, when the administrator had appeared and asked to be substituted, and defendant appeared and consented to the order of May 4, 1901,—all during the same term. * * *

BURGESS, C. J., and SHERWOOD, ROBINSON, BRACE, and VALLIANT, JJ., concur. MARSHALL, J., dissents.⁹⁸

⁹⁸ "Did a writ of error without a *supersedeas* divest the court below of power to proceed judicially in the cause covered by such writ of error, it would not follow that a party might not, through the sheriff, proceed with ministerial acts to realize the money due upon a *fi. fa.*"—*Cummings v. Clegg*, (1889) 82 Ga. 763.

CITY OF PASADENA v. SUPERIOR COURT.

Supreme Court of California. 1910.

157 California, 781.

LORIGAN, J. This is an application for a writ of prohibition. On March 25, 1908, the Sunset Telephone & Telegraph Company, in conjunction with the Pacific Telephone & Tele-

graph Company, brought an action in the superior court of Los Angeles county against the city of Pasadena, and certain of its officers, to enjoin and restrain said city from enforcing one of its municipal ordinances relative to the use of streets thereof by telegraph and telephone companies requiring franchises and fixing charges to be paid for such use, and forbidding the maintenance of certain telegraph and telephone lines, and declaring them nuisances, and to restrain and enjoin the city from destroying or removing (as it was alleged the city threatened and intended to do under said ordinance) the poles, wires, and appliances of the plaintiffs erected and used in the streets, alleys, and public places of said city.

A temporary restraining order was issued on the filing of the complaint and thereafter, on November 12, 1908, upon a hearing it was ordered that an injunction *pendente lite* issue. A trial of the cause being had, the court, on May 27, 1909, entered an order directing a judgment for the city for costs and "that the temporary injunction theretofore issued be forthwith dissolved," and immediately thereafter the city, through its officers, without notice to plaintiffs, commenced the destruction of the companies' telephone system in Pasadena, by cutting 12 of their cables, a total of 1,350 pairs of wires, disconnecting 2,400 subscribers and 3 exchanges, besides 4 toll lines. The next day a conference was had between the attorneys for the respective parties. * * *

An agreement could not be reached and plaintiff moved the court to restore and continue in force such preliminary injunction pending the final determination of the cause which, on June 28, 1909, the court granted, being of opinion, as declared in its order, that the *status quo* between the parties should be maintained pending the final determination of the action. This order was made by the court on certain conditions, namely, that plaintiff should within 10 days perfect their appeal to the Supreme Court from the judgment in the action. * * *

On July 7, 1909, the defendant city moved the court to vacate said order of June 28, 1909, on several grounds, to wit, that no preliminary injunction had in fact ever been issued or been in effect in said action, and, further, that the court was without power or authority to make said order continuing in force the injunction until the final determina-

tion of the action. This motion was denied. * * *

The main question in this controversy is whether a superior court in an action brought to obtain a perpetual injunction can, by an order made concurrently with the granting of a final judgment in the action denying the injunction, continue in force a preliminary injunction, or make an original injunctive order, restraining the successful party, pending an appeal by his adversary against whom the judgment, denying a right to any injunction whatever, runs.

* * * * *

We think, on an examination of the authorities, that it is hardly open to serious question but that the superior court has the power in its final judgment to continue in force a preliminary injunction so as to maintain the *status quo* of the subject-matter of litigation pending an appeal, notwithstanding that the right to a perpetual injunction, which was the primary object of the action, may have been denied by the judgment itself. By article 6, § 5, of the Constitution of this state, the superior court is vested with "original jurisdiction in all cases in equity." A similar constitutional provision as to the jurisdiction of the district courts (predecessors to the present superior courts) is found in the old Constitution of 1849 as amended in 1862 (article 6, § 6), and as to such a provision it is said in *People v. Davidson*, 30 Cal. 379, 390, and likewise in *Rosenberg v. Frank*, 58 Cal. 387, 400, that "the equity jurisdiction with which the district courts are invested under the Constitution is that administered in the high courts of chancery in England." To this same effect is *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317.

It being determined, therefore, that the superior court has equity powers equal to those exercised by the chancery courts in England, it only remains to ascertain whether such courts possessed the power to maintain the *status quo* of the subject of litigation by continuing an injunction pending an appeal. While this is the first time that this exact question has been presented to this court for determination, we have no doubt that the power existed in the chancery courts in England, and that under the authorities from our sister states it is a power with which courts of general equity jurisdiction in this country are invested, certainly at least in the absence of any limitation by constitutional provision or legislative enactment. In some of the authorities, to be cited or quoted from, some

discussion is had as to the power of the appellate court, on application therefor, to grant an injunction pending the appeal, as well as the right of the lower court under its original equitable power to do so. We are not now concerned with what may be the power of the appellate court in that respect, but are dealing solely with the right of the trial court in an equitable action to do so in its final decree, and limit ourselves to a consideration of this sole proposition.⁹⁹

Now as to the power of the English courts of chancery to preserve the subject-matter of litigation *in statu quo*, pending the final determination of a controversy, there can be no question. The existence of this power in such courts, and their right to exercise it in an equity suit, is thus generally declared: "Where an action has been altogether dismissed by a divisional court, the Court of Appeals will in a proper case grant an injunction to restrain any of the parties from parting with the property till the hearing of the appeal. If an appeal is dismissed by the court, the jurisdiction of the court is gone, and no order can be made to bind the parties pending an appeal to the House of Lords. Where a plaintiff whose appeal is about to be dismissed intends to appeal to the House of Lords he should ask that the decree dismissing the bill should be so framed as to keep alive the jurisdiction of the court. But the court has power on a proper case being made out, to restrain by injunction all dealings with a fund pending appeal to the House of Lords, although the court has decided against the title of the plaintiff and dismissed the action. The jurisdiction, however, will be exercised with care and so as not to encourage any one to present appeals for the purpose of delay." *Kerr on Injunctions* (3d Ed.) pp. 29, 30.

In *Hovey v. McDonald*, 109 U. S. 150, 160, 3 Sup. Ct. 136, 142 (27 L. Ed. 888), this power in the English courts of chancery is recognized, where the court says: "In England, until the year 1772, an appeal from a decree or order in chancery suspended all proceedings; but since that time a contrary rule has prevailed there. The subject was reviewed by the House of Lords in 1807, and an order was made establishing the right of the chancellor to determine whether and how far an appeal should be suspensive of proceedings, subject to the order of the House on the same subject. See

Palmer's Pract. H. L. 9, 10; 15 Vesey, 184; [*Hart & Hoyt v. Mayor of Albany*] 3 Paige, 383, 385."

And in that case, the court, referring to the *Slaughter House Cases*, 10 Wall. 273, 19 L. Ed. 915, and still considering the power of the chancery courts of England to maintain by their order the *status quo* of the subject-matter of litigation pending appeal, says as to what was, and was not, decided by those cases: "It was decided that neither a decree for an injunction nor a decree dissolving an injunction was suspended in its effect by the writ of error, though all the requirements for a *supersedeas* were complied with. It was not decided that the court below had no power, if the purposes of justice required it, to order a continuance of the *status quo* until a decision should be made by the appellate court, or until that court should order the contrary. This power undoubtedly exists, and should always be exercised, when any irremediable injury may result from the effect of the decree as rendered; but it is a discretionary power, and its exercise or nonexercise is not an appealable matter."

* * * * *

In our sister states, where the question has arisen as to the power of courts of general equity jurisdiction to make orders maintaining the *status quo* of the subject-matter till final determination on appeal, the existence of such power has been confirmed by the appellate tribunals. *Hart v. Mayor, etc., of Albany*, 3 Paige (N. Y.) 381; *Messonnier v. Kauman*, 3 Johns. Ch. (N. Y.) 66; *Disbro v. Disbro*, 37 How. Prac. (N. Y.) 147; *Jewett v. Dringer*, 29 N. J. Eq. 199; *State ex rel. v. Dearing*, 180 Mo. 53, 79 S. W. 454.

* * * * *

* * * It is nevertheless contended by counsel for petitioner that such general equity jurisdiction is subject to legislative control as far as provisional remedies are concerned, as such remedies are mere incidents to the jurisdiction of the courts, and are no part of its essential jurisdiction.

On this assumption, and in connection with it, it is urged that under the Code provisions of this state the superior courts, notwithstanding they are courts of general equity jurisdiction, are without power to issue injunctions, either permanent or provisional, except in such cases as are provided by the Code, and which it is insisted do not embrace power to continue in force pending an appeal, a temporary

injunction theretofore issued. Conceding, without deciding, all that petitioner contends for, still, if the Legislature has not by some provision curtailed the power which, as courts of general equity jurisdiction invested with all the power exercised by courts of chancery in England, our superior courts possess, this power remains and may be exercised. If it has been shorn of power in this respect by legislation, it must be found in the code provisions as to the matter of injunctions, and a careful examination of these provisions, both in the Civil Code and Code of Civil Procedure, discloses nothing whereby the exercise of power in question has been curtailed.

* * * * *

Did we deem the possession of this power in the court doubtful by virtue of the code provisions to which petitioner refers, we would nevertheless be constrained to hold that the power existed as necessary to the ends of justice, because a decree denying an injunction or dissolving a preliminary injunction is not suspended pending the appeal therefrom, and it is a debatable question whether there is any power in our appellate courts, by original, injunctive order, to maintain the *status quo* of the litigated subject-matter pending appeal. Hence, unless the superior court possesses the power by provisional injunction to maintain the *status quo* of the subject-matter of litigation, there is no remedy afforded plaintiffs whereby their property could be saved from destruction while the question of the right of the city to require its removal from its streets was, in good faith, being litigated.

The petition for a writ is denied.

⁹⁹ It has frequently been held that the power to preserve the *status quo* during an appeal by appropriate orders also resides in the appellate court.—*Doughty v. Somerville & Easton RR. Co.*, (1848) 7 N. J. Eq. 629 (containing a very full and able discussion); *Merrimack River Sav. Bank v. Clay Center*, (1911) 219 U. S. 527; *Campbell Lumber Co. v. Logging Co.*, (1912) 68 Wash. 431; *Farmers Nat. Bank v. Backus*, (1895) 63 Minn. 115.

¹ Even after the appeal has been taken, the trial court may make any injunctive order necessary to preserve the *status quo* pending the final determination.—*Ajax Gold Min. Co. v. Hilkey*, (1902) 30 Colo. 115. See also *Herring v. Pugh*, (1900) 146 N. C. 852. So the trial court may place property in a receiver's hands in order to preserve it during the pendency of an appeal.—*Morbeck v. Bradford-Kennedy Co.*, (1910) 18 Ida. 458.

See extensive note in 67 Am. St. Rep. 714-722, on the implied powers of courts to supersede orders or judgments.

STATE EX REL. RIEFLING v. SALE.

St. Louis Court of Appeals. 1910.

153 Missouri Appeal, 273.

[Hemm and Juede were partners engaged in the retail drug business. Riefling sued them for damages for negligence in filling a physicians prescription. While that suit was pending Hemm brought an action in the circuit court against Juede to dissolve the partnership, and dissolution was decreed and a receiver appointed to dispose of the assets and distribute the proceeds. Thereafter Juede was adjudged a bankrupt and his trustee moved in the dissolution suit for an order directing the receiver to pay him Juede's share of the partnership proceeds, which motion was granted and Hemm appealed. Riefling subsequently won his damage suit and filed an intervening petition in the dissolution suit praying for an order that the receiver pay his judgment out of the partnership assets in his hands. The court held that because of Hemm's appeal it had no jurisdiction to pass on the intervention petition until the cause was remanded. Riefling thereupon brought this action in mandamus to compel the circuit court to act upon his petition.]

CAULFIELD, J. The circuit court having refused to entertain relator's intervening petition on the ground of an alleged want of jurisdiction, it is the duty of this court to determine whether the circuit court has such jurisdiction.

It is undoubtedly the rule that an appeal divests the jurisdiction of the trial court and places it in the appellate court. * * * And in stating the rule our courts have used the broadest language. Thus it was said at an early day, "when an appeal has once been granted, the power over the subject is *functus officio*, and cannot be exercised a second time." *Brill v. Meek*, 20 Mo. 358. "When an appeal is perfected, the cause is pending in the appellate court, and not in the trial court," and, unless the order allowing the appeal is vacated during the term, the trial court "can make no other or further order." *Oberkoetter v. Luebbering*, 4 Mo. App. 481. In *State ex rel. v. Gates*, 143 Mo. 63, 69, 44 S. W. 739, our Supreme Court said that the effect of the order allowing the appeal "is to transfer the jurisdiction of *the case* from the

circuit court to the appellate court. * * * In other words, the effect of the order granting the appeal is to suspend all further exercise of judicial functions in the case by the court from which the appeal is taken, and to transfer the same to the appellate court, where further judicial proceeding is continued until the case is disposed of. The bond does not operate at all upon the judicial functions of the court; they are suspended by the appeal, bond or no bond."

But the mere language of a decision is not to be looked to to discover the extent of the rule announced. It is the conclusion only, and not the reasoning by which it was reached, which is the decision of the court, and constitutes our guide. *Koerner v. St. Louis Car Co.*, 209 Mo. 141, 156, 107 S. W. 481, 17 L. R. A. (N. S.) 292. The decisions of our courts have not been consistent with the literal meaning of the broad language employed as aforesaid. It has been held that the appeal does not affect the power of the trial court over its own records; or its right to amend, collect and complete them; or its power during the term to set aside the order allowing the appeal; or to set aside the judgment appealed from; or to sign and allow a bill of exceptions; or to revive the cause in the name of an administrator; or, there being no *supersedeas*, to execute the judgment appealed from. In *Crawford v. C., R. I. & P. Ry. Co.*, 171 Mo. 68, 66 S. W. 350, our Supreme Court said that the statement "after appeal is taken, the cause is pending in the appellate court so as to deprive the circuit court of further jurisdiction over the cause," applies only to the effect of the appeal after the close of the term of the trial court at which the appeal was taken.
* * *

There can be no reason for the rule under consideration other than that confusion might arise if the trial court and the appellate court were dealing with the same subject at the same time. Thus our Supreme Court said, in holding that the trial court could not proceed to try the case while an appeal was pending from its action in granting a new trial: "The trial of the case going on in the lower court and the question of the right of such court to try the case, pending in the appellate court undetermined, at the same time, would be a strange condition for any case to fall into." *State ex rel. v. Gates, supra*. We have examined the cases declaring the rule under consideration with a view to ascertaining the

nature of the judgment or order appealed from, and we discover that in each case it disposes of the entire case, or is of such a nature that action by the appellate court might be interfered with by further proceedings, or the proceeding attempted to be had, by the trial court, pending appeal; the inhibited exercise of jurisdiction in some manner involves the order or judgment appealed from. Our attention has not been called to any case, applying the rule to a state of facts even remotely resembling that presented by the case at bar. It would seem to be the true rule that, whatever the judgment below legitimately covers, the appeal embraces, and the jurisdiction of the lower court over all matters so covered and embraced is suspended pending the appeal; and, that matters independent of and distinct from the questions involved in the appeal are not taken from the jurisdiction of the trial court. Elliott, Appellate Procedure, § 545.

The necessity for such distinction becomes apparent in extensive receivership proceedings where, owing to the vastness of the business, the receiver may have taken hold of many pieces or lots of personal property having, respectively, many owners. It is customary for such owners to claim their property by intervening petition filed in the receivership proceedings. These claims may be very numerous, and for property the value of which is insignificant when compared to the magnitude of the property and interests involved in the receivership proceedings. It would seem absurd to hold that every time an appeal is taken from an order sustaining or rejecting one of these numerous and comparatively insignificant claims, the jurisdiction of the court over the entire receivership proceeding, its power to make orders and to pass upon all other claims, would be suspended. Yet to hold that every appeal in a cause suspends the trial court's jurisdiction must lead to that result. We do not believe that the decisions of our Supreme Court go that far.

The intervening petition which respondent refused to entertain had no connection with the matter on appeal. It involved a different right which could not be affected by the action of the appellate court upon said appeal. The appeal involved the right of the trustee in bankruptcy to have Juede's share of the partnership assets as against Francis Hemm. Relator was not concerned with that except in an

abstract sense. His right, if it existed at all, was against all of them. The determination of their rights between themselves could not affect his alleged superior claim against all of them. It is true that his petition prayed that the order appealed from should be set aside, and the jurisdiction of the trial court as to that order was suspended by the appeal therefrom, but the proper remedy, if there was any, was represented by the prayer that the receiver be directed to pay relator's judgment out of the assets in his hands, and the jurisdiction to grant that prayer was unaffected by the appeal. Because relator included in his petition along with proper relief prayed for, a prayer for action which the court was without jurisdiction to take, did not deprive the court of jurisdiction to grant such proper relief. The prayer for unauthorized action may be ignored.

* * * * *

Being of the opinion the trial court had jurisdiction to take cognizance of, consider, determine, and decide on its merits the intervening petition of relator, notwithstanding the pendency of the appeal from its action upon the petition of the trustee, a peremptory writ will be awarded.

* *Accord*: Estate of Heaton, (1904) 142 Cal. 116; Mingo County Bank v. Coal & Coke Co., (1910) 67 W. Va. 9; Herbert v. Wagg, (1911) 27 Okl. 674. So, where a case has been appealed only as to the rights of certain parties, it may proceed in the trial court as to the separate rights of others.—Hayes v. Frey, (1882) 54 Wis. 503; Glass v. Greathouse, (1851) 20 Ohio, 503.

"In all matters pertaining to the appeal itself, and to the proper hearing thereby, this court has jurisdiction, and also in regard to all applications which by statute may be made to this court after the taking of an appeal, but as to all other applications the case is regarded as still pending in the court of original jurisdiction."—People ex rel. v. Board of Education, (1894) 141 N. Y. 86.

FIRST NATIONAL BANK v. DUTCHER.

*Supreme Court of Iowa. 1905.**128 Iowa, 413.*WEAVER, J. * * *
* * * * *

5. When the pleadings were finally settled, and before trial was begun, the appellant moved to have the cause set down for trial as an equitable action. This motion was overruled, and the appellant appealed from said order and filed a *supersedeas* bond. This it is said deprived the court of jurisdiction to proceed with the trial to a jury, and the judgment rendered upon the verdict is therefore void. The order appealed from was self-executing, requiring no writ or process of any kind to carry it into effect. There was nothing to supersede by the giving of a bond, and the filing of such an instrument could have no effect to deprive the court of jurisdiction to proceed with the trial. See second paragraph of the opinion in *Allen v. Church*, 101 Iowa, 123, 70 N. W. 127. To hold otherwise, and say that by appealing from an interlocutory ruling a party may deprive the trial court of jurisdiction to take any farther step in the case until in the slow course of appellate procedure it is remanded, only to begin another round through the appellate tribunal from the next adverse ruling, would be to deprive courts of the power to administer substantial justice and prolong litigation until *Jarndyce v. Jarndyce* would cease to be any exaggeration of the law's delays. Of course, the party who proceeds with a case after his adversary has taken an interlocutory appeal assumes the risk of the effect which an adverse decision by the appellate court may have upon his rights; but that risk is often preferable to waiting until time and change have deprived the main issue of significance and value. There is little to choose between indefinite delay and absolute denial of right. Owing to variance in the terms of the practice acts in the several states, we do not derive much aid from decided cases in determining to what extent an appeal from an interlocutory order affects the jurisdiction of the trial court. But, as affording more or less direct support to the conclusion we have announced, see *People v. Whitney*, 47 Cal.

588; *Ford v. David*, 3 Abb. Prac. 385; *Fisk v. Railroad*, 41 How. Prac. 365; *Bramley v. Tyree*, 69 Tenn. 531; *Barrow v. Rhinehandler*, 3 Johns. Ch. 120; *Gorham v. Farson*, 18 Ill. App. 520; *State v. Judge*, 17 La. 511; *Forbes v. Tuckerman*, 115 Mass. 115; *Barker v. Wing*, 58 Barb. 73; *Henry v. Henry*, 4 Dem. Sur. (N. Y.) 253; *Sheaffer's Appeal*, 100 Pa. 379; *Barton v. Long*, 45 N. J. Eq. 161, 16 Atl. 683; *Insurance Co. v. Lemar*, 10 Paige, 505.

It should be said in this connection that, in any case where an interlocutory appeal is taken from some ruling not involving the merits of the controversy and not subject to *superseas* under the statute, the trial court doubtless has the inherent power to order a stay of proceedings pending the disposition of the appeal, either upon its own motion or upon application by a party. No such order was asked in this case. The only question raised is one of jurisdiction. * * *

The judgment of the district court is *affirmed*.³

³ After an interlocutory order appointing a receiver has been made and appealed from, the rest of the case still remains pending in the lower court.—*Guynn v. Newman*, (1909) 174 Ind. 161; *Cuyler v. Atl. etc., RR. Co.*, (1904) 132 Fed. 568; *Wabash RR. Co. v. Dykeman*, (1892) 133 Ind. 56.

KNOWLES v. THOMPSON.

Supreme Court of California. 1901.

133 California, 245.

VAN DYKE, J. Mandamus to compel the respondent, clerk of the county of San Mateo, to issue an execution in a case in which the petitioner is plaintiff, and the Crocker Estate Company, a corporation, and Ernest A. Leigh, are defendants. The petition shows that on the trial of said cause, which was an action of forcible entry and detainer, a verdict was rendered in favor of the plaintiff therein January 5, 1900, and on the 6th day of January judgment was rendered on said verdict in favor of the plaintiff and against said defendants; that thereupon the defendants in said action perfected an appeal from said judgment to this court, February

9, 1900, staying all proceedings upon said judgment so appealed from; that on November 5, 1900, upon motion of the respondent in such appeal, plaintiff in said action, after due notice given, this court dismissed the appeal on the ground that the appellants therein, the defendants in said action, had failed to file a transcript of the record therein. It also appears from said petition that, after the appeal had been taken in said action as stated, to wit, on the 7th day of May, 1900, the superior court in which said action was pending duly made and entered an order granting a new trial therein, which order has not been vacated nor set aside, and no appeal taken therefrom. On March 26, 1901, the *remittitur* on the dismissal of the appeal from the judgment in said cause having theretofore been filed, and the clerk of said court having refused to issue an execution on said judgment, the petitioner applied to said superior court for a writ of *mandamus* to compel said clerk, the respondent herein, to issue said execution. But the court below refused to issue said writ on the ground, stated in the petition herein, that a new trial in said action had been granted. Respondent demurs to the petition filed herein, and also answers the same. The main grounds in support of the demurrer are: First, that the judgment in the case on which it is sought to have an execution issued has been vacated and set aside by the order granting a new trial in said action; second, that the petitioner has a plain, speedy, and adequate remedy in due course of law by an appeal from the order of the superior court denying his application for *mandamus* therein.

1. It is contended by the petitioner that upon perfecting the appeal from the judgment rendered in the lower court by the filing of a *supersedeas* or stay bond, all further proceedings, including any action on the motion for a new trial, were suspended. This, however, is not so. Only such matters as are embraced within the judgment or order appealed from are stayed. Code Civ. Proc. § 946. Proceedings on motion for a new trial are not in direct line of the judgment, but are independent and collateral thereto. The judgment may be at once entered, and even executed, while a motion for a new trial is pending. The motion may be heard and decided and an appeal taken on its own independent record while the proceedings on and subsequent to the judgment may be still regularly going on, and even an independent appeal taken in that

line. *Spanagel v. Dellinger*, 38 Cal. 284; 1 Hayne, New Trial & App. p. 27. An appeal from the judgment does not depend upon the motion for a new trial. The latter is subsequent to the judgment, and the appeal from the judgment may be taken without waiting for the determination of the motion for a new trial, and such appeal from the judgment may go on after the appeal from the order has been dismissed. *Towdy v. Ellis*, 22 Cal. 659. And an affirmance of the judgment on a direct appeal therefrom does not prevent the court below from setting aside the verdict or finding and judgment based thereon, and granting a new trial. *McDonald v. McConkey*, 57 Cal. 326; *Naglee v. Spencer*, 60 Cal. 10. And the dismissal of an appeal from the judgment is no bar to an appeal by the same party from an order denying his motion for a new trial. *Fulton v. Cox*, 40 Cal. 105. But an order granting a new trial has the effect of vacating the judgment, and the party cannot thereafter proceed on said judgment by appeal therefrom or otherwise. *Kower v. Gluck*, 33 Cal. 407; *Bronner v. Wetzlar*, 55 Cal. 420; *Thompson v. Smith*, 28 Cal. 534; *Rayner v. Jones*, 90 Cal. 78, 27 Pac. 24.

2. An appeal lies from the judgment of the superior court denying the writ of mandate. Code Civ. Proc. § 939; *Palache v. Hunt*, 64 Cal. 474, 2 Pac. 245; *People v. Perry*, 79 Cal. 109, 21 Pac. 423; *Heinlen v. Phillips*, 88 Cal. 557, 26 Pac. 366. This furnishes a plain, speedy, and adequate remedy to the petitioner in the ordinary course of law. *Santa Cruz Gap Turnpike Joint Co. v. Board of Sup'rs of Santa Clara Co.*, 62 Cal. 40. The demurrer to the petition must be sustained, and the writ denied, and it is so ordered.⁴

⁴ *Accord*: *Rice v. Parrott*, (1906) 76 Neb. 501; *Henry v. Allen*, (1895) 147 N. Y. 346; *Molt v. Nor. Pac. Ry. Co.*, (1911) 44 Mont. 471; *Elliott v. Whitmore*, (1895) 11 Utah, 308. But other cases hold that the motion for a new trial is so directly in the line of the judgment that after an appeal has been taken the lower court has no more jurisdiction over motions for new trials based on grounds occurring at the trial.—*Minkinen v. Quincy Min. Co.*, (1912) 169 Minn. 279; *McArdle v. McArdle*, (1866) 12 Minn. 122 (even on the ground of newly discovered evidence); *Hudson v. Bauer Grocery Co.*, (1894) 105 Ala. 200; *Elgin Lumber Co. v. Langman*, (1887) 23 Ill. App. 250; *Skinner v. Bland*, (1882) 67 N. C. 168.

Where, however, a motion for a new trial is based upon newly discovered evidence or other ground recognized as sufficient which may become available only after an appeal has been taken, the pendency of the appeal cannot affect the right of the trial court to grant the new trial.—*Cook v. Smith*, (1882) 58 Ia. 607; *Hellman v. Adler*, (1900) 60 Neb. 580; *Gibson v. Manly* (1853) 15 Ill. 140; *Louisville & Nash. RR.*

Co. v. Ueltschi's Ex'rs, (1907) 126 Ky. 556; Mills v. Atl. Coast Line RR. Co., (1908) 82 S. C. 126; Fuller v. United States, (1900) 182 U. S. 562; Commonwealth v. McElhaney, (1873) 111 Mass. 439; State v. Circuit Court, (1888) 71 Wis. 595.

SECTION 2. EFFECT AS SUPERSEDEAS.

DULIN v. PACIFIC WOOD & COAL CO.



Supreme Court of California. 1893.

98 California, 304.

HARRISON, J. At a meeting of the stockholders of the Pacific Wood & Coal Company, a corporation, held at San Diego, November 17, 1892, for the election of five directors for the year then next ensuing, the appellant Clugston was declared elected as one of the directors. The respondent herein claimed that certain votes offered to be cast for himself at the election should have been received, and that, if they had been received, the result of the election would have been shown that he was elected instead of Clugston. On the 10th of December, 1892, Dulin filed his petition in the superior court of the county of San Diego, under the provisions of section 315 of the Civil Code, making the corporation and Clugston defendants, and praying the court to set aside the election of Clugston as a director, and to confirm the election of himself as such director, and for such other relief in the premises as might seem proper. The matter was heard by the court, and on the 25th of January, 1893, it rendered its judgment that, at the said election, Dulin was elected one of the directors of the corporation, and that his election be confirmed, and that Clugston was not elected, and had not, since the 17th day of November, 1892, been a director in said corporation. On the same day the defendants appealed from the judgment, and now ask for an order "staying the proceedings in this action, and restraining the respondent Dulin from doing any act as director, president, or manager of the appellant the Pacific Wood & Coal Company, or interfering with the management of the business of said company by the appellant Clugston as director and president, and the other di-

rectors thereof." Each of the contestants herein states in his affidavit filed upon this motion that after the election in November he was duly elected president of the corporation,—the respondent Dulin stating that he "was by said board of directors duly elected president of said corporation," and the appellant Clugston that he "was duly elected president of said corporation by the votes of himself, James Wells, and L. Clugston, being a majority of said board,"—from which it would appear that, after the election, two of the directors recognized the appellant as having been elected one of their number, while two others recognized the respondent, and that each of the contestants thereafter assumed to act as such president. It also appears from the affidavits that, after judgment had been entered herein, the corporation brought an action against the appellant Clugston for the purpose of preventing him from trespassing upon its property or interfering with its business, and that, by virtue of the process issued therein, Clugston was ejected from certain premises belonging to the corporation, and Dulin took possession thereof, and assumed to act as a director and its president, and that Clugston was excluded from the management thereof. The appellants contend that by virtue of their appeal the respondent is prohibited from doing these acts, and they now ask for this order in support of their contention.

The writ of *supersedeas* is "an auxiliary process designed to supersede the enforcement of the judgment of the court below, brought up by writ of error for review." *Williams v. Bruffy*, 102 U. S. 249. Originally it was a writ directed to an officer, commanding him to desist from enforcing the execution of another writ which he was about to execute, or which might come into his hands. In modern times the term is often used synonymously with a "stay of proceedings," and is employed to designate the effect of an act or proceeding which of itself suspends the enforcement of a judgment. In this state the writ is frequently granted by this court for the purpose of staying proceedings in the superior court, when a review of the action of that court is sought in this court, either upon direct proceeding or on appeal, and is directed to the court whose action is under review, or to an officer of that court, who may be about to enforce its judgment.

Section 949, Code Civil Proc., declares that in cases like the present the perfecting of an appeal "stays proceedings in the

court below upon the judgment or order appealed from," thus creating a statutory *supersedeas*, or "a suspension of the power of the court below to issue an execution on the judgment or decree appealed from, or, if a writ of execution is issued, a prohibition against the execution of the writ." *Hovey v. McDonald*, 109 U. S. 159, 3 Sup. Ct. Rep. 136. If, after such appeal, the court below seeks to enforce its judgment, this court will grant a special order or writ restraining its action. The writ itself is directed to the court whose action is sought to be restrained, or to some one of its officers, and is limited to restraining any action upon the judgment appealed from. It cannot be used to perform the functions of an injunction against the parties to the action, restraining them from any act in the assertion of their rights, other than to prevent them from using the process of the court below to enforce the judgment, nor can the writ be employed for any purpose upon persons not parties to the judgment. Its effect is merely to leave the parties to the judgment in the same position as they were prior to its entry, and to prevent the appellant from being prejudiced by its enforcement. There are many judgments, however, which are self-executing, or which have an intrinsic effect, upon which there are no proceedings to be stayed, and which will not be affected by an appeal therefrom. A judgment granting or dissolving an injunction, or determining the *status* of an individual, granting or denying a divorce or an annulment of marriage, quieting title to a tract of land, setting aside the execution of a deed, are instances of such judgments. In *Walls v. Palmer*, 64 Ind. 496, a judgment had been rendered suspending the petitioner from practicing as an attorney, and it was urged that an appeal therefrom had the effect of restoring him to his right to practice during the pendency of the appeal. The court, however, held that to give that effect to the appeal would be to reverse the judgment of the suspension before the appeal was judicially decided; saying: "The effect of the appeal and *supersedeas* is to stay the judgment of suspension as it is, and prevent further proceedings against the petitioner. It does not reverse, suspend, or supersede the force of the judgment. That remains in all respects the same. The judgment itself requires no further execution than its own terms. It executes itself except as to the collection of costs, which is stayed by the appeal and *supersedeas*. The only effect of an appeal to a

court of error, when perfected and while pending, is to stay execution upon the judgment from which it is taken." And herein should be observed the distinction between the effect of an appeal from a judgment in staying further proceedings thereon, and its effect in depriving the judgment itself of any efficacy as evidence of the fact determined. The appeal suspends its force as a conclusive determination of the rights of the parties, but the stay of proceedings consequent upon the appeal is limited to the enforcement of the judgment itself, and does not destroy or impair its character.

The purpose of the present application is not to prevent the court from taking any action to enforce its judgment, but to prevent Dulin from acting as one of the directors of the corporation. His assuming to be such director, while it may be in consequence of the judgment, is not a proceeding upon the judgment. The acts done and threatened by him were not done by virtue of the judgment, but in consequence of the recognition by his fellow directors of his right to co-operate with them. The fact that the judgment was rendered in his favor may have been a motive governing the other directors in recognizing him as a fellow director, and in admitting him to their counsels and excluding Clugston therefrom, but such action is independent of the proceeding in court. The stay of proceedings upon the enforcement of the judgment resulting from the appeal cannot prevent the moral support which the rendition of the judgment may give to the other directors, or form the basis of an injunction against them, nor can it be invoked to prevent the respondent from committing a trespass against the appellant. Its only effect is to leave the parties in the same situation, with reference to the rights involved in the action, as they were prior to the rendition of the judgment. They still have, notwithstanding the appeal, the same right to assert, outside of the court, or in any other proceeding, their respective rights, as they had prior thereto. While this proceeding was pending in the court below, that court had no authority, by virtue thereof, to enjoin Dulin from assuming to act as a director, and, after it had adjudged that he had been duly elected one of the directors, there would have been a manifest inconsistency in enjoining him from acting as such director. The appeal from that judgment cannot confer upon Clugston any greater right to an injunction against Dulin than he had prior to its rendition. The court limited

its action to ascertaining the result of the election, and did not grant any relief in the premises other than to confirm the election of Dulin, and to declare that Clugston was not elected. No other proceedings have been had or attempted in the court below upon this judgment, and the judgment itself does not contemplate or authorize any other proceedings, or any process to enforce it. The motion is denied.⁵

⁵ Although the operation of a judgment is suspended on an appeal, the judgment is still effective as a bar to another action.—*Moore v. Williams*, (1890) 132 Ill. 589; *Bank of North America v. Wheeler*, (1859) 28 Conn. 433; *Nill v. Comparet*, (1861) 16 Ind. 107; *Burgess v. Poole*, (1885) 45 Ark. 373; *Willard v. Ostrander*, (1893) 51 Kan. 481; *Creighton v. Keith*, (1897) 50 Neb. 810; *Watson v. Richardson*, (1899) 110 Ia. 698; *Parkhurst v. Berdell*, (1888) 110 N. Y. 386. *Contra*. *Smith v. Smith*, (1901) 134 Cal. 117; *Glenn v. Brush*, (1876) 3 Colo. 26; *Hershey v. Meeker County Bank*, (1898) 71 Minn. 255, 269. And an action may be brought on a foreign judgment notwithstanding a pending appeal from the judgment of the foreign court.—*Merchants' Ins. Co. v. De Wolf*, (1859) 33 Pa. St. 45; *Faber v. Hovey*, (1875) 117 Mass. 107.

SAGE v. CENTRAL RAILROAD CO.

Supreme Court of the United States. 1876.

93 United States, 412.

[The Farmers' Loan and Trust Co., trustee for bondholders of the Central Railroad Co. of Iowa, brought suit on Oct. 14, 1874, to foreclose the mortgage securing the bonds. While the suit was pending, Sage and his associates, being holders of bonds issued by the Central Railroad Co., presented certain requests to the Trust Co. relative to the form of the decree, and thereafter a decree was agreed upon by the parties to the suit and duly entered on Oct. 22, 1875. So far Sage and his associates had not become parties to the suit. On December 16, 1875, the Trust Co. prayed an appeal on behalf of Sage and his associates, which was denied. On January 11, 1876, Sage and two of his associates filed a petition for intervention in order to protect their interests, and a motion to set aside the decree of October 22. The court made an order on January 14 denying the motion to set aside the decree, but as to the petition allowed the petitioners to intervene in order to

prosecute an appeal to the Supreme Court, and further ordered that if the appeal was to operate as a *supersedeas* a bond for \$1,000,000 should be filed within 30 days, in which case the appeal should be regarded as perfected on December 16, 1875; but if not to operate as a *supersedeas*, the bond should be \$2,000. No bond was filed under this order, but on February 16, 1876, a petition for an appeal was presented to, and allowed by, Mr. Justice Miller of the Supreme Court, and a *supersedeas* bond for \$20,000 executed.]

WAITE, C. J. * * *

1. As to the *supersedeas*.

In *Kitchen v. Randolph*, 93 U. S., 86, we held that it was not within the power of a justice of this court to grant a *supersedeas* on a writ of error or upon an appeal, unless the writ of error was sued out and served or the appeal taken within sixty days, Sundays exclusive, after the rendition of the judgment or decree complained of.

The decree in this case was rendered October 22, 1875. At that time, the present appellants were not parties to the suit, and consequently could not appeal. The application of December 16, though made in their interest, was in form by the Farmers' Loan and Trust Company. This application was denied; and properly so, because an appeal was only asked so far as it affected the interests of these appellants. The trustee represents all the bondholders; and as the decree is indivisible, it must appeal for the whole, or none. No application was then made by the appellants for leave to intervene and become parties, and consequently the court could not then have been asked to allow them an appeal as parties. Such an application was, however, made January 11; and January 14 they were admitted as parties for the purpose of appealing. An appeal was then allowed to them; but they did not avail themselves of it, either by giving a *supersedeas* bond or a bond for costs. And if they had done so, it could not have had the effect of a *supersedeas*, because it was not allowed until after the expiration of the sixty days. The order of the court, to the effect that if the bond should be given the appeal might be regarded as taken and perfected December 16, was of no effect for the purposes of a *supersedeas*. While it is true that the court may enter an order in a cause *nunc pro tunc*, where the action asked for has been delayed by or for the convenience of the court (*Perry v. Wilson*, 7 Mass.

394), it is never done where the parties themselves have been at fault (*Fishmongers' Company v. Robertson*, 3 Man., Gr. & S. 974), or where it will work injustice.

A *supersedeas* is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with. *Hogan v. Ross*, 11 How. 297; *Railroad Co. v. Harris*, 7 Wall. 575. Time is an essential element in the proceeding, and one which neither the court nor the judges can disregard. If a delay beyond the limited time occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired, and of which he cannot be deprived without due process of law. The court can no more give effect to a *supersedeas* by ordering that the appeal shall relate back to a time within the sixty days, than it can to an appeal taken after the expiration of two years, by dating it back to a time within the limitation. To make a *nunc pro tunc* order effectual for such purposes, it must appear that the delay was the act of the court and not of the parties, and that injustice will not be done.

A slight examination of the facts in this case will be sufficient to show that the failure to take this appeal in time is attributable entirely to the parties. * * *

From this it follows that the motion to vacate the *supersedeas* must be granted.

* * * * *

[MILLER and FIELD, JJ., dissented on the ground that the trial court was justified in considering the application of December 16 as in substance a proper application for an appeal, and in finally allowing it as of that date, in which case the \$20,000 bond would operate as a *supersedeas*.]⁶

⁶ "It is a rule of almost universal application that a perfected appeal does not stay the execution of the judgment or order appealed from, and that to obtain a stay certain statutory requirements must be complied with either as to giving an undertaking or getting an order of the court."—*Matter of Meyer*, (1913) 209 N. Y. 59, 65.

At Common Law. "By the common law a writ of error, without any security, was of itself a *supersedeas* of execution from the time of its allowance or recognition by the court to which it was directed; and even before, if the defendant in error had notice of it; or, in the Common Pleas, from the time of its delivery to the clerk of the errors of that court, whose business it was, amongst other things, to prepare the returns. 1 Tidd's Pract. 530, 1145; Impey's Pract. C. P. 16; Petersd. Abr.

tit. Error, I. (N. a) The presentation of the writ issuing from the superior court stopped all further proceedings except such as were incidental to a compliance with its command to certify the record. But as writs of error came to be sued out for the purpose of delay, various acts of Parliament were passed, requiring security in certain cases, in order that the writ might operate as a *supersedeas* * * *—Kountze v. Omaha Hotel Co., (1882) 107 U. S. 378, 381.

In Chancery. “* * * The jurisdiction of the house of lords in England, relative to appeals from the court of chancery, * * * was for a long time contested. * * * During this contest, it was a matter of course that the lords, for the purpose of sustaining the jurisdiction which they claimed, should prohibit the respondents from taking any steps in the cause, in the court of chancery pending the appeal. * * * Hence it became the law of the appellate court, that the mere presenting an appeal to the house of lords, suspended all proceedings whatever in the court below. And so far was this principle carried, that as late as 1772 it was supposed that an appeal had the effect of totally suspending the jurisdiction of the lord chancellor as to the whole suit, until the decision of the lords on the appeal. But in the case of Lord Pomfret v. Smith, which came before Lord Apsley at that time, he decided that his jurisdiction was suspended only as to the matter appealed from: but that it was not totally suspended, so as to prevent a proceeding as to any other matter in the cause. (Palmer's Pr. H. of L. 9.) The jurisdiction of the lords being finally established, and having remained for a long time undisputed, they saw the necessity of permitting the court of chancery, during the recess of parliament, to take such proceedings in the cause, pending the appeal, as the lord chancellor might deem requisite for the preservation of the rights of the parties. At length this practice became so fully established, that in the case of Burke v. Brown, in 1807, (Palmer's Pr. 10; 15 Vesey, 184) the lords decided that an appeal did not stay any of the proceedings, even upon the point appealed from, without an express order of the appellate court; unless the lord chancellor, in the exercise of a judicial discretion, thought proper to suspend the proceedings wholly or in part pending the appeal. This country having separated from England before this change in the practice had been established, the courts of this state followed the practice, as settled by Lord Apsley, in 1772, of considering the appeal as a stay of the proceedings upon the point of the appeal. The same reasons, which had produced a change in the practice in England, caused a modification here, so as to make the appeal only a stay of the proceedings in the first instance, subject to the right of the respondent to apply to the chancellor for leave to proceed notwithstanding the appeal.”—Hart v. Mayor, etc. of Albany, (1832) 3 Paige (N. Y.) 381.

BORTREE v. DUNKIN.

Supreme Court of Wyoming. 1912.

20 Wyoming, 376.

POTTER, J. This action was brought in a justice's court by the defendant in error against the principal and surety upon an undertaking given upon an appeal from the judgment of a justice of the peace to the district court. * * * [By the terms of the bond the appellant and his surety undertook that the appellant should prosecute his appeal with effect and without unnecessary delay, and if judgment were rendered against appellant or the appeal dismissed, they would satisfy such judgment and costs.]

To the petition an answer was filed alleging: "(1) That the said bond on which plaintiff bases his action was without consideration; (2) that the said attempted appeal was dismissed in the district court upon the motion of plaintiff, H. C. Dunkin, for the reason that said bond was insufficient either as an appeal bond or a *supersedeas* bond, and was declared by the judge of said court as utterly void and invalid, as nowhere in the bond does it appear to what court an appeal was attempted, and for other reasons." To this answer a general demurrer was filed. The justice sustained the demurrer, and, the defendants failing to further plead, rendered judgment in favor of the plaintiff upon the pleadings for \$152.65 against the defendants Bortree and Lindley. The defendants appealed to the district court. That court also sustained the demurrer to the answer, and thereupon, reciting in the order that the defendants failed and refused to further plead to the petition, judgment was entered for the plaintiff against the said defendants and John Hecht, their surety. The case is here on error.

* * * The answer alleged that the ground of the dismissal was the insufficiency of the undertaking as an appeal bond or as a *supersedeas* bond. But it is apparent from our statutes that the question of the sufficiency of the bond or undertaking for the purpose of staying execution was not before the court upon the motion to dismiss the appeal, whatever the grounds stated in the motion. Section 5261, Compiled Statutes, provides that any person desiring to appeal from a judg-

ment rendered by a justice of the peace shall, within 15 days after the rendition of the judgment, file with the justice a notice of such desire, and either pay all the costs of the cause up to the time of the transmission of the papers to the district court, including \$1.50 for the transcript allowed to the justice for allowing the appeal and making a transcript, or shall give bond in double the amount of all such costs to the effect that he will pay the same in case judgment be rendered against him therefor in the district court, "and such undertaking may be included in the undertaking in stay of execution hereinafter provided for in case such undertaking in stay shall be given." Section 5266 provides that no appeal shall operate as a stay of execution unless the party appealing shall enter into an undertaking to the adverse party with at least one good and sufficient surety to be approved by the justice, in a sum not less than \$50 in any case, nor less than double the amount of the judgment rendered, conditioned: (1) That the applicant will prosecute his appeal without unnecessary delay; (2) that the party appealing shall abide by the decision of the district court in such case and satisfy any judgment that may there be rendered against him on account of such appeal. In case the action is forcible entry and detainer, other conditions are provided for.

It is clear that the only bond or undertaking necessary to perfect an appeal is one for the costs accruing up to the time of the transmission of the papers, including the prescribed fee for allowing the appeal and making the transcript, and that bond is only necessary where such costs are not paid. The fact that no undertaking in stay of execution has been given is not a ground for dismissing the appeal, and hence, if one given for that purpose be insufficient in form or substance, it constitutes no ground for dismissing the appeal. For that reason the fact, as alleged in the answer, that the judge, in determining the motion to dismiss, declared the bond to be utterly void and invalid is immaterial. If the costs which the statute requires to be paid as a condition to the appeal were not paid or properly secured, then the appeal might be dismissed. Upon the allegations of the answer, the only question relating to the undertaking that was before the district court on the motion to dismiss the appeal was whether the instrument was a sufficient bond for the payment of the

costs in the justice's court under the provisions of section 5261.

Where a bond or undertaking is required to perfect an appeal or to give the appellate court jurisdiction, and the appellee, refusing to accept or recognize as sufficient a bond executed and filed for that purpose, procures a dismissal of the appeal upon the ground that the bond or undertaking is insufficient, it is held that the appellee cannot thereafter recover upon it. The reasoning of the decisions to that effect is that the appellant, under such circumstances, does not receive the benefit sought by the giving of the bond, viz., a hearing of the case upon appeal, and that it is inconsistent for the appellee to seek a recovery against the surety as upon a valid and binding obligation after having declined to accept it as such and caused the appeal to be dismissed on the ground that it was not an effectual obligation for the purposes of the appeal. *Columbia P. S. R. Co. v. Brillard*, 12 Wash. 22, 40 Pac. 382; *Reilly v. Atchinson*, 4 Ariz. 72, 32 Pac. 262; *Tilden v. Worrell*, 30 Pa. 272; *Van Riper v. Scott*, 11 N. J. Law, 315.

* * *

The rule declaring the sureties discharged from liability upon an undertaking on appeal or for the stay of proceedings or execution where the appeal has been dismissed on the ground of the insufficiency of the undertaking is usually limited, if recognized at all, to cases where it appears that, by the dismissal of the appeal, the appellant has lost the only benefit to be derived from the undertaking, thus leaving it without any consideration. By the statute of Michigan an appeal could not be dismissed on account of any informality or imperfection in the bond. But, where the bond was insufficient and a final order of dismissal was entered after an order had been made, which was not complied with by the appellant, that the appeal be dismissed unless a new and sufficient bond be filed within a specified time, a suit was held to be maintainable upon the bond. The court said that the lower court had no power to dismiss the appeal in the first instance, but could order a new bond, and, in default of compliance with that order, then the appeal might be dismissed. Replying to the contention that the appellee could not be heard to claim anything on the bond, after he had deliberately refused to receive it and had destroyed the only consideration for which it was given, the court said: "We are unable to agree

with this contention. The bond operated as a stay of proceedings, and the party appealing had the right * * * to amend the bond or file a new one. * * * The appellee, in moving to dismiss in default of a new and sufficient bond, was only exercising his right to have a sufficient bond to cover the damages and costs, as the statute prescribes. He did not, however, in taking that action, release his rights under the former bond until the order of the court had been complied with and a new bond filed." *Hascall v. Brooks*, 105 Mich. 383, 63 N. W. 413. And a similar ruling was made in Missouri where the appellant might have avoided a dismissal for a defect in the affidavit upon the bond by correcting it or filing a proper and competent bond. *Skidmore v. Hull*, 33 Mo. App. 41.

* * * * *

It is not a good defense to an action upon a bond or undertaking given to stay execution pending appeal that it was insufficient for that purpose and that the appellee might for that reason have proceeded to enforce the judgment, where the appellee has not taken such action, or in some other effective manner rejected the instrument for the purpose of the stay. In the notes to the case of *Babcock v. Carter*, 67 Am. St. Rep: 193, 199, it is said: "So far as we have been able to discover, the courts have unhesitatingly and with entire unanimity overruled defenses of this character, and have regarded the fact that no proceedings were taken to enforce the judgment as sufficient evidence that the bond had accomplished the object for which it was given, namely, to procure a stay of the execution, and, such being the case, that it is supported by a sufficient consideration and enforceable against the sureties as a common-law obligation. * * *"

It is not necessary to decide in this case whether a surety upon a mere cost bond given pursuant to the provisions of section 5261 to avoid the immediate payment of the costs and perfect the appeal would be discharged from liability upon a dismissal of the appeal upon the ground that the bond was insufficient. Nor is the question here to be decided whether the bond in question was sufficient as a cost bond to take the place of the payment of the costs, for the order of the court in dismissing the appeal in the action wherein the bond or undertaking was given is not here for review. The petition alleges that the costs were not paid, and it may be that the

undertaking was intended to secure their payment and thus perfect the appeal. But, whether it was so intended or not, it was plainly intended as an undertaking to stay execution during the pendency of the appeal. The petition alleges the fact that execution of the judgment was stayed until the appeal was dismissed, and this is not denied by the answer. The undertaking was filed December 12, 1908, and the appeal was dismissed July 15, 1910. There is no allegation in either the petition or answer that the plaintiff took any steps during the period between those dates to collect the judgment. It appears therefore that execution was stayed for a period of 19 months. A stay of execution having been one of the purposes of the undertaking, and, if not its only or chief purpose, at least an important one, the appellant had all the benefit that could be derived from giving an undertaking for such purpose. There is nothing inconsistent on the part of the plaintiff in bringing this action upon the undertaking after he had procured a dismissal of the appeal on the ground of its insufficiency as a bond to secure the payment of the costs which had accrued in the justice's court, for an effectual bond for that purpose was necessary to the appeal if the costs were not paid, while an undertaking to stay execution was not. * * *

For the reasons above stated, we think that the demurrer to the answer was properly sustained and that the judgment for the plaintiff below was proper upon the facts alleged.⁷

⁷ The amount of the bond necessary for appeal or for *supersedeas* or for both is usually fixed with more or less exactness by statute. See many cases cited in 3 C. J. § 1433. *Kountze v. Omaha Hotel Co.*, (1882) 107 U. S. 378, contains a very illuminating discussion of the considerations which should enter into the determination of the amount of a bond for damages and costs in a foreclosure suit.

STATE v. DULUTH STREET RAILWAY CO.

*Supreme Court of Minnesota. 1891.**47 Minnesota, 369.*

After the appeal taken from the order dissolving the *ex parte* injunction, as stated in the opinion, the defendant, the Duluth Street Railway Company, entered upon the premises of Richardson, the plaintiff in the action, and with a large force of men, proceeded to construct thereon a road-bed for its electric street railway. The plaintiff thereupon procured an order to show cause why the defendant should not be punished for contempt for violating the injunction. At the hearing, before Mills, J., the defendant moved that the order be discharged for want of jurisdiction. The motion was denied, a hearing had, and the defendant adjudged to be in contempt and to pay a fine of \$50. The defendant thereupon brought the proceedings to this court by *certiorari*.

GILFILLAN, C. J. One Richardson brought an action in the district court in the eleventh district against the Duluth Street-Railway Company, and at the commencement of the action procured from a judge of the court an *ex parte* order for an injunction against the defendant, and the injunction was issued and served, and the defendant thereupon procured an order to show cause why the injunction should not be vacated, returnable before the court, and on its return the court made an order vacating and dissolving the injunction. From this order the plaintiff in the action appealed to this court, and executed and filed the proper stay-bond, as provided in Gen. St. 1878, c. 86, § 10.

The only question brought here by this proceeding is, what was the effect of the appeal and stay upon the order vacating the injunction? Did it suspend the operation of that order, so as to leave the injunction in force? This must be determined by the statute. Section 10 provides: "Such appeal, when taken from an order, shall stay all proceedings thereon, and *save all rights affected thereby*," if the appellant shall execute the bond required. No class of orders from which appeal is allowed is excepted from this provision. Whether, because of the possible hardship in some cases to the party procuring an order from the suspension of its operation, any

class of orders ought to be excepted from the provision, is for the legislature, and not for the court, to say. There is no room in the statute for the distinction suggested by the relator, between what might be termed "active orders," or those contemplating or directing something to be done to make them effectual, and what the counsel designates "passive orders," which of themselves, and without anything further, effect the desired end. Perhaps that distinction might be claimed if the statute stopped with the clause, "shall stay all proceedings thereon." But those words, with the words, "and save all rights affected thereby," show more than the intent to merely arrest affirmative action on the order; show the intent that the order, when appealed from and stayed, shall not affect any rights,—in other words, that it shall be inoperative pending the appeal. In this case the right affected by the order was the right to the continuance and operation of the injunction. The appeal and stay saved that right so that it continued, notwithstanding the order appealed from. * * * The order removed here by *certiorari* is affirmed.⁸

MITCHELL, J., (dissenting.) According to the opinion of the court, although a plaintiff's papers are so insufficient on their face or so false in their allegations that, if he should apply on notice for an injunction, any court would, on a hearing, promptly refuse to grant one, yet, if he can find anywhere in the state a judge or court commissioner who will improvidently grant one *ex parte*, which the court on the first and only hearing ever had dissolves, he can by appealing and filing a bond make the *ex parte* injunction impervious to all judicial interference until the appeal is determined in this court. I cannot believe that the statute was ever intended to thus permit the trial court to be deprived of its discretion, (which is really never exercised at all until the hearing on the motion to dissolve,) and the opposite party to be thus tricked out of his rights without a hearing, leaving him no redress except an action on the *supersedeas* bond for damages, which are often incapable of measurement. Such a result is so unjust, and so utterly inconsistent with all known rules of equity practice, that no court should adopt such a construction unless absolutely put up to it by the clear and unequivocal language of the statute. Considering the nature and office of an injunction *pendente lite*, and the former equity rules on the subject, I think it may well admit of doubt whether the

phrase, "and save all rights affected thereby," were intended in any case to have the effect of reviving or continuing in force an injunction after an order dissolving it. * * *

The hearing upon the motion to dissolve an *ex parte* injunction is the first hearing ever had in the matter, and, while the order made may be in form one dissolving, it is essentially one refusing to grant an injunction, and the legal *status* of the matter is, in effect, the same. I do not think that this view is assuming any unwarranted liberty with the language of the statute. Nothing is more common in the construction of statutes than, under certain circumstances, to ingraft upon general language implied limitations and exceptions. We have a notable instance of this in our construction of this very statute relating to appeals. The general doctrine of this court is that no appeal will lie directly from orders or judgments made or rendered *ex parte* or on default, but that a party must first apply to the district court for relief. No such limitation or exception is to be found in the language of the statute, but is implied on the common-sense idea that it could not have been intended to grant a right of appeal on a matter upon which there never has been a hearing, and upon which the court below has never in fact exercised its judgment. I am authorized to say that Justice Collins concurs with me in these views, and joins in this dissent.⁹

⁸ Some cases hold on general principles of appellate practice that the stay of execution on a decree dissolving an injunction reinstates the injunction.—*Hamilton v. State*, (1869) 32 Md. 348; *Kimball, Raymond & Co. v. Alcorn*, (1871) 45 Miss. 145; *Quarnberg v. City of Chamberlain*, (1912) 29 S. D. 377; *Turner v. Scott*, (1827) 5 Rand. (Va.) 332; *McMichael v. Echman*, (1890) 26 Fla. 43; *Williams v. Pouns*, (1877) 48 Tex. 141; *Elizabethtown, etc., RR. Co. v. St. Ry. Co.*, (1893) 94 Ky. 478.

Other cases hold the contrary.—*Knox County v. Harshman*, (1889) 132 U. S. 14; *Hovey v. McDonald*, (1883) 109 U. S. 150; *Griffin v. Branch Bank*, (1846) 9 Ala. 201; *Nacoochee Hydro. Min. Co. v. Davis*, (1869) 40 Ga. 309; *Manning v. Poling*, (1901) 114 Ia. 20; *Brown v. Wilkerson*, (1910) 82 Kan. 553; *Hulan v. Circuit Judge*, (1910) 159 Mich. 605; *Reyburn v. Sawyer*, (1901) 128 N. C. 8.

⁹ See *State v. District Court*, (1900) 78 Minn. 464, stating that the opinion in the *Duluth St. Ry. Case* is unsound, but following it on the basis of *stare decisis*.

Statutes sometimes expressly provide that appeals from decrees dissolving injunctions shall not have the effect of continuing the injunctions in force.—*New York Exch. Bank v. Reed*, (1908) 232 Ill. 123.

BARNES & CO. v. CHICAGO TYPOGRAPHICAL UNION.

*Supreme Court of Illinois. 1908.**232 Illinois, 402.*

CARTWRIGHT, J. The appellees, a number of printing firms in Chicago, who are members of the voluntary association known as the Chicago Typothetæ, organized for the promotion of their business interests, filed their bill of complaint in the superior court of Cook county against Chicago Typographical Union No. 16, the appellant, and certain individuals who were officers of the union, praying for an injunction restraining the defendants from picketing the premises of complainants, interfering with their employes, congregating about their premises for the purposes of compelling, inducing, or soliciting said employes to leave their service, or doing other acts of that nature specified in the prayer of the bill. On October 11, 1905, a preliminary injunction was ordered as prayed for, and a writ was issued and served. The defendants appeared and demurred to the bill, and, their demurrer being overruled, elected to stand by it. The court thereupon entered a final decree in the cause, enjoining and restraining the defendants, their agents, and servants from doing any of the acts set forth in the prayer of the bill and the preliminary injunction. From that decree the appellant and other defendants appealed to the Appellate Court for the First District. On October 28, 1905, an appeal bond was filed and approved, in accordance with the order granting the appeal. The defendants continued to do the same acts from which they were enjoined after the entry of the decree, and on December 9, 1905, the appellees filed their petition in said superior court against the appellant, and Edward R. Wright and Edward E. Bessett, two of its officers, praying for a rule against them to show cause why they should not be punished for contempt of court for violating the injunction. Appellant and said officers appeared and made defense, and upon a hearing the court fined appellant \$1,000 for contempt of the court in violating the injunction. From the judgment imposing the fine the appellant again appealed to the Appellate Court for the First District and the branch of that court

affirmed the judgment. This appeal was then prosecuted from the judgment of the Appellate Court.

* * * * *

The important question in the case, and the one to which the argument is almost wholly devoted, relates to the jurisdiction of the superior court to entertain this proceeding and punish appellant for violating the injunction after an appeal had been taken from the decree. The law is that an appeal [from a decree] enjoining a defendant from doing an act does not suspend the operation of the injunction, stay it in any manner, or disturb its operative force. The appeal does not have the effect of dissolving or suspending the injunction and the defendant acquires no right to disregard it by the execution of an appeal bond. The doing of the act enjoined may be punished as a contempt notwithstanding the appeal, and the contempt is a contempt of the court which granted the injunction. There is no controversy between counsel on this question, and a reference to the works where the numerous authorities are collated will be sufficient. 2 High on Injunctions (4th Ed.) § 1698a; Elliott on Appellate Procedure, § 391; 2 Cyc. 913; 22 Cyc. 1010; 7 Am. & Eng. Ency. of Law (2d Ed.) 55; 16 Am. & Eng. Ency. of Law, 436; 20 Ency. of Pl. & Pr. 1231. * * *10

The question being by what court the contempt can be punished, the natural answer would be by the court whose order is disobeyed, and whose dignity and authority are defied. And, indeed, it does not seem to be disputed that if the proceeding is in the name of the people, for the purpose of maintaining the dignity and authority of the court, an appeal would present no obstacle to it. Such a proceeding is wholly independent of the appeal or any question to be considered by the appellate tribunal, and we see no substantial distinction between a prosecution for contempt instituted for the purpose of punishing a person for disobeying an order of the court on the ground that its authority or dignity is in question and one which is instituted to enforce the authority of the court in the administration of justice between litigants. The question whether the injunction was properly awarded or whether the decree was erroneous is not involved in either. A defendant cannot refuse to obey an injunction, however improvidently or erroneously granted, but he is bound, at his peril, to obey it while it remains in force. *Tolman v. Jones*, 114 Ill. 147, 28 N.

E. 464; *Leopold v. People*, 140 Ill. 552, 30 N. E. 348; *Swedish-American Telephone Co. v. Fidelity & Casualty Co. of New York*, 208 Ill. 562, 70 N. E. 768.

Counsel for appellant says that this proceeding, being for a civil contempt, partakes of the nature of the original action; and that while a proceeding for criminal contempt is a separate and independent suit, the prosecution of which cannot be delayed by an appeal taken in the civil suit, in this case the proceeding is a part of the same suit and the court is deprived of jurisdiction to enter any further order until the appeal is finally disposed of. It is true that the appeal operated as a *supersedeas* in the suit in which the appeal was taken and that the court could not enter any further orders in the execution of the decree, but it does not follow that the court could not punish appellant for doing an act prohibited by the decree. If a decree is of a nature to require something to be done or a writ to be issued and served, an appeal operates to supersede and prevent the issuing and service of such a writ. But the decree in this case requires no process or action for its enforcement. The cases relied upon by counsel are all of a nature requiring something to be done which was superseded by an appeal. * * * In the case of *People v. Prendergast*, 117 Ill. 588, 6 N. E. 695, and other like cases, there were appeals from orders to pay over money or to do some act of an affirmative nature, and, if a decree is of that character, an appeal prevents its execution. An attachment for contempt for disobedience of an order to pay money is a civil execution for the benefit of the injured party, though carried on in the form of a criminal process for contempt of the authority of the court. *Buck v. Buck*, 60 Ill. 105.

There are judgments and decrees which require something to be done for their enforcement, and there are others which are simply prohibitory or self-executing, and others partake of the nature of both. A prohibitory decree which does not require anything to be done is self-executing. It requires no process, but by force of the decree itself the party is bound to desist from the prohibited act. If an injunction is of a mandatory character, requiring something to be done, or if negative in terms, but with the same effect, a proceeding for contempt in refusing to obey it is in the nature of an execution to enforce the command. An injunction, the effect of which is to authorize one party to take possession of property or to

do some act, although it may be negative in form as against the other party and merely commands the latter not to obstruct the former in taking possession of the property or doing the act, is in reality affirmative in its nature, and a proceeding for contempt would have for its object to accomplish the doing of the act. An appeal would stay any such proceeding, while it would have no such effect with respect to the power of the court to compel obedience to a self-executing decree. That distinction is clearly drawn in both High on Injunctions and Elliott on Appellate Procedure, above cited. Mr. High applies the rule to prohibitory injunctions, and says that the court which granted the injunction still has power to punish its violation notwithstanding the appeal, and Judge Elliott says that a *supersedeas* does not operate upon a self-executing judgment, and, where the judgment in one part requires an execution for its enforcement and in another part does not require such a writ, the *supersedeas* may operate only upon part of the judgment.

To adopt a rule that the court granting an injunction must stand idly by and see it violated while an appeal is pending, and after the case is reinstated in that court may then proceed to punish, would be attended with evil consequences. All that it would be necessary for a defendant to do to secure immunity until the case should be reinstated in the court would be to pray an appeal and file a bond. * * * The Appellate Court reviews the record brought to it by the appeal, which includes nothing happening after the decree is entered, and the question whether the injunction was obeyed or disobeyed is not involved in the appeal. No reason is apparent to us why the superior court should be refused the right to maintain its authority as to a matter not affected in any way by the appeal, and which is not dependent in any respect on the final outcome of the suit until the decree has been affirmed by the Appellate Court, since the question whether the decree was erroneous or not is in no way involved in maintaining the existing *status*. If the court should be denied the right to compel obedience to the prohibition of the decree until the original case has completed its rounds through the courts, the appellees might lose all the benefits of their litigation and have their business ruined, although the decree should finally be affirmed. We are not prepared to adopt or declare such a doctrine.

* * * * *

*Judgment affirmed.*SCOTT and FARMER, JJ. (dissenting). * * *¹¹

¹⁰ This is the doctrine of the federal courts. Thus in *Knox County v. Harshman*, (1889) 132 U. S. 14, the court said: "The general rule is well settled that an appeal from a decree granting, refusing, or dissolving an injunction, does not disturb its operative effect." To the same effect see,—*St. Louis, I. M. & S. Ry. Co. v. Miller*, (1907) 84 Ark. 494; *Albers Commission Co. v. Spencer*, (1911) 236 Mo. 608; *Hawkins v. State*, (1890) 126 Ind. 294; *Bullion, etc., Min. Co. v. Min. Co.*, (1887) 5 Utah, 151.

Some courts, however, hold that a *supersedeas* in an appeal from a decree granting an injunction has the effect to wholly suspend the injunction during the appeal, and there can be no contempt in regard thereto.—*Powell v. Fla. Land & Imp. Co.*, (1899) 41 Fla. 494; *Penn. RR. Co. v. Nat. Docks Ry. Co.*, (1896) 54 N. J. Eq. 647; *Haley v. Walker*, (Tex. Civ. App. 1911) 141 S. W. 166.

¹¹ *Accord*, on the point that contempt proceedings are not in execution of the judgment and hence not stayed by *supersedeas*, *Sixth Ave. RR. Co. v. Elev. RR. Co.*, (1877) 71 N. Y. 430.

The United States Supreme Court holds, in *Merrimack River Sav. Bk. v. Clay Center*, (1911) 219 U. S. 527, that while the trial court has inherent power to continue an injunction pending an appeal, in order to preserve the *status quo*, it does not follow that violation of the injunction is not also a contempt of the appellate jurisdiction.

FARMERS' NATIONAL BANK v. BACKUS.

Supreme Court of Minnesota. 1895.

63 Minnesota, 115.

COLLINS, J. Order to show cause why a receiver of certain real property, in possession, should not be required to turn over and deliver such possession to appellant, Burdic, pending the determination of an appeal taken to the court from an order appointing such receiver. The nature of the main action may be seen by reference to *State v. Egan*, 64 N. W. 813, in which we held that such order was appealable.

Immediately upon the making and filing of the order in the court below, and before an appeal was taken, the receiver named entered into possession of the premises involved, proceeded to collect the rents, incomes, and profits thereof, as far as possible, and has ever since been in possession and collecting and receiving such rents, incomes, and profits. When

taking the appeal, Burdic duly executed a proper and sufficient *supersedeas* bond, in accordance with the provisions of Gen. St. 1894, § 6142, which bond was duly approved and filed. The important question now is, was the appellant entitled, upon executing and filing such *supersedeas* bond, upon taking such appeal, and upon procuring a complete return to be made and filed in this court, to have restitution of the premises, and to be restored to actual possession, including such powers and rights as are incidental to possession? We are satisfied that he was. The general rule is that, if an appeal with a *supersedeas* be taken from an interlocutory order, that part of the case which is appealed is completely removed from the jurisdiction of the lower court, and wholly transferred to that of the higher or appellate tribunal. Elliott, App. Proc. § 542. *Pierson v. McCahill*, 23 Cal. 250. And the statute (section 6142, *supra*) expressly provides that the effect of the appeal with the bond is to "stay all proceedings" on the order, and to "save all rights affected thereby." This was the legal effect of a *supersedeas* at common law. The statutory bond stands as indemnity to the party to whom it is given—it stands in place of the action of the receiver—until the matter is heard and disposed of on appeal. The *supersedeas* does not undo or render nugatory any action of the receiver already had under the order before the appeal was taken and the bond duly filed, but it terminates the right of the lower court and of its officer from further acting in the matter. It suspends the operation of the order, or, as has been said, "paralyzes" the arm of the receiver. His authority to proceed is absolutely stayed and suspended by operation of law. The rights and powers of the receiver being suspended, of which he was duly notified, he should have restored possession of the premises to the appellant; for, his authority to take being inoperative by the suspension, his authority to hold was equally so, both being derived from the same order. The legal effect of the appeal and *supersedeas* was to withdraw from the receiver the right to the possession of the property, and vest that right in the party from whom it had been taken. *State v. Johnson*, 13 Fla. 33 (a leading and extremely well-considered case); *Buckley v. George*, 71 Miss. 580, 15 South. 46; *Blondheim v. Moore*, 11 Md. 365; *Northwestern Mut. Life Ins. Co. v. Park Hotel Co.*, 37 Wis. 125; High. Rec. 190; 20 Am. & Eng. Enc. Law, p. 110. We have

not overlooked the cases cited by counsel for plaintiff. That of *Swing v. Townsend*, 24 Ohio St. 1, merely decides that the office of certain receivers was not vacated by an appeal,—nothing more. In *Re Real-Estate Associates*, 58 Cal. 356, it was held that, pending an appeal from an order adjudicating a person as insolvent, the functions of the receiver were not suspended, but in that case there was no *supersedeas* bond filed, simply an ordinary bond on appeal. That of *Bristow v. Catlin* (Va.), 20 S. E. 946, seems to have been decided upon the somewhat peculiar circumstances, before the court, in a proceeding to punish a receiver for contempt. We do not regard either of these cases as opposed to the doctrine we have adopted.

* * * * *

The order of this court is that the receiver restore possession to the appellant pending the appeal, and also that he account and turn over to appellant all sums which have come into his hands as rents, incomes, and profits of said property from the day on which the *supersedeas* bond was filed in the court below.¹⁸

BUCK, J., took no part.

CANTY, J. (dissenting). I cannot concur in the foregoing opinion. If the appeal had been taken and the *supersedeas* bond given before the receiver took possession, it would have prevented his taking possession; but the receiver was in possession about 11 days before the appeal was taken and the bond given. It seems to me that the filing of a *supersedeas* bond does not have the effect of a writ of restitution issued and executed. It does not *ipso facto* undo what has been done. If the receiver took possession before the filing of the bond, such filing does not *ipso facto* oust him of possession, but his possession continues. If he was in full possession before the bond was filed, he continues in full possession afterwards,—not in half possession, emasculated possession, or paralyzed possession, but in the same possession as he was before; and one of the incidents or attributes of that possession is the right to collect the rents. Of course, the order would stay all acts and proceedings which did not consist in exercising the possession, and would therefore prevent the receiver from paying over the rents after he had collected them.

* * * * *

In many such instances, instead of making an immediate profit out of his possession, the receiver is compelled to expend large amounts of money in purchasing stock, paying current expenses, etc. But, according to the decision of the majority, the appellant has, for 30 days after the order appointing the receiver, the right and the power to cut off his authority, and oust him on a moment's notice, and to seek the time for doing this which will cause the greatest loss and embarrassment to the receiver, and give the appellant the greatest amount of the fruits of the receiver's labor and expenditure. Then, if the appellant prevails, the receiver will remain ousted with no way to reimburse himself. Of course, if the language of the statute required such a construction, it would be a different question, but it does not. The statute says that the filing of such a *supersedeas* bond "shall stay all proceedings * * * and save all rights." Gen. St. 1894, § 6142. It is well settled as a general rule that staying all proceedings by a *supersedeas* bond does not release any levy, restore the possession, or undo anything done in execution of the judgment or order appealed from. Saving all rights simply means that, if the appellant prevails on the appeal, then (but not till then) shall everything which has been done in execution of the order be, as far as possible, undone.¹²

¹² *Accord*: Catlin v. Baldwin, (1879) 47 Conn. 173; Heyman v. Heyman, (1905) 117 Ill. App. 542; Wabash RR. Co. v. Dykeman, (1892) 133 Ind. 56; Cook v. CoFe, (1880) 55 Ia. 70; Tornanser v. Melsing (1901) 106 Fed. 775; State v. Johnson, (1870) 13 Fla. 33 (discussing the subject at length, including the point made by Judge Canty in the principal case), *supra*; Buckley v. George, (1893) 71 Miss. 580 (in which the court justifies the operations of a *supersedeas* in compelling restitution where the appeal is taken after the receiver has taken possession, by saying:—"It is hardly necessary to say that, in the great majority of cases of receiverships, there is something more to be done than to hold an inert mass of property in an unchanged and unchanging condition. * * * If the *supersedeas* merely paralyzes the receiver as an actor, and leaves the property, as it were, in mortmain pending the appeal, the strange result will have been produced of changing the nature of the decree originally made, of authorizing that to be done which never would have been directed by any court, and of destroying the estate by enforcement in action and mere lapse of time").

Contra: Baird v. Cumberland, etc., Turnpike Co., (1878) 1 Lea. (Tenn.) 394; Home Fire Ins. Co. v. Dutcher, (1896) 48 Neb. 755.

¹³ In many jurisdictions the common law rule that a *supersedeas* does not destroy the lien of a levy already made or prevent further proceedings upon it, no longer is followed, and a *supersedeas* not only prevents a sale but discharges the levy.—Sam Yuen v. McMann, (1893) 99 Cal. 497; Keith v. Wilson, (1860) 3 Metc. (Ky.) 201; Parker v. Dean, (1871)

45 Miss. 408; *Hamilton v. Henry*, (1844) 27 N. C. 218. In other states it is held only to prevent further proceedings based on the levy.—*Thalheim v. Phosphate Co.*, (1904) 48 Fla. 190; *Peterson v. Wayne Circuit Judge*, (1896) 108 Mich. 608; *Tilley v. Washburn*, (1895) 91 Wis. 105.

HOME FIRE INSURANCE CO. v. DUTCHER.

Supreme Court of Nebraska. 1896.

48 Nebraska, 755.

IRVINE, C. The Home Fire Insurance Company instituted an action in the district court of Douglas county to foreclose a mortgage executed by Warren Dutcher on premises which he afterwards conveyed to defendant A. J. Dutcher. The petition contained allegations to the effect that the present value of the premises is less than the mortgage indebtedness, that taxes on the premises to a large amount have been suffered to become delinquent, and that waste was being committed. There was a prayer for a receiver *pendente lite*. The district court, upon hearing evidence on the application for a receiver, sustained said application, and appointed a receiver for the premises. From this order the defendants have appealed.

The district court, at the time of making the order, fixed the amount of the *supersedeas* bond at \$500, and within the statutory period the defendants entered into a bond in that sum, conditioned according to the third subdivision of section 677 of the Code of Civil Procedure. * * * A motion was made to strike this bond from the files on the grounds: First, that there is no authority in law for superseding an order appointing a receiver *pendente lite*; and second, * * * This motion the court sustained, and, an application having been made by the receiver for a writ of assistance, the appellants made application to this court for an order restraining the district court and the receiver from taking any further steps pending the appeal.

The primary question presented is that stated as the first ground of the motion to strike the bond from the files, to wit, is there any authority for superseding an order appointing a receiver *pendente lite*? In considering the application we are, therefore, not reviewing the order striking the bond from the

files, because, if an order appointing a receiver can be superseded as a matter of right, it must be under the third subdivision of section 677, as that is the only provision which could possibly apply to such a case. In such event, the filing and approval of the bond operated as a *supersedeas*, and the order striking the bond from the files was a nullity. If, on the other hand, there is no authority for a *supersedeas* in such a case, the bond itself was a nullity, and the district court had authority to proceed in disregard of such bond. The question so presented is by no means free from difficulty. A *supersedeas* is now almost everywhere so much controlled by statute, and the statutes are so different in their provisions, that but little assistance can be had from the adjudications of other states. After a severe struggle it became established in England that an appeal of itself operated as a *supersedeas*. Following the analogy of this practice, it is held in some states that statutes providing special conditions, such as the giving of a bond, in order to affect a *supersedeas*, are merely restrictive in their character, and that the appeal itself works a *supersedeas* where there is no statute requiring a bond or a compliance with other conditions. A different doctrine has, however, been announced in this state; and it must be accepted as the established rule here that a *supersedeas* can be had, as a matter of right, only where it is affirmatively provided for by statute. *Gandy v. State*, 10 Neb. 243, 4 N. W. 1019; *State v. Judges of District Court*, 19 Neb. 149, 26 N. W. 723; *State v. Meeker*, 19 Neb. 444, 27 N. W. 427; *Cooperrider v. State*, 46 Neb. 84, 64 N. W. 372. * * * A series of cases in Tennessee is instructive. That state has a statute which provides that "the supreme court in term or either of the judges in vacation may grant writs of *supersedeas* to an interlocutory order or decree or execution issued thereon as in case of a final decree." 2 St. Tenn. § 3933. It would seem that the language of this statute was broad enough to authorize, by a liberal construction at least, the allowance of a *supersedeas* on appeal from an order appointing a receiver. But the Tennessee court holds that it does not apply to such an order. *Baird v. Turnpike Co.*, 1 Lea. 394; *Bramley v. Tyree*, 1 Lea, 531; *Roberson v. Roberson*, 3 Lea, 50. The reasons given for this construction are that the statute was intended only to apply to orders adjudicating rights, and that it

does not extend to orders made pending litigation for the preservation of rights, but not adjudicating them.

* * * * *

* * * The chapter relating to receivers contains no special provision for the superseding of an order of appointment; nor is there elsewhere in the Code any provision of that character. As pointed out already, to allow a *supersedeas* as a matter of right would, in many cases, defeat the whole purpose of the order; and we think the obvious intention of the legislature was that such purpose should not be in that manner defeated, and for that reason no provision was made for superseding such an order. Furthermore, the Code provides protection to the defendant from the results of continuing provisional remedies in the way of bonds which are always required for that purpose.

In holding that a party may not, as a matter of right, supersede an order appointing a receiver, we do not hold that a *supersedeas* may not be granted in the discretion of the court. This court has already held that a writ of ouster in a *quo warranto* case and a writ of *mandamus* are writs which may not be superseded as a matter of right; but it has also held that the court may, in its discretion, allow a *supersedeas* in such cases. *Gandy v. State*, 10 Neb. 243, 4 N. W. 1019; *State v. Judges of District Court*, 19 Neb. 149, 26 N. W. 723; *Cooperrider v. State*, 46 Neb. 84, 64 N. W. 372. It is quite clear from the record that the district court has been proceeding on the theory that there was no authority whatever for a *supersedeas* in this case, and has not exercised, or been called upon to exercise, its discretion in granting or refusing a *supersedeas*. This court now has jurisdiction of the case on appeal, and we have no doubt of its power to itself grant a stay on proper conditions. *City of Janesville v. Janesville Water Co.*, 89 Wis. 159, 61 N. W. 770; *Haught v. Irwin*, 166 Pa. St. 548, 31 Atl. 260. Inasmuch as the allowing of a stay is wholly a matter of discretion, it follows that the court may, in allowing the stay, affix such conditions as, in its judgment, are necessary for the protection of the parties. A bond conditioned merely not to commit waste is, as we have seen, not a sufficient protection. We think the bond should be further conditioned to pay the reasonable rental value of the property to the receiver in case the order appointing him should be affirmed. The record discloses that the premises are now

occupied by one of the appellants as a homestead, and this state of facts demands that we should permit in this case the order appealed from to be superseded. In view of the evidence as to the value of the property and its probable rental value, we think the bond should be in the penal sum of \$1,000. If a bond in that sum, and so conditioned, be filed within 20 days, with sureties approved by the clerk of the district court, the enforcement of the order will be suspended pending appeal. If not so given, the order heretofore entered staying proceedings will stand discharged. Ordered accordingly.¹⁴

¹⁴ *Accord*: In re Epley, (1901) 10 Okl. 631; Board of Med. Examiners v. Kellogg, (1894) 14 Mont. 243; Boynton v. Church, Judge, (1910) 148 Ia. 197 (*semble*). Many statutes declare that stays may be ordered in the discretion of the court.—Gross v. Kelleher, (1887) 73 Cal. 639; Devereau v. Katz, (1911) 22 N. D. 351.

CHAPTER X.
DISPOSITION OF CASE UPON REVIEW.

SECTION 1. HEARING AND REHEARING.

BRODIE v. FITZGERALD.

Supreme Court of Arkansas. 1892.

55 Arkansas, 460.

COCKRILL, C. J. The case comes up on a motion to advance it on the docket for hearing out of its regular order, upon the suggestion that the public interest is involved. The motion sets forth the following state of facts: "Alexander Haker devised to Edward Fitzgerald, as bishop of the Catholic Church, certain real property in the city of Little Rock, Arkansas, the rents and profits of which were to be used in maintaining a hospital in said city. Soon thereafter Edward Fitzgerald obtained from the Pulaski chancery court an injunction restraining John Brodie, as county clerk, from extending the taxes against said property, which consists of and is rented for store-houses and dwellings." According to the numerical practice of this court, no case can be taken up out of its order in the calendar, even by consent, where private or local interests only are concerned, unless the statute has otherwise specified. It is incumbent upon the court to see to it that the unnecessary advancement of causes out of their order does no injustice to other litigants, the hearing of whose causes has already been delayed by the crowded state of the docket. *Vaught v. Green*, 51 Ark. 378, 11 S. W. Rep. 587. The fact that a case is of public importance or interest, or that the interest of many persons in many localities depend upon it, does not, of itself, entitle the parties to have it heard out of its order. To make it a question of public interest, within the meaning of the practice which

(1155)

gives preference to such cases, the administration of public affairs—that is, the government—must in some way be involved. And then only the party representing the governmental interest can be heard to raise the question. In such a case the practice is to refuse to advance the cause unless it is made to appear that the unsettled condition of the question will embarrass the operation of the state government or of some one of the political subdivisions of the state. It is accordingly the practice to refuse to advance a contest about a county-seat, which is always a matter of great public interest in the county where it arises, unless the controversy has left the question of the location of the seat of justice in doubt, and makes it probable that confusion will arise in the administration of the law. In the annexation of new territory to a city, the assumption of jurisdiction by the city over the new territory before the right is finally settled might create confusion in all departments of the city government, (*Black v. Brinkley*, 54 Ark. 372, 15 S. W. Rep. 1030), and the case is advanced to prevent it. Contested election cases have been advanced upon the theory that they involve the due administration of the law, because the people have the right to have the law enforced by those whom they have elected. The only other class of cases to which the practice has been applied is such as involves the public revenue. Numerous cases under that head have been advanced. But the reason upon which the practice is based limits it to cases in which it is made to appear that the question involved is such as to materially embarrass the operation of the state or of a county or municipal government.

The present case does not present that state of things. For aught that appears, the property involved is a small part of the taxable property of the county and city, and the question presented affects the taxation of that property alone. It is not shown, then, that any department of the government will be in any wise embarrassed by the delay. The motion is denied.

POWERS v. STURTEVANT.

Supreme Judicial Court of Massachusetts. 1909.

200 Massachusetts, 519.

KNOWLTON, C. J. This is an appeal by the defendant from an order of the superior court that judgment be entered for the plaintiff. The appeal is founded upon the fact that an application for a rehearing, on account of a supposed error in law in the decision of the case by the full court, had been sent to the Chief Justice, and the receipt of it had been acknowledged, with a statement that it would be considered by the justices at their next meeting for consultation. The application was sent in July, and the next meeting of the justices was to be on the first Tuesday of September.

The defendant seemingly misapprehends the standing of a case after a final decision of it by the full court upon questions of law. On this subject Chief Justice Gray said, in the opinion in *Winchester v. Winchester*, 121 Mass. 127-130:

"The practice of that court [the English Court of Chancery] affords no rule to govern a court of last appeal, whose judgments have the strongest presumptions in their favor, and cannot be freely reconsidered without unreasonably protracting litigation and disregarding the claims of other suitors to the attention of the court.

"After final judgment in the House of Lords or in the Judicial Committee of the Privy Council, no rehearing is allowed, unless for the purpose of correcting mistakes in the form of the decree. * * * In the Supreme Court of the United States no rehearing of a case once decided is granted, nor even an argument permitted upon the question whether a rehearing should be had, unless the court, upon inspection of the petition for a rehearing, sees fit so to order, * * * and this court, for some years past, has conformed to that practice as essential to the discharge of its increasing business."

He supports his statements as to the practice in England and in the Supreme Court of the United States by numerous citations. A similar practice prevails generally in the courts of last resort in the states of this country, although there are two or three, and possibly more, in which applications

for a rehearing of questions of law are entertained and arguments heard upon them. The application in *Winchester v. Winchester, ubi supra*, was on the ground that a decree had been entered erroneously as by consent of the parties, when in fact there was no consent. The court received the application without hearing argument upon it, and announced a decision refusing a rehearing. In cases of applications for a rehearing on the ground of a supposed error of the full court, it has been the practice, for many years, not to treat them as having any standing as a part of the legal procedure in the case. They are not recognized by our statutes. They cannot be made as a matter of right, and they are not entered upon the records of the court unless the justices, in their discretion, think they ought to be.

Of course there is a possibility of error in a decision by the most learned and painstaking court in the world. The justices of the Supreme Court of the United States, and of other distinguished tribunals, are often nearly evenly divided in opinion upon a difficult question of law. But when a decision is made, after a court's best efforts to reach a correct conclusion, it ought not to be open to revision merely because it seems to the defeated party to be wrong. On the other hand, if by any accident, oversight or inadvertence a wrong conclusion should be reached in any case, the judges who made the decision presumably would be more desirous than any one else to correct the error. Accordingly, in such a case they would welcome a suggestion in the interest of justice, from anybody, at any time while they have power to revise the decision. The practice of the court in reference to such suggestions from a party is stated in *Wall v. Old Colony Trust Company*, 177 Mass. 275-278, 58 N. E. 1015, 1016, as follows: "Such an application has no standing under our laws as a recognized part of our procedure, but is received only as friendly information to the justices of an oversight or manifest error, which, in the opinion of the justices, should call for correction or reargument. Argument is not heard upon such an application, nor should the application itself contain any argument, but it should suggest the error relied on." If such a suggestion indicates an error the court, of its own motion, will do anything in its power to accomplish justice and protect the rights of the parties. But happily there is seldom occasion to do anything of this

kind, and it would be likely to work injustice rather than justice, to permit a party, by presenting such an application, to postpone as of right the entry of final judgment, after a case has been through all the earlier stages of litigation, and has been finally decided with due deliberation by the court of last resort. If the justices, after receiving such an application, do not recall the rescript, or otherwise suggest a postponement of action by the lower act, the action of that court should be governed by the rule stated in *Shannon v. Shannon*, 10 Allen, 249, in these words: "The application to the court, holden by a single judge, to postpone entering judgment for the purpose of affording the party an opportunity for a reargument upon a case already decided by the full court, was a matter within the discretion of the judge, and his ruling refusing such application does not furnish any ground for a bill of exceptions." On the face of the record the case was ripe for judgment, and there was no error of law in making the order.

*Judgment affirmed.*¹⁵

¹⁵ Any party is entitled as of right to *apply* for a rehearing,—*Cummings v. Nielson*, (1913) 42 Utah, 157; but there is no *right* to have it *granted* in the absence of statute. The matter is usually regulated by rules of court.—*Hanson v. McCue*, (1872) 43 Cal. 178; *Florida Land Rock Phos. Co. v. Anderson*, (1905) 50 Fla. 516; *Columbia Min. Co. v. Holter*, (1872) 1 Mont. 429. Statutes or rules of court sometimes allow a rehearing as of right in case of dissent in the court as in 3 Mich. C. L. (1915) § 12010.

"A rehearing will not be granted unless a plain error appears upon the record probably requiring a reversal."—*De Bolt v. McBrien*, (1914) 96 Neb. 237.

"The office of a petition to rehear is to call the attention of the court to matters overlooked, not to those things which the counsel supposes were improperly decided after full consideration."—*Louisville & Nash. RR. Co. v. Fidelity Co.*, (1911) 125 Tenn. 658, 691.

"If rehearings are to be had until counsel on both sides are entirely satisfied, I fear, that suits would become immortal."—*Story, J.*, in *Jenkins v. Eldredge*, (1845) 3 Story, 181, 305. See further discussion of the serious disadvantages of rehearings in *Brown v. Aspden*, (1852) 14 How. (U. S.) 25.

New points, not raised or argued on the first hearing, cannot be availed of on a rehearing.—*Murphy v. Cooper*, (1910) 41 Mont. 72; *Gamble v. Silver Peak Mines*, (1913) 35 Nev. 319; *Gardner v. City of Bluffton*, (1910) 173 Ind. 454; *McWilliams v. Ry. Co.*, (1913) 172 Mo. App. 318; *Gooch v. Thompson*, (1914) 68 Ore. 411; *Van Dyke v. Cole*, (1908) 81 Vt. 379; *Tazewell v. Herman*, (1908) 108 Va. 416; *State v. City of Birmingham*, (1909) 160 Ala. 196.

Scope of Rehearing. A rehearing cannot be employed merely as a means of rearguing the whole case.—*Cummings v. Nielson*, (1913) 42

Utah, 157; *Goodwin v. Goodwin*, (1874) 48 Ind. 584. In some states, however, the practice allows the whole case to be re-opened on rehearing unless the order granting it imposes limits.—*Fish v. Poorman*, (1911) 85 Kan. 237; *Palmer v. Mizner*, (1903) 70 Neb. 200. It is not uncommon for the court in its order allowing a rehearing, to specify upon which of the stated grounds it will be allowed.—*Ivie v. King*, (1915) 169 N. C. 261; *Christy v. Burch*, (1889) 25 Fla. 978.

Oral argument on petition or motion for rehearing is permitted only in cases of the greatest importance.—*Parker v. State*, (1912) 7 Okl. Cr. 238.

GRATIOT v. MISSOURI PACIFIC RAILWAY CO.

Supreme Court of Missouri. 1893.

116 Missouri, 450.

BARCLAY, J. This case reached the court *in banc* by transfer from the second division at the October term, 1891, after steps shown in the report of the case in 16 S. W. Rep. 384, and 19 S. W. Rep. 31. Our jurisdiction to review upon the merits is seriously challenged by plaintiff's counsel. The chronology of the material proceedings in the divisional court is this: *April term, 1891*:—April 23, 1891, cause argued and submitted; May 19, 1891, judgment affirmed, opinion by Thomas, J.; May 26, 1891, motion for rehearing filed; October 12, 1891, motion for rehearing overruled; opinion by Thomas, J. *October term, 1891*:—October 14, 1891, motion to set aside order overruling motion for rehearing filed; December 22, 1891, last motion sustained, rehearing granted, and cause transferred to court *in banc*, (Thomas, J., dissenting.) The April term, 1891, expired after the motion for rehearing was denied, and the steps to set aside the overruling order were taken at a later (the October) term, 1891. This last "motion to set aside," etc., is based on grounds disputing the correctness of the legal propositions advanced in the divisional opinions. It does not assert any irregularity of procedure in reaching the result in the case. The plaintiff, on the other hand, insists that the motion was improvidently sustained, and that it was beyond the constitutional powers of division No. 2 to set aside its final judgment of the former term in that manner.

It is plain that there must be a stage of every cause at which further investigation of its merits ceases. The interests of justice demand the establishment of some fixed terminal point to litigation. That point is ordinarily understood to be the close of the term of final judicial action in the case. But it may generally be moved further forward by appropriate steps, taken at that term, if authorized by law. Successive motions for review, in indefinite series, obviously cannot be tolerated by any court, though it is not so easy to mark the point at which they must stop. A standing rule here permits the filing of a motion for rehearing on certain stated grounds, (102 Mo. Append. Rule 20, 16 S. W. Rep. vii.,) and in many instances those motions prove of great service and value to the court; but when one is denied, and the term thereafter lapses, we discover no authority on which to sustain further moves at a subsequent term to rectify judicial errors in a judgment. This court, some 40 years ago, said: "There would be no end to litigation of county courts, or any other courts, could they review their own acts from term to term, and correct supposed errors in their past decisions. The matter is beyond their reach." *Peake v. Redd*, (1851), 14 Mo. 83. To justify action by this court, or either division thereof, in any cause, at a later term than that at which the motion for rehearing is overruled, something must be done at that term to retain the jurisdiction to act upon it; otherwise no judicial errors therein can be reviewed after the term lapses. It was expressly so held by the second division of this court, with reference to extending time for bills of exceptions in the circuit court, in *State v. Berry*, (1890,) 103 Mo. 367, 15 S. W. Rep. 621, following older cases; and the same principle governs the case before us. The rule of this court permitting motions for rehearing to be filed within 10 days after the decision of a case, it may be conceded, amounts, in effect, to a standing order in each decided cause; but its force extends only to one motion for rehearing, and obviously is not intended to sanction an unlimited number of motions to set aside orders as they may be made, after the ruling upon the motion for rehearing. The United States supreme court and other courts of last resort have often ruled that a motion for rehearing on the merits, first made at a term subsequent to final judgment, cannot properly be considered. *Hudson v. Guestier*, 7 Cranch. 1; *Brooks v. Railroad Co.*, (1880,) 102

U. S. 107; *Milam Co. v. Robertson*, 47 Tex. 222; *Daniels v. Daniels*, 12 Nev. 118. That proposition is firmly settled, and beyond it we find no authority in the rules of court or in any order in this action authorizing the interposition of such a motion as that made herein October 14, 1891, after the close of the term at which the motion for rehearing was overruled. We are hence of opinion that this cause passed beyond the jurisdiction of this court to review, upon its merits, at the end of the April term, 1891; and consequently that the rehearing was erroneously granted thereafter. The order granting it should, we think, be vacated, and the "motion to set aside order overruling motion for rehearing" should be overruled. * * *¹⁶

¹⁶ While courts almost invariably adopt the practice of refusing to entertain an application for a rehearing after the term, they do not always consider that there is an absolute jurisdictional prohibition upon doing so.—*Attorney General v. Joy*, (1914) 181 Mich. 266 (application considered after 30 years); *Jones Stationery Co. v. Hentig*, (1884) 31 Kan. 317.

SECTION 2. DISMISSAL.

SARATOGA GAS & ELECTRIC LIGHT CO. v. TOWN.

Supreme Court of New York, General Term. 1893.

67 Hun, 645.

Argued before MAYHAM, P. J., and HERRICK, J.

HERRICK, J. * * *

As a general rule, it is a matter of right that a party who has commenced a litigation may discontinue it, unless substantial rights of the other parties have accrued, and injustice will be done to them by a discontinuance. *In re Butler*, 101 N. Y. 307, 4 N. E. Rep. 518; *Winans v. Winans*, 124 N. Y. 140, 26 N. E. Rep. 293. In the case last cited, it was held that an application to discontinue was addressed to the legal, not the arbitrary, discretion of the court. But in that particular case it was held that the public must be regarded as a party, and that, in the public interest, a discontinuance

might be refused. In the case at bar the respondents to the appeal are not only willing, but ask, that the appeal be dismissed, so that we have all the parties to the record uniting. There is no claim that the rights of any persons not parties to the record will be affected, and it is not an action or proceeding like *Winans v. Winans*, *supra*, where the public can be considered a party. The fact that the attorney for the appellants opposes the dismissal of the appeal, in the absence of any claim of fraud or collusion, or lien upon the matter in controversy, is of no consequence. *Roberts v. Doty*, 31 Hun, 128; *Root v. Van Duzen*, 32 Hun, 63. This is not a case where the attorney is in fact a party in interest,¹⁷ where he has a lien upon the claim, and where there has been a collusive settlement in fraud of his rights; and, in the absence of any such facts, it seems to me that it would be very unseemly for the court to refuse, at the request of an attorney, to grant the desire of all the parties to a contention, that the litigation be settled. The purpose of courts is to settle contentions and controversies, not continue them; and they will aid parties, not embarrass them, in making amicable adjustments of their differences. The motion to dismiss the appeal is granted. No costs having been asked, none are allowed.¹⁸

¹⁷ "The attorney, however, even if he has a lien on the judgment, * * * is not a party to the suit, nor does he stand in the place of a party in interest. He is in no way responsible for the costs of the proceedings, and to permit him to control them would, in effect, be compelling the client to carry on the litigation at his own expense, simply for the contingent benefit of the attorney."—*Platt v. Perome*, (1856) 19 How. (U. S.) 384.

¹⁸ "Usually the court will not allow it if the party intend at some future time to bring a new appeal, as the allowance under such circumstances would be unjust to the defendant,"—*Calcote v. Stanton*, (1855) 18 How. (U. S.) 241. A dismissal by appellant does not affect the appeal based upon appellee's assignment of cross-errors,—*San Pedro, etc., RR. Co. v. Board of Education*, (1909) 35 Utah, 13.

DORE v. DOUGHERTY.

*Supreme Court of California. 1884.**4 Pacific Reporter, 1067.*

MCKEE, J. The respondent moves to dismiss the appeal taken from the order denying a motion for a new trial in this case, principally upon the ground that the transcript shows on its face that the proposed statement on the motion was not served upon one of the "adverse parties," as required by subdivision 3, § 659, Code Civ. Pro.

It is conceded that the proposed statement was served on all the parties except one, viz., the defendant Hallidie. Upon him it was not served; but the court, as to the parties upon whom it was served, settled and allowed the same, certified to its correctness, and upon it, as certified, the motion for a new trial was submitted and denied. It may be that the court denied the motion because the proposed statement had not been served upon *all* the parties. If that were so, or if it were not so, it is not cause for a dismissal of the appeal. An appeal is dismissible for some irregularities in taking it, or for failure to prosecute it, or for want of appearance, or for consent of parties; but where it has been perfected according to law, and the appellant appears, he is entitled to be heard upon any question or fact involved in the merits. *Motion denied.*¹⁹

¹⁹ *Grounds.* "Various defects in the proceedings for review constitute grounds for dismissing an appeal or writ of error on motion, in the absence of a sufficient excuse therefor or a waiver thereof. This rule applies to defects such as failure to obtain an order allowing an appeal; failure of the record to show that an appeal was taken or a writ of error issued; failure of the record to show that an appeal was ever granted or allowed; failure of the record to show an application for an appeal; failure to group and number the exceptions; failure to bring the appeal within the time prescribed; * * * failure to number the pages of the petition in error and of the record before filing same; * * * failure to prepare the order appealed from in accordance with the statute; * * * failure to give notice of appeal; * * * failure to bring up all the parties in interest; * * * failure to give an appeal bond or undertaking when required by statute, rule of court, or valid order of court; * * * failure to file the transcript as required by law; * * * failure to specify errors; failure to file and serve briefs or points and authorities; failure to appear at the call of the case;" etc.—4 C. J. 565, citing a very large number of cases.

A motion to dismiss is the proper method of attacking a moot case,—

Cardoza v. Baird, (1907) 30 App. D. C. 86; Mills v. Green, (1895) 159 U. S. 651; or raising the objection of want of jurisdiction in the appellate court,—Hecker v. Fowler, (1861) 1 Black (U. S.) 95; Eustis v. Bolles, (1893) 150 U. S. 361. Want of prosecution is also a common ground for dismissal,—Bronson v. Bank, (1910) 83 Conn. 128; O'Mara v. Wabash RR. Co., (1898) 150 Ind. 648; Perkins v. Perkins, (1913) 173 Mich. 690; Parsons v. Babson, (1906) 129 Wis. 311.

"The dismissal is a penalty for not taking the steps required,"—Elwood v. Sac County, (1912) 156 Ia. 407. An order of dismissal is often made *nisi*, e. g., unless a proper bond shall be filed,—Seward v. Corneau, (1880) 103 U. S. 161; King v. Gridley, (1888) 69 Mich. 84.

MINOR v. TILLOTSON.

Supreme Court of the United States. 1843.

1 Howard, 287.

TANEY, C. J. This is a writ of error from the Circuit Court of the United States for the eastern district of Louisiana.

A motion has been made to dismiss the writ, upon the ground that the record contains no bill of exception, nor statement of facts by the court, according to the practice of Louisiana, by which any question of law is brought up for revision in such a form as to enable this court to decide upon it; and that there is a mass of various and conflicting testimony in relation to facts, upon which no jurisdiction can be exercised upon a writ of error.

Assuming this statement to be correct, it does not follow that advantage can be taken of it upon a motion to dismiss. The record shows that a judgment was rendered in the Circuit Court, over which this court undoubtedly have jurisdiction upon a writ of error. The plaintiffs allege that there is error in law in this judgment, and have brought it here for the revision of this court. And upon the argument of the case it will be incumbent upon them to show that the record presents, in some form or other, a statement of facts upon which a question of law arose in the Circuit Court, and which was there erroneously decided. And if he fails to do this, the judgment must be affirmed. But he is entitled to be heard, in order that he may show, if he can, that the error of which he complains appears in the record; and whether

it does so appear or not, is a matter which cannot be inquired into in the form in which the case is now brought before us.

The motion must therefore be dismissed.

JOHN P. SHARKEY CO. v. CITY OF PORTLAND.

Supreme Court of Oregon. 1910.

58 Oregon, 353.

MOORE, C. J. This is a motion to dismiss an appeal as to some of the parties. The defendants, the city of Portland, a municipal corporation, W. Scott and T. McDougal, partners as Scott & McDougal, and M. J. Connelley, having been perpetually enjoined from trespassing on the plaintiff's land and required to pay him damages arising from the injury thereto, jointly appealed from the entire decree. The city of Portland alone filed a brief, and because its codefendants did not join therein or file a separate brief this motion was interposed.

As the entire decree is attempted to be reviewed by all the defendants, the appeal cannot be dismissed as to any of them, for a reversal, affirmance, or modification of the determination of the trial court will necessarily affect all of them alike. If the failure of the counsel for the codefendants to file a brief is so flagrant that the omission should subject their clients to discipline, the most severe punishment that could be legally inflicted upon them would be to deny them the right to file a brief herein, and to refuse them the privilege of appearing in person or by counsel at the trial of the cause in this court.

* * * * *

MOORE v. MCCOLLUM.

Supreme Court of Nebraska. 1895.

43 Nebraska, 617.

NORVAL, C. J. At the present term a motion was submitted by the defendants in error to dismiss the petition in error for want of prosecution. This cause was submitted for decision upon its merits at the September term, 1893, without briefs or oral argument. The motion to dismiss, therefore, comes too late. Such a motion, to be of any avail, must be presented before the final submission of the cause upon the merits. No brief having been filed by either party, and the judgment conforming to the pleadings and evidence, it is accordingly *affirmed*. * * *²⁰

²⁰ In general motions to dismiss must be made promptly or they will be deemed to be too late. See many cases cited in 4 C. J. 594-7.

DAVIDSON v. LANIER.

Supreme Court of the United States. 1861.

131 U. S. lxxii.

Motion to dismiss. The case is stated in the opinion.

TANEY, C. J. A motion has been made in each of these cases to dismiss it for want of jurisdiction, on account of certain defects, as it is alleged, in the process and proceedings made necessary by the act of Congress, in order to bring it before this court.

It is the practice of this court to receive and hear motions of this kind on the day assigned for business of that description, before the case is reached in the regular call of the docket. And the rule has been adopted, because it would be unjust to the parties to delay the decision until the case is called for trial, if the court are satisfied that they have not jurisdiction, and that the case must be ultimately dismissed without deciding any of the matters in controversy between the parties.

But in order to prevent surprise upon the plaintiff in error, or appellant, the court have always, where the motion is made in advance of the regular call, directed notice to be given to him or his counsel, and required proof that it was served long enough before the motion is heard to give him an opportunity of contesting the motion if he desires to do so. And the time required must depend upon the distance of the counsel or the party from the place of holding the court, and must be sufficient not only to enable him to make the journey, but to arrange business in which he may be engaged when he receives the notice. For, when a case stands so late on the docket of this court as to give no reasonable hope of reaching it during the term, it cannot be expected that distant counsel will leave their usual place of business, and attend here to guard against the possibility of a motion to dismiss.

The motions in these two cases were made about three weeks before the close of the term, but as soon as it could be conveniently made after they were docketed, and the court directed the usual notice to be given. We are satisfied that the counsel for the defendant in error has used every means in his power to comply with the order. But he has no proof that it was actually served. The counsel and client both reside in Mississippi, and the case stands so late on the docket that a trial could not be expected at this term. Nor could they anticipate that there would be any reason for their attendance. Under these circumstances the court order that the motion be continued, to be heard on the first Friday in next term, provided notice of the motions and the day of hearing be served on the party or his counsel, thirty days before the commencement of the next term.

*So ordered.*²¹

²¹ The notice should specify the grounds upon which the motion is made,—*Bell v. So. Pac. Ry. Co.*, (1902) 137 Cal. 77; and the time of hearing,—*Glenny v. Langdon*, (1876) 94 U. S. 604. The length of time of notice is frequently fixed by statute or rule of court,—*Rogers v. Trumbull*, (1903) 31 Wash. 656; *Commonwealth Ins. Co. v. Pierro*, (1861) 6 Minn. 569. Want of notice may be waived,—*Smith v. Hawley*, (1899) 11 S. D. 399; *Haggin v. Montague*, (1907) 125 Ky. 507.

DAKOTA COUNTY v. GLIDDEN.

*Supreme Court of the United States. 1885.**113 United States, 222.*

MILLER, J. This case comes before us on a motion to dismiss the writ of error. The ground of this motion is that since the judgment was rendered, which plaintiff in error now seeks to reverse, the matter in controversy has been the subject of compromise between the parties to the litigation, which is in full force and binding on plaintiff and defendant, and which leaves nothing of the controversy presented by the record to be decided. The evidence of this compromise is not found in the record of the case in the circuit court, nor in any proceedings in that court, and it is argued against the motion to dismiss that it cannot, for that reason, be considered in this court. It consists of duly certified transcripts of proceedings of the board of commissioners of Dakota county, who are the authorized representatives of that county in all its financial matters, of receipts of the parties or their attorneys, and of affidavits of persons engaged in the transaction. These are undisputed on the other side, either by contradictory testimony or by the brief of counsel who appear to oppose this motion. They leave no doubt of the fact, if it is competent for this court to consider them, that shortly after the judgment against the county in favor of Glidden was rendered, the parties entered into negotiations to settle the controversy, which, after due deliberation and several formal meetings of the board of commissioners, resulted in such settlement. The judgment in the case was rendered on certain coupons for interest due on bonds issued by said county to aid in constructing railroads. These bonds bore interest at the rate of 10 per cent. per annum, and became due in the year 1896. By the new agreement the county took up the bonds and the coupons on which judgment was rendered, and issued new bonds bearing 6 per cent. interest, the principal payable in the year 1902. These new bonds were delivered to plaintiff and accepted by him in satisfaction of his judgment and of his old bonds, and these latter were delivered by him to the county authorities and destroyed by burning.

There can be no question that a debtor against whom a judgment for money is recovered, may pay that judgment, and bring a writ of error to reverse it, and if reversed can recover back his money. And a defendant in an action of ejectment may bring a writ of error, and, failing to give a *supersedeas* bond, may submit to the judgment by giving possession of the land, which he can recover, if he reverses the judgment, by means of a writ of restitution. In both these cases the defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal. And so, if, in the present case, the county had paid the judgment in money, or had levied a tax to raise the money, or had in any other way satisfied that judgment without changing the rights of the parties in any other respect, its right to prosecute this writ of error would have remained unaffected. But what was done was a very different thing from that. A new agreement, on sufficient consideration, was made, by which the judgment itself, the coupons on which it was recovered, and the bonds of which these coupons were a part, were all surrendered and destroyed, and other bonds and other coupons were accepted in their place, payable at a more distant date and with a lower rate of interest, with the effect of extinguishing the judgment now sought to be reversed, so that the plaintiff in that judgment could not issue execution on it, though there is no *supersedeas* bond to secure its payment. It is a valid compromise and settlement of a much larger claim, but it includes this judgment necessarily. It *extinguishes* the cause of action in this case. If valid, it is a bar to any prosecution of the suit in the circuit court, though we should reverse this judgment on the record as it stands for errors which may be found in it. To examine these errors and reverse the judgment is a fruitless proceeding, because when the plaintiff has secured his object the relation of the parties is unchanged, and must stand or fall on the terms of the compromise.

It is said that to recognize this compromise and grant this motion is to assume original instead of appellate jurisdiction. But this court is compelled, as all courts are, to receive evidence *dehors* the record affecting their proceeding in a case before them on error or appeal. The death of one of the parties after a writ of error or appeal requires a new

proceeding to supply his place. The transfer of the interest of one of the parties by assignment or by a judicial proceeding in another court, as in bankruptcy or otherwise, is brought to the attention of the court by evidence outside of the original record, and acted on. A release of errors may be filed as a bar to the writ. A settlement of the controversy, with an agreement to dismiss the appeal or writ of error, or any stipulation as to proceedings in this court, signed by the parties, will be enforced, as an agreement to submit the case on printed argument alone, within the time allowed by the rule of this court.

This court has dismissed several suits on grounds much more liable to the objection raised than the present case, as in the case of *Cleveland v. Chamberlain*, 1 Black, 419, where the plaintiff in error, having bought out the defendant's interest in the matter in controversy, and having control of both sides of the litigation in the suit, still sought for other purposes to have the case decided by this court. On evidence of this by affidavits the court dismissed the writ. Similar cases in regard to suits establishing patent rights or holding them void by the inferior courts, as in *Lord v. Veazie*, 8 How. 254; *Wood Paper Co. v. Heft*, 8 Wall. 336, have been dismissed, because the parties to the suit having settled the matter, so that there is no longer a real controversy, one or both of them was seeking a judgment of this court for improper purposes, in regard to a question which exists no longer between these parties.

It is by reason of the necessity of the case that the evidence by which such matters are brought to the attention of the court must be that, not found in the transcript of the original case, because it occurred since that record was made up. To refuse to receive appropriate evidence of such facts for that reason is to deliver up the court as a blind instrument for the perpetration of fraud, and make its proceedings by such refusal the means of inflicting gross injustice. The cases and precedents we have mentioned are sufficient to show that the proposition of plaintiff in error is untenable.

In the case of *Board of Liquidation v. Louisville & N. R. Co.*, 109 U. S. 223, S. C. 3 Sup. Ct. Rep. 144, a question arose on the presentation of an order made by the authorities of the city of New Orleans to dismiss a suit in this court in which that city was plaintiff in error. The order was based

on a compromise between those authorities and the railroad company, which the board of liquidation, intervening here, alleged to be without authority, and fraudulent. The court here did not disregard the compromise or the order of the city to dismiss the case; but, considering that the question of authority in the mayor and council of the city to make the compromise, and of the alleged fraud in making it, required the power of a court of original jurisdiction to investigate and decide thereon, continued the case in this court until that was done in the proper court. But when this was ascertained in favor of the action of the mayor and council, the suit was dismissed here on the basis of that compromise order.²³

In the case before us we see no reason to impeach the transaction by which the new bonds were substituted for the old, and for the judgment we are asked to reverse; and the writ of error is accordingly dismissed.

²³ If the motion is based upon facts which should be but are not shown on the record presented above, the appellate court may direct the lower court to certify up any additional facts relevant to the point raised which may appear on the record below.—*Kelly & Jones Co. v. Moore*, (1906) 125 Ga. 382.

TRUMBULL v. JEFFERSON COUNTY.

Supreme Court of Washington. 1910.

60 Washington, 479.

CROW, J. This action was commenced by Thomas F. Trumbull and Lida P. Trumbull, his wife, against Jefferson county and Harry Hart, its treasurer, to vacate a tax foreclosure judgment and set aside a tax deed affecting real estate to which the plaintiffs claim title. From a decree in their favor, the defendants have appealed.

The present hearing is upon respondents' motion to dismiss the appeal. They contend that, since the commencement of the action and prior to judgment, the county conveyed its interest in the real estate to one P. M. Coyne; that the appellants are not aggrieved by the final judgment and cannot

prosecute this appeal. In support of their motion they have filed affidavits and certified copies of records showing that, when this action was commenced, they filed a notice of *lis pendens* with the auditor of Jefferson county, and that on the next day the appellant Harry Hart, as treasurer of Jefferson county, sold to P. M. Coyne all the right, title and interest of the county in and to the real estate. The transcript shows that the action was commenced on April 10, 1908. No suggestion of the sale to Coyne appears in any of the pleadings, although the issues were not completed until March 9, 1910, the date of the trial. From the statement of facts it appears that the cause was tried on the issues raised between the respondents and appellants; that no mention of the transfer to P. M. Coyne was made during the trial, and that no motion was made to substitute him as a defendant. Respondents' contention is that, by reason of the transfer, the county has no further interest in the subject-matter of the action, and that the controversy has ceased. In support of their contention they cite a number of cases from this court, in which it appeared that some action such as a satisfaction of the judgment had occurred, which determined the controversy. Here nothing changing the situation of the parties has occurred since judgment. The deed upon which respondents now predicate their motion to dismiss was executed and recorded almost two years before the trial. Not a suggestion of the transfer was made prior to trial, judgment, or appeal. The statement of facts has attached thereto the certificate of the trial judge, under date of June 13, 1910, that it contains all material facts, matters, and proceedings theretofore occurring in the cause and not already a part of the record. The appellants now support their motion by a showing that the transfer was made prior to the framing of the issues, after the commencement of the action, and long prior to trial or judgment. Matters outside of the record occurring after judgment, which affect the right of an appellant to prosecute his appeal, may be shown to and considered by the appellate court, on a motion to dismiss. But no such showing should be permitted as to matters occurring prior to judgment. They should be incorporated in the record by proper procedure at the instance of the litigant who intends to rely upon them. In *Merriam v. Victory Mining Company*, 37 Or., at page 329, 56 Pac., at page 75, 58 Pac., at page 37,

60 Pac., at page 998, discussing this rule of practice the court well said: "It is quite well settled that evidence of facts outside of the record, occurring after the rendition of the judgment in the court below, and which affect the proceedings of the appellate court, when deemed necessary, will be received and considered by such court for the purpose of determining its action. *Ehrman v. Astoria Ry. Co.*, 26 Or. 377, 38 Pac. 306; *Dakota County v. Glidden*, 113 U. S. 222 [5 Sup. Ct. 428] 28 L. Ed. 981; *Elwell v. Fosdick*, 134 U. S. 500 [10 Sup. Ct. 598] 33 L. Ed. 998. But the record of the court below, upon which the appeal is based, cannot be contradicted or varied by an *ex parte* showing in the appellate court."

After the county transferred its interest to Coyne, he either could have been substituted as a party defendant on his motion, or he could have consented to a continuation of the action in the name of his grantors for his benefit. The final judgment would adjudicate his rights. Under the doctrine of *lis pendens*, if he so elected, he should be permitted to obtain in the names of his grantors, by appeal if necessary, any benefit resulting from the litigation. Had the county obtained judgment, the present respondents could have prosecuted an appeal, and they cannot now insist that rights of the appellants' vendee cannot be protected by an appeal prosecuted by his grantors for his benefit.

* * * * *

The motion is denied.²³

²³ Thus, it cannot be shown by evidence *dehors* the record that the judgment was really entered by consent,—*Woodbury v. Nevada, etc., RR. Co.*, (1898) 120 Cal. 367; *Fox v. City of Hinton*, (1912) 70 W. Va. 654; or, that the appellant tendered a deposit with the trial justice in lieu of a recognizance on appeal which the justice refused to receive,—*Tibbetts v. Handy*, (1888) 145 Mass. 537; or, that no assignment of errors was presented to the trial judge with the bill of exceptions,—*Thomas Bros. v. Price*, (1908) 56 Fla. 694.

DUNTERMANN v. STOREY.

*Supreme Court of Nebraska. 1894.**40 Nebraska, 447.*

RAGAN, C. On the 25th day of November, 1889, Joseph Storey recovered a judgment in the district court of Adams county, Neb., against John H. Duntermann. On the 9th day of January, 1890, Duntermann as principal, and Jacob Bernhart as surety, executed and filed in the office of the clerk of the district court a *supersedeas* bond. * * *

The bond was approved by the clerk of the district court on the day of its execution. This suit was brought by Storey against Duntermann and Bernhart on said bond. Storey, in his petition, alleged the recovery of the judgment against Duntermann; the execution, delivery, and approval of the aforesaid *supersedeas* bond by Duntermann and Bernhart; its filing with, and approval by, the clerk of the district court of Adams county. The petition further alleged that more than a year had elapsed since the making of the last final order and judgment in the case of Storey against Duntermann in the district court of Adams county; that no bill of exceptions had ever been settled in said case, "and that no proceedings in error or appeal are now pending in the supreme court of Nebraska from the said judgment, whereby the same has been wholly affirmed, unreversed, and unmodified. * * * The district court * * * rendered a judgment for Storey for the amount of his judgment against Duntermann, with interest and costs, and Bernhart brings the case here on error.

* * * * *

The bond which Bernhart signed provided that he would pay the condemnation money and costs in case said judgment should be affirmed in whole or in part. So then we have the question as to whether the failure of Duntermann to institute, or attempt to institute, in this court, any proceeding for a reversal of the judgment for more than one year after its rendition, amounted to an affirmance of it. We are cited by the counsel for the plaintiff in error to *Drummond v. Husson*, 14 N. Y. 60, to sustain the contention of counsel that such failure on the part of Duntermann did not affirm the

judgment. In that case the bond signed by the surety was in the following language: "Now we, the subscribers, hereby undertake that if the judgment appealed from, or any part thereof, be affirmed, the appellant will pay the," etc. This bond was said by Selden, J., who delivered the opinion of the court, to be in the precise language of section 335 of the New York Code. It appears from the opinion that the appeal was filed and docketed in the court of appeals, and was dismissed for want of prosecution. In the suit on the bond the dismissal of the appeal from the appellate court was made the sole ground of defense, and the court of appeals sustained the defense made, holding that: "A dismissal of an appeal for want of prosecution is clearly not an affirmance of the judgment. This court has decided nothing whatever in respect to the validity of the judgment." This case from New York is in point, but we are constrained to say that we do not think it sound. The opinion of the court proceeds on the theory that, in order to the affirmance of a judgment appealed from, the appellate court must hear or examine the case appealed, deliberate thereon, and reach the same conclusion that the court below reached, and render a formal judgment of affirmance. This case, so far as we have been able to ascertain from a somewhat extended examination of the reported decisions, stands alone, and is certainly not in line with the weight of authority. The general rule is that the dismissal of an appeal from an appellate court without an examination of the case upon its merits operates as an affirmance of the judgment appealed, or attempted to be appealed from. In *McConnell v. Swailes*, 2 Scam. 571, the supreme court of Illinois said: "The dismissal of an appeal is equivalent to a regular technical affirmance of the judgment of the court below, so as to entitle the party to claim a forfeiture of the bond, and have his action therefor." In *Sutherland v. Phelps*, 22 Ill. 92, it was said: "The dismissal of an appeal is equivalent to an affirmance of the judgment." In *Clark v. Milles*, 2 Pin. 432, the supreme court of Wisconsin said: "Where an appeal is dismissed, the party who brought it, with his sureties in recognizance, will be immediately liable thereon for the amount of the judgment rendered by the justice." In *Ellis v. Hull*, 23 Cal. 161, it was held: "Where an appeal is taken to the supreme court from a judgment, by filing notice of appeal and undertaking, and

the appeal is afterwards dismissed by the supreme court for failure of the appellant to send up the transcript, the sureties are liable on the undertaking on appeal." To the same effect are *Healey v. Newton* (Mich.) 55 N. W. 666; *Shannon v. Dodge* (Colo. Sup.) 32 Pac. 61; *Pratt v. Gilbert* (Utah) 29 Pac. 965.

It is true that the contract of a surety is to be construed strictly in his favor, but such a construction as the one contended for in this case would be too technical. Bernhart promised that, if the judgment rendered against Duntermann should be affirmed in whole or in part, he would pay it. This was, in effect, a promise on his part to pay the Storey judgment unless the supreme court should reverse it. Bernhart cannot allege as a defense the failure of his principal to successfully and properly prosecute his petition in error. *Pierce v. Banta* (Ind. App.) 31 N. E. 812.

5. By the execution and filing of the *supersedeas* bond, Bernhart took one step in the proceedings to have reviewed on error the Storey judgment. He then abandoned all further attempts to reverse the judgment, thus leaving it in full force. The judgment, then, is in the same plight that it would have been in had Bernhart filed his transcript of the record of said judgment and bill of exceptions in this court, and then had neglected to have a summons in error issued within one year from the date of the judgment, and this court had dismissed such error proceeding. We have already seen that, had this court dismissed the error proceedings by reason of the failure of Bernhart to comply with some requirement necessary to a review of the judgment on error, the dismissal of the proceedings would in effect be an affirmance of the judgment rendered. Is not the effect on the judgment just the same whether proceedings in error be instituted, and then dismissed without an examination of the case upon its merits, or whether the judgment debtor, after taking one or more steps looking towards reviewing the judgment on error, abandons the proceedings? A judgment debtor, by filing a *supersedeas* bond with the clerk of the district court and a petition in error in this court, stays the execution of the judgment at least for one year from the date of its rendition, as the filing in this court of the petition in error does not invest this court with jurisdiction over the person of the judgment creditor. For this purpose it is necessary that a summons

in error shall be issued within a year from the date of its rendition, although it may be served afterwards. Now, if the contention of counsel for the plaintiff in error be correct, a judgment debtor, by filing a *supersedeas* bond with the clerk of the court and a petition in error here, may stay the execution of the judgment for a year, and then, by voluntarily abandoning the proceedings in error, or by failing to have a summons in error issued, may thus deprive the judgment creditor of the power of collecting his judgment for the length of time intervening between its rendition and the dismissal of the error proceedings, and at the end of that time leave the judgment creditor with no more security for the collection of his judgment than he had on the date of its rendition. Such a construction of the statute would deprive the judgment creditor of the very rights given him by the statute; it would be, in effect, a judicial enactment of a stay law without bond.

* * * * *

The judgment of the district court is affirmed. *Affirmed.*²⁴

²⁴ But where the dismissal is made "without prejudice," to the right of the appellant to take another appeal, it does not operate as an affirmance.—*Garibaldi v. Garr*, (1893) 97 Cal. 253; *Long v. Sullivan*, (1895) 21 Colo. 109.

So, too, if the dismissal is for want of jurisdiction in the appellate court, it is not the equivalent of an affirmance, for "it would be a non-sequitur to say a court may affirm a decree when it has no jurisdiction to hear the case for any purpose,"—*Blair v. Reading*, (1882) 103 Ill. 375.

"The effect of the dismissal is to leave the judgment appealed from in full force and effect in the court in which it was rendered. In other words the status is the same as if no appeal had been prosecuted."—*Calhoun v. Kidd*, (1912) 150 Ky. 609. To same effect,—*Johnson v. Ford*, (1893) 92 Ga. 751.

HOWELL v. VAN NESS.

The Supreme Court of New Jersey. 1866.

31 New Jersey Law, 443.

Certiorari to set aside an order of the Court of Common Pleas of the county of Warren, dismissing an appeal.

HAINES, J. From a judgment recovered in a court for the

trial of small causes by Howell, Van Ness, the defendant, appealed to the Court of Common Pleas of Warren. When the appeal was regularly called for hearing, according to the course of practice of the court, the appellant failed to appear and move his appeal, and it was dismissed for want of prosecution; and leave was granted to the appellee to take the appeal bond from the files, and it was accordingly taken and an action upon it commenced.

At a subsequent term, on the allegation of surprise upon the appellant and merits in his defense, the court granted a rule to show cause why the appeal should not be reinstated, and also a rule to take affidavits. On hearing the rule to show cause, the only evidence of surprise was, that the appellant was ignorant of the time of hearing appeals, and had neglected to inform himself on the subject.

In the attempt to show merits, the testimony disclosed an entire want of merits; that the promissory note on which the action was brought was made by the appellant; that he had promised to pay and pretended to pay it, by giving a check upon a bank in which he knew he had no funds.

The Court of Common Pleas, not upon the ground of surprise and merits, but upon some error, real or supposed of the justice, ordered the appeal to be reinstated. To set aside that order the writ of *certiorari* was taken.

Of the power and duty of the Court of Common Pleas to dismiss an appeal for want of prosecution, there can be no question. One of the terms upon which the appeal is granted is, that the appellant shall enter into bond to appear and prosecute it. The operation of the judgment is suspended, until a new judgment is given or the appeal dismissed. On failure to prosecute the appeal, the only proper relief to be afforded to the appellee is to dismiss it. *Read v. Rocap*, 4 Halst. 347; *Lum v. Price*, 1 Halst. 195.

The power to reinstate an appeal is equally clear. But it must be for some good cause shown. If it were dismissed on a misapprehension of the law, as in *Case v. Rowland*, 2 Harr. 76; or on a mistake of the facts, as in *Adams v. Mathis*, 3 Harr. 310, it is the duty of the court to reinstate; and if it refuse, a *mandamus* will issue from this court commanding it to be done.

So where the appellant has a meritorious defense, which by some surprise, he has been prevented from showing, the

only redress is by reinstating the appeal to afford him the opportunity.

But when an appeal has been properly dismissed, and there is no error in law or mistake in fact and no surprise, the power of the Common Pleas over it is gone. Their jurisdiction is then exhausted, and they cannot legally reinstate the appeal. Their decision in such case is as final as if they had rendered judgment upon the merits, and they have no power to reinstate or to grant a new trial.

It is suggested that the order to reinstate an appeal is the exercise of a discretion, and not assignable for error; that it is like the granting of a new trial in a common law court, which no writ of error will correct. But it is not a matter of discretion. If the appeal had been improperly dismissed the court was bound to reinstate it; and on refusal so to do would, by a writ of *mandamus*, be required to do it.

The office of the writ of *mandamus* is to require to be done some manifest duty, not the exercise of a mere discretion. It never commands the granting of a new trial, nor the hearing or continuance of the trial of a cause, nor the allowance of an amendment of a pleading. These and other incidental orders in the progress of a cause, are so peculiarly subjects for the exercise of the discretion of the court as not to be assignable for error or affected by a writ of *mandamus*. But the reinstating of an appeal is the subject of *mandamus*. When proper to be done, it is a matter of duty and not of discretion; and a mistake in the discharge of the duty may be assigned for error.

In this case there was clearly an error in the Court of Common Pleas. The appeal was lawfully dismissed, and there was no legal ground on which it could be reinstated.

Let the rule to reinstate the appeal be set aside and for nothing holden.²⁵

²⁵ Where an appeal has been dismissed through mistake, surprise, etc., it is frequently reinstated by order of the appellate court, sometimes under statutes, sometimes on common law principles,—*Egan v. Ohio*, etc., RR. Co., (1894) 138 Ind. 274; *Collat v. Ives*, (1905) 141 Mich. 500; *Baldwin v. Rogers*, (1881) 28 Minn. 68; *State v. Foster*, (1882) 44 N. J. L. 378; *Main v. McLaughlin*, (1891) 78 Wis. 449 (after term by statute); but it is often held that such reinstatement cannot take place after the term at which the dismissal occurs,—*Bleyer v. Distillery Co.*, (1883) 70 Ga. 724; *Pisa v. Rezek*, (1903) 206 Ill. 344; *Jackson v. Ashton*, (1836) 10 Pet. (U. S.) 480.

In *The Palmyra*, (1827) 12 Wheat. (U. S.) 1, reinstatement at a sub-

sequent term where the dismissal was on account of the misprision of the clerk of the court, was held to be within the necessarily implied powers of the court.

SECTION 3. DECISION ON THE MERITS.

(a) *On Stipulation.*

MANTLE v. LARGEY.

Supreme Court of Montana. 1903.

28 Montana, 38.

BRANTLY, C. J. This action was brought for the purpose of obtaining a decree in favor of plaintiff declaring the defendant, Patrick A. Largey, a trustee for plaintiff of a one-sixteenth interest in the Speculator quartz lode mining claim, situate in Silver Bow county, and requiring the defendant to execute to the plaintiff a deed for that interest, and to render an accounting for a one-sixteenth interest in the ores extracted from the property by the defendant. After the institution of the suit the defendant died, and Lulu F. Largey was substituted in his place, as his administratrix. The judgment in the court below was for defendant. Subsequently, on motion of the plaintiff, the court entered an order granting plaintiff a new trial. Thereupon defendant appealed.

The parties to the action have filed in this court a stipulation wherein it is set forth that they have settled their differences and controversies by a compromise of all matters involved; that they desire the order from which the appeal is taken reversed, so that the judgment of the district court may stand as rendered; that *remittitur* be issued at once; and that this disposition of the appeal is desired because it is in accordance with the terms of the compromise and settlement made by the parties. This court is asked to make the order according to the terms of the stipulation. When the stipulation was filed, and counsel moved for the order, we entertained doubt as to whether this court could, with propriety, reverse the action of the district court upon an agreement of the parties, without an examination of the record, and a de-

termination that the action of that court was in fact erroneous. Upon consideration, however, we deem it the duty of the court, so far as it may, when there is no question as to its jurisdiction in the particular case, to assist parties to settle their controversies by removing any obstruction which may stand in the way of such settlement. This cause involves title to valuable mining property, and, as the settlement between the parties contemplates the existence of a valid and subsisting judgment in favor of defendant, we think that the order desired may be made with propriety, though it is not apparent that the plaintiff would not, upon examination of the record, be found entitled to an affirmance of the order. It is therefore adjudged that the action of the district court in the premises be reversed, and that the cause be remanded, with directions to that court to vacate the order granting a new trial, and that it permit the judgment in favor of defendant to stand as rendered.

Reversed and remanded.

HOLLOWAY, J., concurs. MILBURN, J., dissents.

(b) *By a Divided Court.*

CHARLOTTESVILLE & ALBEMARLE RAILWAY CO. v.
RUBIN.

Supreme Court of Appeals of Virginia. 1908.

107 Virginia, 751.

PER CURIAM. The petition to rehear in this case proceeds upon the mistaken theory that the order of affirmance is void, inasmuch as the present statute (Va. Code 1904, § 3485) makes no express provision, as did the former statute, for judgments by divided court.

The contention is founded upon the misconception that the origin of that procedure is statutory. On the contrary, the statute was merely declaratory of a well-settled pre-existing rule of necessity.

"Where the court is equally divided, so far as the point of division goes the judgment or decree of the court below is

affirmed. *The Antelope*, 10 Wheat. (U. S.) 66, 6 L. Ed. 268; *Washington Bridge Co. v. Stewart*, 3 How. (U. S.) 413, 11 L. Ed. 658; *Durant v. Essex Co.*, 7 Wall. (U. S.) 112, 19 L. Ed. 154. Although, where the court is equally divided in opinion upon a writ of error, the judgment of the court below is affirmed, no principle is settled thereby. *Etting v. Bank of U. S.*, 11 Wheat. (U. S.) 59, 6 L. Ed. 419. On a point upon which the judges are equally divided the Supreme Court will pronounce no opinion. *Benton v. Woolsey*, 12 Pet. (U. S.) 27, 9 L. Ed. 987. Where the court is equally divided, it cannot change the decree of the circuit court, or exercise the discretionary power to allow interest, for this would be a new decree. *Hemmenway v. Fisher*, 20 How. (U. S.) 255, 15 L. Ed. 799. A writ of error was dismissed by the Supreme Court on a division of opinion as to jurisdiction, where a fugitive murderer indicted in Canada was arrested in Vermont under warrant from the Governor upon demand for his surrender, and the state court refused to release him on *habeas corpus*. *Holmes v. Jennison*, 14 Pet. (U. S.) 540, 10 L. Ed. 579. When the court is equally divided, the judgment will be affirmed, with costs. *Bauer v. Texas & P. R. Co.*, 131 U. S. 430, 9 Sup. Ct. 795, 33 L. Ed. 209; *Moffit v. Miller*, 34 L. Ed. 539. Equal division of the court on motion for rehearing of a judgment of reversal previously rendered, leaves that judgment in force, and does not result in affirming the judgment of the lower court. *Carmichael v. Eberle*, 177 U. S. 63, 20 Sup. Ct. 571, 44 L. Ed. 672." Taylor on Jur. & Proc. of U. S. Sup. Ct. § 441.

The other grounds assigned for a rehearing involve questions already considered, and upon which the court was divided.

For these reasons, the prayer of the petition is denied.²⁶

²⁶ Where by constitutional provision the concurrence of a majority of the members of the court is necessary for a decision, as in Florida and California, the court will as a matter of policy, in case of equal division, unite for affirmance.—*State ex rel. v. McClung*, (1904) 47 Fla. 224; *Santa Rosa RR. Co. v. Central St. Ry. Co.*, (1869) 112 Cal. 436.

Some interesting judicial discussions have arisen over the question as to the result upon the judgment below of a division of opinion such that a majority of the court fail to agree upon any one ground of error although a majority agree that the case should be reversed. See Will of McNaughton, (1909) 138 Wis. 179, citing and discussing prior cases in various courts. Where a majority are for affirmance but on different grounds the case should be affirmed because a case is always to be af-

affirmed unless there is a majority for reversal. *Foltz v. Merrill*, (1873) 11 Kan. 479.

(c) *Prejudicial and Harmless Error.*

JONES v. STATE.

Supreme Court of Mississippi. 1913.

104 Mississippi, 871.

SMITH, C. J. Appellant, having been convicted of selling intoxicating liquors, appealed to this court, and his conviction was affirmed at a former day of this term. His counsel now suggests that we erred in so doing, for the reason that the court below committed manifest error in permitting the introduction of certain testimony offered by the state.

Appellant was convicted on the testimony of two detectives employed by the sheriff for the purpose of ferreting out the commission of crimes of this character. They testified that they went to the house of appellant, and were met at the door by his wife, Carrie, and told her they wished to purchase some whisky; that she returned into the house, and shortly afterwards appellant himself appeared with two half pints of whisky, for which they paid him the sum of \$1.25. A Mr. Davis was then introduced by the state, and after he had testified that he had requested these detectives to go to this house, he was permitted, over the objection of appellant, to answer the following questions: "Q. For what purpose did you send them there? A. I sent them up there to catch Carrie. Q. For what purpose; to catch Carrie doing what? A. To get a sale of whisky or beer on her." The "Carrie" referred to is appellant's wife. Appellant denied having made this sale, he and one other witness testifying that he was at a place other than his residence at the time these detectives claimed to have purchased the whisky. Conceding, but not deciding, that this testimony was incompetent, and ought not to have been admitted, its admission can by no stretch of the imagination be said to have resulted in a miscarriage of justice.

Counsel for appellant very vigorously attacks the principle

of harmless error here applied and embodied in rule No. 11 of this court (59 South. ix), * * * the rule criticised comes to us from the common law, and in slightly different language is now enforced in many jurisdictions by virtue of statutes, rules of court, or judicial decision, including the courts of that country from which our jurisprudence is derived, and in addition has been approved by various Bar Associations, including the American and our own State Bar Association. The rule referred to is as follows: "No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice."

Counsel does not advise us what, in his judgment, the rule in this matter ought to be; but we presume that he approves that rule which Mr. Wigmore terms the "Exchequer heresy," for the reason that it was first announced in the English Court of Exchequer, and which is "that an error of ruling creates *per se* for the excepting and defeated party a right to a new trial"; for part of the language quoted from this address by him with approval is as follows: "The true rule must be that a miscarriage of justice has already resulted when the case has not been tried according to law, and the only business of the Supreme Court of Mississippi has heretofore been and ought to be to see that this error is corrected. Any other rule will bring chaos and confusion worse confounded."

Prior to the decision of the case of *Crease v. Barrett*, in 1835, by the Court of Exchequer, reported in 1 C. & M. 918, the orthodox common-law rule on this subject was that an erroneous ruling of the character here under consideration "was not sufficient ground for setting aside a verdict and ordering a new trial, unless upon all the evidence it appeared to the judges that the truth had thereby not been reached." 1 Wigmore on Evidence, § 21, and authorities there cited, particularly *Tyrwhit v. Wynn*, 2 Bar. & Ald. 637. In *Crease v. Barrett* the Court of Exchequer "announced a rule which in spirit and in later interpretation signified that error of ruling created *per se* for the excepting and defeated party a right to a new trial. The new Exchequer rule was speedily accepted in the other courts; and for something more than a generation

it remained the law of England, until it was reformed away, for civil causes, in 1875." 1 Wigmore on Evidence, § 21. This heresy also early obtained recognition in America, and is probably still the rule in a majority of the states. The many miscarriages of justice, of which its enforcement was undoubtedly the cause, have at last brought it into disfavor, and it has now been repudiated in many jurisdictions, the courts of which have returned to the orthodox English rule, either voluntarily or by legislative command.

* * * * *

Unfortunately, however, this Exchequer heresy soon obtained a foothold here, and in 1855, in *Jackson v. Jackson*, 28 Miss. 674, 64 Am. Dec. 114, it was said "that the correct rule is that, when error of law manifestly appears, the presumption of law is that it was to the prejudice of a party complaining of it, and that the judgment will be reversed by reason of it, unless it appear by the record that it did not operate to the injury of the party complaining." This presumption of prejudice from the commission of error seems gradually to have become more conclusive, as will appear from *Harper v. Tapley*, 35 Miss. 506, *Josephine v. State*, 39 Miss. 648; *Solomon v. Compress Co.*, 69 Miss. 319, 10 South. 446, 12 South. 339, and *Foster v. State*, 70 Miss. 755, 12 South. 822, and reached its apotheosis in *Lipscomb v. State*, 75 Miss. 559, 23 South. 210, 230, wherein it seems to have been held that this court has nothing whatever to do with the correctness of the result reached by the jury in the court below, but must in all cases reverse for the commission of an error "of such character as that the jury itself might have been influenced by it." 75 Miss. 599, 620, 23 South. 221.

After the decision of this case, however, this court continued to decline to reverse judgments, notwithstanding the commission of error by the court below of the character here under consideration, when it appeared from the whole record that justice had been done; and in *Rector v. Outzen*, 93 Miss. 256, 46 South. 408, it seems to have returned to the earlier and orthodox rule, for it is there said that "in order to secure a reversal it must be shown that there was an error and that the error was prejudicial." Until it is shown that the party against whom an error was committed has failed to obtain justice, it cannot be said that he has been prejudiced—that is, injured or damaged—by its commission.

The objections generally urged against the rule now under consideration are that by acting upon it the court invades the province of the jury, and that its frequent application would cause the rules of evidence to be less carefully considered. The second reason may have some foundation in fact, but we must remember that the rules of evidence are not an end in themselves, but merely a means to an end, and when the end sought has been reached it is folly to reject it merely for the reason that the jury arrived at it in a manner other than that contemplated by the law. The first reason is wholly without merit, for by applying it an appellate court, instead of invading the province of the jury, upholds it to the full extent in its prerogative of determining what the truth of the matter in controversy is, and declines to interfere unless it clearly appears that it has failed to correctly discharge this duty.

This court is one of appellate jurisdiction only, and its sole duty is to correct errors made in the courts below which have operated to the prejudice of the parties complaining thereof, and until both error and prejudice resulting therefrom are shown by the record it should not and will not interfere with the course of justice. It will continue to protect litigants in all of their fundamental rights, and will see, so far as in its power lies, that full and complete justice is administered to them. Nevertheless it must be thoroughly understood, in the language used by Judge Whitfield in his dissenting opinion in *Lipscomb v. State*, 75 Miss. 617, 23 South. 228, "that this * * * tribunal is not a helpless prisoner, bound in the fetters of some supposed hard and fast rule requiring it to reverse cases where, first, erroneous instructions have been given; or, second, proper instructions have been refused; or, third, competent testimony has been excluded; or, fourth, incompetent testimony admitted; or, fifth, improper argument has been allowed; or, sixth, the trial court has erred in its rulings on the pleadings—on the ground, merely, that such action of the court, of the one kind or the other, constitutes error in law merely," and that for the commission of such an error the judgment of a trial court will be reversed only when it "affirmatively appears from the whole record that such judgment has resulted in a miscarriage of justice."

Suggestion of error overruled.

COOPER & CO. v. COATES & CO.

*Supreme Court of the United States. 1874.**21 Wallace, 105.*

HUNT, J. * * *

The objection to the evidence of the witness, White, in stating the dates of delivery and the weight of the iron is not practical. If we suppose the evidence to be stricken out, as requested, the result of the case must necessarily be the same. It would then stand thus: The witness, White, testifies that he knows of the delivery to the defendants of certain plates of iron, forwarded by the Baltimore and Ohio Railroad Company, in January and February, 1870; that the freight bills were paid by the defendants, and that the defendants made no complaint that the amount of the iron was less than it should be. The plaintiffs then proved by other witnesses that the four bills of iron were shipped by them by the Baltimore and Ohio Railroad to the defendants in pursuance of written orders from them, marked C. & J. Cooper & Co., a few days prior to the dates mentioned in White's deposition; that the bills of lading for the iron were mailed to the defendants, and that they never came back to the plaintiffs. This was *prima facie* evidence of the delivery of the iron as specified, and, no proof to the contrary being offered, it became conclusive. The plaintiff's case is as well without White's evidence as with it. The defendants suffer no injury by its retention, and have, therefore, no legal cause of complaint.

* * * * *

PANGBURN v. BULL.

*Supreme Court of New York. 1828.**1 Wendell, 345.*

Error from the Albany common pleas. The action in the common pleas was for a malicious prosecution, brought by Bull against Pangburn. * * *

WOODWORTH, J. * * * The question of probable cause, is a mixed question of law and fact. Whether the circumstances alleged to shew it probable or not probable, are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law. (1 D. & E. 545.) The court observe, that upon this distinction proceeded the case of *Reynolds* and *Kennedy*, (1 Wils. 232).

The court below erred in submitting both the law and the fact to the jury. This was necessarily the consequence of the charge; for the court instruct the jury, that if from the testimony they should be of opinion that the prosecutions were malicious and without probable cause, and the defendant knew the facts to be so, they ought to find damages for the plaintiff. The jury found damages for the plaintiff. Probably they had no difficulty in arriving at the conclusion that the defendant's motives were malicious, after proof of the defendant's declaration that he would bring the plaintiff four times to Guilderland for the same cause, and the course he pursued to effect the object in view, but they also passed on the question of want of probable cause; and although the court ought to have instructed the jury whether, on the supposition that certain facts were established, they would show the want of probable cause, still, if on a review of the case by this court, it shall appear that, from the facts not disputed at the trial, there was evidently a want of probable cause, the verdict ought not to be set aside for the error of the court below in this respect, because this court are called on to pronounce on that question; and if they see that the jury have not erred in point of law, although the charge was erroneous, no injury has been done to the defendant below, of which he has a right to complain. In making this remark, however, it must be understood, that if the evidence as to any material facts is contradictory, or leaves the question doubtful whether the fact existed or not, then the error of the court is good ground for a reversal, inasmuch as this court cannot take upon itself to draw inferences from conflicting testimony; this is the exclusive province of the jury. * * *

GORDON v. CONLEY. O'NEIL v. SAME. TWITCHELL
v. SAME.*Supreme Judicial Court of Maine. 1910.**107 Maine, 286.*

Three actions of *assumpsit* on accounts annexed, * * *
The defendant filed a general motion in each action for a new trial and also excepted to several rulings of the presiding justice.

SPEAR, J. These were three actions of *assumpsit* on accounts annexed, severally brought by Seth C. Gordon, James B. O'Neil, and Herbert F. Twitchell, all of Portland, in said county of Cumberland, physicians and surgeons, against Rose A. Conley and trustees, to recover for professional services as expert witnesses three days each in the case of Dr. Gordon and Dr. O'Neil, and four days in the case of Dr. Twitchell;
* * *

The jury rendered a verdict for the plaintiffs Seth C. Gordon and James B. O'Neil each the sum of \$112.50, and for the plaintiff Herbert F. Twitchell the sum of \$150. The defendant introduced no testimony. * * *

During the course of the trial, the defendant filed 43 exceptions to the rulings of the presiding judge. In view of the conclusion of the court upon the motion, it becomes immaterial whether the rulings of the court as abstract principles of law were right or wrong. We shall therefore not undertake to discuss the exceptions. Upon the law and legal evidence, whatever the errors in the rulings of the court, the result of the trial was evidently right. It would seem like trifling with the ends of judicial procedure to say that an erroneous ruling, which did not affect the truth of the result, should be regarded as a sufficient reason for the overturning of a fair and honest judgment. If the court erred, the jury did not. They were right. If the exceptions were sustained and the case retried along the lines of law laid down in the discussion of the motion, the only possible difference in the result would necessarily be confined to the amount of damages a new jury might render. But, as the damages are clearly not excessive, the case should not be sent back for a new speculation upon this question.

* * * * *

Motion and exceptions overruled.

MELODY v. DES MOINES UNION RAILWAY CO.

Supreme Court of Iowa. 1914.

145 Northwestern Reporter, 466.

[Action at law to recover damages for personal injury alleged to have been occasioned by the negligence of the defendant. There was a verdict and judgment for plaintiff, and defendant appeals. Affirmed. 161 Iowa, 695. On petition for rehearing the following opinion was given.]

PER CURIAM. * * *

In submitting the case, the trial court charged the jury that, to find the defendant guilty of negligence as alleged, it must be found that by reason of its want of reasonable care "snow and ice had accumulated at the place where plaintiff was required to go in the discharge of his duty as switchman, and that they further allowed snow and ice to accumulate on the footboard," and failed properly to remove such dangerous conditions of the switch yard and footboard, and, if the jury further found that "these conditions were the proximate cause of the injury to plaintiff," then he was entitled to recover. In other words, to charge defendant with liability the jury were required to find both the bad conditions of the footboard and of the yard, and that the two together were the proximate cause of the plaintiff's injury. Now, even upon the narrowest and most technical construction of the statute in the light of our prior decisions, there can be no reasonable doubt that negligence of the defendant or its employes with respect to the condition of the footboard is negligence connected with the operation of the railway, and injuries resulting therefrom are clearly within the legislative intent as expressed in this statute, and, under the instruction, the jury could find for plaintiff only upon the theory that such negligence was established.

The fact that the court went further and required the jury also to find a negligent failure to properly care for the yard

only had the effect to cast upon plaintiff an additional burden of which the defendant has no cause to complain.

* * * * *

²⁷ "The rule is well settled that a party on appeal to this court cannot assign error upon nor complain of a ruling of the lower court as erroneous which is in his favor."—Kime v. Vetter, (1909) 172 Ind. 317.

WEISELS-GERHARDT REAL ESTATE CO. v.
PEMBERTON INVESTMENT CO.

St. Louis Court of Appeals. 1910.

150 Missouri Appeals, 626.

NORTON, J. This is a suit for commissions alleged to have been earned by plaintiff under an express contract. Plaintiff recovered, and defendant prosecutes an appeal.

There is but one question presented for decision, and that relates to the fact the jury returned a verdict for just one-half the amount sued for, when it appears that under the terms of the contract plaintiff should recover, if anything, the full amount therein stipulated. * * *

The instructions submitted to the jury the question as to whether or not the contract for commissions was made, and the jury were directed that in event of a finding for plaintiff the verdict should be for \$6,200. Though the jury found for plaintiff, it awarded him a recovery of \$3,100, only, or, in other words, precisely one-half the amount sued for. Defendant insists the verdict should be set aside for the reason it is not responsive to the issue in the case, and for the further reason that it discloses on its face the jury acted arbitrarily in the premises and in utter disregard of the evidence and instructions of the court. As a general rule, one is not entitled to a reversal of the judgment, because it is more favorable to him than the case asserted in the trial court justifies. 2 Ency. Pl. & Pr. 527. In keeping with this general doctrine, it has been several times decided in this state that a judgment should not be reversed on appeal for the reason it appears to be for a much smaller sum than the plaintiff insists was due on the theory advanced for a recovery. The following

cases will illustrate: *Alderman v. Cox*, 74 Mo. 78; *Gaty v. Sack*, 19 Mo. App. 470; *Gifford v. Weber*, 38 Mo. App. 595; *Chinn v. Davis*, 21 Mo. App. 363; *Crigler v. Duncan*, 121 Mo. App. 381, 99 S. W. 61. But in all of these cases the issues were such as to warrant the jury in reckoning with the equities involved, and it seems the verdicts were awarded accordingly. There can be no doubt that a different rule prevails in this jurisdiction, at least when the suit is on an express contract for a given amount, and the question presented relates solely to whether or not the contract was made as in the case now in judgment. The Supreme Court has conclusively settled the question, so far as we are concerned, in *Cole v. Armour*, 154 Mo. 333, 55 S. W. 476. The case mentioned is directly in point, and under the Constitution it is controlling authority here. For another adjudication to the same effect, see *Powers v. Gouraud*, 19 Misc. Rep. 268, 44 N. Y. Supp. 249. In *Cole v. Armour*, *supra*, the Supreme Court based its ruling on the ground that the verdict itself conclusively proved the jury did not believe the testimony going to establish the alleged contract. It is said, if the jury had believed the contract was made as asserted by plaintiff, then its verdict necessarily would have been for the full amount; for if the contract existed in fact, and plaintiff fully performed it, he was entitled to recover its full measure.

On the other hand, in such suits on express contracts, if the jury believes no such contract was made, then no recovery at all may be allowed. The reasoning of the law in such circumstances is that, instead of acting on the evidence and in conformity with the instructions of the court, the jury proceeds to administer equities when none whatever are involved, for it is a clear issue of contract with all its terms and conditions or no contract at all. It is said by the New York court, in actions on contract in which the plaintiff is entitled to recover his full claim or nothing whatever and the jury awards a lesser amount, the verdict will be deemed to show that in determining the case the jury either wholly disregarded the evidence, misapprehended its effect, or overlooked some important fact, or necessarily found some fact in favor of defendant which is wholly inconsistent with the verdict for any amount in favor of the plaintiff, and it should therefore be set aside even on the motion of defendant. *Powers v. Gouraud*, 19 Misc. Rep. 268, 44 N. Y. Supp. 249. The reasoning

seems to be sound in logic in those cases where the sole issue is as to whether or not there is a contract between the parties and, if so, stipulating a certain amount, which plaintiff is entitled to recover, if at all. In such cases where the contract is wholly denied, it seems to be a just doctrine which permits the defendant to insist upon his right to have the jury respond to the precise issue, for, unless there is a contract for the full amount, there is no right to recover at all.

The judgment should be reversed, and the cause remanded. It is so ordered. All concur.

PEOPLE v. SMITH.

Court of Appeals of New York. 1902.

172 New York, 210.

Appeal from a judgment of the Supreme Court, rendered at a Trial Term for the county of Monroe, November 10, 1898, upon a verdict convicting the defendant of the crime of murder in the first degree.

MARTIN, J. * * *

5. Another class of exceptions argued by the appellant relates to the admission of the evidence of the witness Albert L. Hall, who testified as an alleged expert as to the manufacture, uses, and differences of pistols and cartridges, the chemistry of burned powder and other substances, and to receiving the speculative opinion of the witness, which was incompetent, and subsequently stricken out by the court of its own motion, without consent or objection. The court was occupied several days in taking the evidence of this witness, to which there were numerous objections and exceptions that were obviously valid. * * * That this witness was improperly permitted to testify as an expert to many matters material to the investigation, when he was obviously incompetent, can hardly be denied. * * * It is obvious from the record that the court struck out portions of the improper evidence which were specifically stated, and followed this action by a general statement to the effect that all the testimony of that witness, except that pertaining to his experiments with powder after

revolvers had been discharged, and with reference to the appearance and condition of the fatal bullet, was stricken out, and the jury directed to disregard it. Subsequently other portions of his testimony were directed to be stricken out. The court likewise stated that it would direct all exhibits introduced on the examination of the witness to be stricken out if there was any question about them, but that they were actually stricken out does not appear. It may be fairly said that it is difficult, if not impossible, to ascertain, even from the record, with any degree of accuracy, the particular portions of the evidence of this witness which the court attempted to withhold from the consideration of the jury. This difficulty arises from the fact that it is hardly possible to determine what evidence pertained to his experiments with powder after revolvers had been discharged, what pertained to his testimony with reference to the appearance and condition of the fatal bullet, to separate it from the other evidence which was given by him, or to ascertain what particular portion of the remaining evidence was subsequently withdrawn. The evidence which was competent and that which was incompetent was so intermingled and woven together as to render it difficult to separate one from the other, and it must have been almost, if not quite, impossible for the jury under the rulings of the court, to understand what portion of this evidence was to be disregarded, and what portion it was to consider. * * *

It seems to be settled by the decisions of this court that if evidence is improperly admitted, the mistake is immediately discovered, and the evidence promptly withdrawn, with instructions to the jury to disregard it, or if it is stricken out on the motion or application of the appellant, the error will be deemed cured or waived, and the exception to its admission deprived of its potency. *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106; *Holmes v. Moffat*, 120 N. Y. 159, 24 N. E. 275; *People v. Schooley*, 149 N. Y. 99, 103, 43 N. E. 536; *Cole v. Coal Co.*, 159 N. Y. 59, 65, 53 N. E. 670; *People v. Priori*, 164 N. Y. 459, 469, 58 N. E. 668.

The theory of the decisions to the effect that errors in receiving improper evidence may be cured when the jury are clearly and plainly instructed to disregard certain specified evidence so erroneously and recently received, and the evidence is promptly stricken out, is based upon the presumption that the instructions of the court were obeyed. The circum-

stances under which that rule has generally been applied were widely and essentially different from those in the case at bar. Here, many days had been employed in taking the testimony of this witness, and many pages of evidence had been given by him, which was so interwoven as to render it extremely difficult, under the rulings of the court, for a jury to understand or determine what portion of the evidence remained in the case, which they were to consider, and what portion they were instructed to disregard. Under such circumstances, it would indeed be very extraordinary to presume that the jury in this case literally obeyed the instructions of the court, no matter how much they may have intended to do so. In the recent case of *Ives v. Ellis*, 169 N. Y. 85, 90, 62 N. E. 138, incompetent evidence was received; the court at the time remarking, "I shall instruct the jury that the letter and the statements in the letter do not in any wise prove the statements therein contained, or any of them." * * * In discussing that question this court added: "But before an appellate court will hold that such an error has been cured, it must feel sure that the effort of the trial court to correct the error was necessarily effective with the minds of the jury. Now, that cannot be said of the caution of the court in this instance, for it must be borne in mind that this letter was introduced in the early part of the trial, which was not only a long one, but in its progress there was an adjournment for a period of ten days, during which the jurors presumably had their minds occupied with affairs of their own; and in view of that situation it was necessary that the court should so accurately describe the letter which it wished them to disregard as to make it apparent that there could be no confusion in their minds as to what letter was referred to." We think the principle of that decision is applicable to, and decisive of, this case. * * * In view of all these circumstances, it seems quite impossible to say that the error was waived, or that the court so accurately described the evidence to be disregarded, or that its directions were at a time when they would be so firmly impressed upon the minds of the jury, as to justify us in holding that there was a presumption that the jury obeyed the suggestions of the court, and the error in its admission was cured.

* * * * *

LEQUATTE v. DRURY.

*Supreme Court of Illinois. 1881.**101 Illinois, 77.*

SCOTT, J. The bill in this case was to have partition made among the several heirs, of the lands of which it is alleged Isaiah and Priscilla Drury were either the legal or equitable owners at the time of their death. * * *

On the trial of the cause before the court, complainants offered as witnesses in their behalf, Eli and Silas Drury, two of defendants, who are heirs at law of Isaiah Drury, to prove facts in relation to the creation of a trust in these lands, and other facts occurring prior to the death of the common ancestor, as set forth in the bill. To the admission of the testimony of the witnesses offered, defendant Stuart R. Drury objected, on the ground the witnesses were parties to the suit, and heirs of the common ancestor, and therefore directly interested adversely to defendant interposing the objection, and who defends as heir at law of Isaiah Drury; which objection was by the court sustained. That decision is the only error insisted upon in the argument as a ground for the reversal of the decree of the circuit court.

It may be conceded, that under the decision of this court in *Pigg v. Carroll*, 89 Ill. 206, the witnesses called on behalf of complainants to testify concerning facts alleged in the bill as having occurred prior to the death of the common ancestor, were entirely competent for that purpose. Exactly what complainants wished to prove by the witnesses is not definitely stated. Assuming, however, the material facts alleged in the bill as having happened before the death of the common ancestor would be established by their evidence, still it is apparent no harm was in fact done complainants by the exclusion of the testimony, for the reason they have been guilty of such *laches* in asserting the rights they now claim that no decree could pass in their favor. Whatever rights complainants may have had in these particular lands came to them on the death of Isaiah Drury, in 1854, and certainly as early as 1858, when Andrews reconveyed the premises to Stuart R. Drury. The bill in this case was not filed until April, 1871.

* * * Equity will not assist a party who has not been rea-

sonably diligent in asserting those rights concerning which its aid is invoked. * * *²⁸

²⁸ Conversely, there is no prejudice in any action of the court where the appellant succeeds in spite of the error on the matter in respect to which exception is taken.—Good v. Knox, (1891) 64 Vt. 97; Dixon v. Russell, (1914) 156 Wis. 161; Hamilton v. Mich. Cent. R.R. Co., (1903) 135 Mich. 95; Brigham v. Morgan, (1904) 185 Mass. 27; Greenleaf v. Egan, (1883) 30 Minn. 316.

JOHNSON v. FEATHERSTONE.

Court of Appeals of Kentucky. 1911.

141 Kentucky, 793.

O'REAR, J. Appellee brought this action of slander against appellant, who had charged appellee with the crime of false swearing committed in the course of a trial of a civil action in the Hickman circuit court. * * *

It is insisted by appellant that the demurrer to the petition should have been sustained because the petition did not allege that the testimony in question had been given in a judicial proceeding or trial in court. An amended petition was filed before the trial containing this averment. Although the petition may have been bad, and the demurrer should have been sustained, the amendment cured the defect. The error, if one, was thereby also cured. * * *²⁹

²⁹ So, error in sustaining a demurrer to one defense is not prejudicial where the same matters appeared in other defenses under which they were litigated,—Koch v. Story, (1910) 47 Colo. 335; and error in refusing to permit an amendment is harmless where other counts sufficiently cover the same ground,—Sharpe v. Nat. Bank, (1888) 87 Ala. 644.

(d) *Affirmance.*

WARDER, BUSHNELL & GLESSNER CO. v. JACOBS.

*Supreme Court of Ohio. 1898.**58 Ohio State, 77.*

MINSHALL, J. The action below was a suit brought by Treca A. Jacobs against the defendant, Warder, Bushnell & Glessner Company, to recover the possession of certain personal property that had been taken in execution on a judgment that had been rendered in their favor against the husband of the plaintiff, the wife claiming to be the owner of the property. The attorney for the plaintiff, in the course of his argument to the jury as shown by the record, used the following language: "Gentlemen: The plaintiff is a poor woman. Your verdict against her will mean much, very much; but to the defendants, with all their wealth, residing in their magnificent castles in the city of Springfield, a verdict against them does not hurt them,"—to which remarks, as the record says, the defendants "then and there objected and excepted." This is all the record discloses in regard to the matter, other than that, after a verdict for the plaintiff, a motion for a new trial was made on this among other grounds, which was overruled by the court, and judgment rendered on the verdict. A bill of exceptions was taken and made a part of the record, showing the matters above stated. It also contained the evidence given at the trial; but, as nothing is claimed from the evidence, it has been omitted in the printing of the record. The judgment was affirmed on error by the circuit court. The only ground for a reversal relied on in this court is the misconduct of plaintiff's counsel in using the words to the jury above stated.

Certainly these remarks were of the most reprehensible character, and it is a matter of some surprise that counsel should so far forget himself in argument to the jury as to commit such a breach of his privilege as is shown by the words used in this case. No heat of argument nor zeal for his client, can be admitted as a palliation of such an offense against the fair administration of justice. But the question arises whether, upon this record, anything appears from

which this court can say there is error in the judgment for which it should be reversed. It is a settled principle of practice in all reviewing courts that the error for which a judgment may be reversed must *affirmatively* appear on the face of the record. From the record before us it simply appears that these observations were made by counsel for the plaintiff to the jury, and that counsel for the defendant then and there "objected and excepted." From this we readily infer that counsel "objected" to the remarks of the opposing counsel, as he had an undoubted right to do. But to what did he "except." An exception is not to the act of a party, but to that of a court in ruling on an objection. What the court did in this matter is not disclosed by the record. The court may at once have reproved the counsel and instructed the jury, in the most positive terms, not to regard the remarks of counsel in arriving at their verdict. To this the defendant could not have excepted, or, if he did, the exception would be unreasonable and of no avail. If the court took no notice of the objection, or overruled it, then the defendant might reasonably have excepted, and such action of the court would have been a clear ground of error, for which the judgment should be reversed. But, inasmuch as the record is silent as to what the court did, we are not permitted to assume that it did what it should not have done. On the contrary, the only presumption we are permitted to make, in such case, is that the court performed its duty in the premises,—reproved the counsel and properly instructed the jury at the time. If he did not, and a review of its action is desired, the party excepting must cause the record to show what the ruling of the court was; otherwise it cannot be said to *affirmatively* appear that the court committed error.

* * * * *

The evidence is not before us, so that the question presented is whether, where a record shows that improper remarks were made by counsel of the prevailing party, to which objection was made at the time, but does not show the ruling of the court, should the verdict and judgment thereon be set aside and reversed as a matter of course? We think not; for, in such case, for aught that appears, the court severely reproved the remarks of counsel, directed the jury not to regard them, and the evidence may show a clear case for a recovery on the part of the prevailing party, notwithstanding the of-

fense of his counsel. As much as we reprehend such practice in counsel, we are not prepared to say that the use of such language may not be so far corrected by the court by the reproof of counsel and instruction to the jury, as, in a clear case upon the evidence, to warrant the court trying the case to sustain the verdict rendered. * * *

* * * The judgment is therefore affirmed.³⁰

³⁰ PRESUMPTIONS in support of the judgment, *in the absence of any showing in the record to the contrary*, are made by the appellate court in a great variety of cases. Thus, every presumption is indulged in favor of the jurisdiction of the lower court over the parties,—*Hughes v. Cuming*, (1900) 165 N. Y. 91, and subject matter,—*McFarland v. Stewart*, (1899) 109 Ia. 561; it is presumed that the parties had proper capacity,—*Batchelder v. Baker*, (1889) 79 Cal. 266; that proper pleadings were filed,—*Seldschlag v. Town of Antioch*, (1904) 207 Ill. 280; that amendments were duly allowed,—*Hanchy v. Brunson*, (1913) 181 Ala. 453; that due notice of the application for an interlocutory order was given and all objection to the order was waived,—*Shore v. White City State Bank*, (1899) 61 Kan. 246; that depositions were properly taken,—*Simonds v. Cash*, (1904) 136 Mich. 558; that evidence admitted was properly admissible,—*Perkins v. Hayward*, (1890) 124 Ind. 445; that evidence excluded was not properly admissible,—*State ex rel. v. Maloney*, (1892) 113 Mo. 367; that instructions given were correct and sufficient,—*Batchelder v. Home Nat. Bank*, (1914) 218 Mass. 420; that the jury obeyed the court's instructions,—*Vasby v. U. S. Gypsum Co.*, (1912) 46 Mont. 411; that the court below found all the facts necessary to support this judgment,—*Halbouer v. Cuenin*, (1909) 45 Colo. 507; that the ruling on a motion for a new trial was correct,—*Santos v. Roman Catholic Church*, (1909) 212 U. S. 463; that the court was justified in directing a verdict,—*Ralya v. Atkins & Co.*, (1901) 157 Ind. 331.

COOK v. GLOBE PRINTING CO.

Supreme Court of Missouri. 1910.

227 Missouri, 471.

The gist of the complaint of the plaintiff is that defendant published that plaintiff had made a false affidavit under the Corrupt Practices Act, and thereby charged the plaintiff with the crimes of perjury and of making a false affidavit.

GAN'TT, J. This is an action for libel. The defendant is a corporation, and the owner and proprietor of the well-known metropolitan newspaper, the St. Louis Globe-Democrat, printed in the city of St. Louis. His action is founded on an

alleged libelous and defamatory article, which appeared in that paper, and in its issue of February 12, 1905.

* * * * *

7. We are finally brought to the last contention of the defendant that the verdict is so excessive that it was clearly the result of passion or prejudice, or both. The jury returned a verdict assessing plaintiff's damages at \$75,000 actual, and \$75,000 punitive, damages. * * *

Proceeding, then, to the consideration of the contention of the defendant that the verdict in this case is so excessive and unreasonable that it should be set aside, it is to be remarked, first, that we are all of the opinion that there was no error in the instructions of the court, or in any of its rulings in the admission or rejection of the testimony, or upon its construction of the pleadings in the case. That the publication, which is a basis of the action, was libelous we think there can be no doubt whatever, so that the sole question remaining is whether the verdict is so excessive as to indicate that it is the result of prejudice or passion. In our opinion the verdict is excessive and is unusually large, but it does not follow that, because the verdict is too large, it is necessarily the result of prejudice or passion.

* * * The court said, in the case of *Chicago Street Ry. Co. v. Wrixon*, 150 Ill. 532, 37 N. E. 895, after an exhaustive examination of the authorities in this state, it was said: "We are committed to the practice of allowing *remittiturs* in actions *ex delicto*, both in the trial and appellate courts, to such sums as shall to the court seem not excessive, and conforming as to the balance of the judgment." And the practice therein referred to is now too well established to be questioned. *Railroad Company v. Musa*, 180 Ill. 130, 54 N. E. 168; *Railroad Company v. Lewandowski*, 190 Ill. 301, 60 N. E. 497.

The decisions of this court as to the power of this court to require a *remittitur* in actions for unliquidated damages are not uniform * * * The rationale of these late cases is that the fact that a verdict is too large does not itself indicate that the jury were actuated by passion or prejudice, where there was no error in the admission or rejection of testimony or in the instructions of the court, and no misconduct on the part of the jury was shown, and the evidence established that the plaintiff was entitled to a substantial verdict, and that in such

case, if the plaintiff would consent to a *remittitur* of a part of his verdict, the defendant could not complain.

Accordingly it is ordered that, if the plaintiff shall remit \$50,000 of the amount assessed for actual damages, and shall also remit \$50,000 from the amount of punitive damages assessed in the verdict within 20 days, the judgment will be affirmed for \$25,000 for actual damages and \$25,000 for punitive damages, aggregating \$50,000. Otherwise the judgment will be reversed, and the cause remanded for a new trial.

VALLIANT, C. J., and BURGESS, FOX, and WOODSON, JJ., concur. LAMM and GRAVES, JJ., dissent in separate dissenting opinions.⁸¹

⁸¹ Affirmance of judgment on condition is frequently ordered where the condition is simple and its performance will entirely remove the necessity for a reversal and new trial. Thus the appellee, as a condition of affirmance, has been required to enter a release of a part of the judgment,—*Baxter v. Baxter*, (1910) 46 Ind. App. 514; or to deliver up an instrument for cancellation,—*Lustig v. McCulloch*, (1897) 10 Colo. App. 41; or to consent to the correction of the verdict to show a proper description of land,—*Townsend v. Kreigh*, (1903) 133 Mich. 243; or to file a release of liability of a party not joined,—*Culver v. Smith*, (1899) 82 Mo. App. 390; or to stipulate against the use of the judgment as a bar under certain circumstances,—*Hartford v. Greenwich Bank*, (1913) 157 N. Y. App. Div. 448.

JACKSON & SHARP CO. v. FAY.

Court of Appeals of the District of Columbia. 1902.

20 Appeal Cases, District of Columbia, 105.

A motion on behalf of the appellant to modify the judgment of affirmance, was denied on the 23d day of June, 1902,

MORRIS, J. In this case, upon a demurrer filed by the appellee Fay, as defendant in the court below, to the declaration of the appellant as plaintiff, the demurrer was sustained; and the plaintiff thereupon electing to stand by its declaration had judgment rendered against it, from which it appealed to this court. Here the judgment was affirmed. Now the appellant comes and moves the court for a modification of the judgment of affirmance in such manner "as will admit of an

amendment of the pleadings in the particular in which this court holds them to be defective."

Plainly this is an application which should not be entertained, except for very grave reasons and in exceptional cases. The ground of the application is that this court based its decision upon a very different ground from that on which the court below proceeded. But the demurrer was a general demurrer to the plaintiff's declaration, in which several grounds of invalidity of the declaration were stated; and if the court below preferred to rest its decision on one of these grounds and this court upon another, it is not apparent that the plaintiff was not duly notified of the imperfections of its case as made by it. Instead of amending its declaration, as it was then duly notified to do, it deliberately elected to stand by that declaration and to try its fortunes in this court, with the reservation, as we may assume, that it would go back and try the case over again, if the decision against it should happen not to be sustained upon the precise grounds for it assigned by the court below. We find no warrant in law for this practice; and we do not think that it would be in accordance with the requirements of justice.

Various cases have been cited in which appellate courts have remanded causes for the purpose of amendment in order that full justice might be done in the premises. *Magruder v. Belt*, 7 App. D. C. 303; *Waite v. Larocque*, 12 App. D. C. 410; *Wiggins Ferry Co. v. Railroad Co.*, 142 U. S. 396; *Liverpool, etc., Co. v. Phoenix Co.*, 129 U. S. 397; *Jones v. Meehan*, 175 U. S. 1; *Melville v. Railroad Co.*, 2 Mackey, 63; *Merrick v. Giddings, McA. & Mackey*, 57. The majority of these cases are of equity cognizance, wherein it is always proper to direct amendment whenever the interest of justice seems to require it. But we have no hesitation in saying that we think that in causes at common law as well as in equity the power of amendment conferred by statute may be freely exercised or authorized by appellate courts, if such is the requirement of justice in the particular case. * * * Here we have a distinct notification to a party that his pleading is defective and that he should amend, if he would recover, and a final refusal by him to avail himself of his right. If we were to allow or direct amendment now, it would be impossible in the future to have any finality in such cases, either in the court

below or in this court. The motion for modification must be *refused*.³²

³² In the absence of appropriate statutes of amendments such affirmance with permission to amend or plead over would probably be unauthorized.—*Piper v. Hoard*, (1887) 107 N. Y. 67; *Whiting v. Mayor*, (1868) 37 N. Y. 600.

DUNTON v. MCCOOK.

Supreme Court of Iowa. 1903.

120 Iowa, 444.

[Tyrrell conveyed a parcel of land to McCook by a deed absolute on its face. Dunton, a judgment creditor of Tyrrell, brought an action in which he sought to have this deed declared a mortgage, and asked that his judgments be decreed to be liens upon Tyrrell's interest in the land and be satisfied out of that interest. The court, on May 18, 1892 made the decree as prayed and found that \$524.44 was still due to McCook on Jan. 1, 1890, and that upon payment thereof Tyrrell would be entitled to a reconveyance of the land. This was affirmed on appeal on Jan. 18, 1895. A rehearing was denied June 1, 1895, a *procedendo* was filed in the district court June 22, and on Feb. 6, 1896, Dunton was given leave to file a "supplemental petition" alleging that McCook had been in possession of the premises since Jan. 1, 1890, and had received more than enough in rents and profits to cover the balance due him, and asking for an accounting and that Dunton's liens be confirmed and be satisfied by sale of the premises. The district court so decreed, and McCook appealed.]

LADD, J. The original decree in this case was entered in the district court May 18, 1892. Upon appeal that court lost jurisdiction. As said in *Levi v. Karrick*, 15 Iowa, 444: "When appeal is taken, all power of the court below over the parties and subject-matter is lost until the cause, or some part thereof, is remanded back, by order of this court, for its further action." *McGlaughlin v. O'Rourke*, 12 Iowa, 459; *Stillman v. Rosenberg*, 111 Iowa, 322, 82 N. W. 768. But

pending such appeal the decree continued in full force for all purposes. *Watson v. Richardson*, 110 Iowa, 698, 80 N. W. 416, 80 Am. St. Rep. 331. It was affirmed in this court January 18, 1895, and petition for rehearing denied June 1st of that year. That ended the suit. Thereafter it was pending in neither court. The affirmance was merely a ratification of what had been done in the lower court, and left the parties in precisely the same situation as though no appeal had been taken. *U. S. v. Jones*, 26 Fed. Cas. 638 (No. 15,492); *Steinback v. Stewart*, 11 Wall. 566, 20 L. Ed. 56; 3 Cyc. 422; *Werborn v. Pinney*, 76 Ala. 291. Under our practice a new decree is not entered in the Supreme Court upon affirmance, but that of the court below confirmed, with a judgment for costs added. As the cause was not remanded for any purpose, the district court did not acquire jurisdiction to retry any of the issues subsequent to appeal. The suit having been terminated, the clerk could not revive or open it again by issuing a *procedendo*. The only purpose for that process in such a case is to notify the district court that it is at liberty to enforce its decree. In *Steel v. Long* (Iowa) 84 N. W. 677, an order of the district court striking a cross-petition filed subsequent to the affirmance of the original decree was approved, the court saying: "Not a thing remained for the trial court to do, nor was it directed to take further action in the matter. The original action was therefore, at an end, so far, at least, as the district court was concerned, and the defendant had no right to then file a cross-petition. If the position contended for by appellants were tenable, there would be no end to a cause of action. If a cross-petition may be filed and new parties brought in one week after final determination by decree it might, under such circumstances, be permitted one, two, or three years thereafter." To the same effect, see *McCall v. Webb* (N. C.) 36 S. E. 174; *Greenwood Township v. Richardson* (Kan.) 62 Pac. 430; *Herstein v. Walker* (Ala.) 7 South. 821. So far as the questions at issue were concerned, the suit, upon affirmance, became a part of the irrevocable past.

2. But no attempt was made in the subsequent pleadings to change or modify the decree. The object sought related solely to the enforcement of that already rendered. True, the pleading filed by plaintiff is designated a "supplemental petition," and, as contended, was not such as is contemplated

by section 3641 of the Code. *Leach v. Germania Building Ass'n*, 102 Iowa, 125, 70 N. W. 1090; *Foote v. Burlington Gaslight Co.*, 103 Iowa, 576, 72 N. W. 755; *Allen v. Davenport* (Iowa) 87 N. W. 743. But the name by which it was labeled is not material. Though the court had lost jurisdiction of the suit, it had not of the decree. It still retained the inherent power to enter appropriate orders for its enforcement. In *Hartley v. Bartruff*, 112 Iowa, 592, 84 N. W. 704, in approving an order extending the time fixed in the decree for redemption, we said: "The manner and time of carrying a decision into effect never rests upon evidence, in the sense that evidence controls these questions. These are always to be determined by the court, unaffected by the proof; and we can conceive of no good reason why, in a proper case, a decree may not be modified in the respect proposed." One of the advantages of a court of equity is that its decree may not only be so framed and molded as to protect the relative rights and duties of the parties, but its execution may be controlled, or even suspended for a time, as exigencies arising may require. Formerly decrees were executed by the parties; their obedience being compelled by proceedings in the nature of punishment for contempt, attachment, or sequestration. Statutes providing for other methods of enforcement, as by execution, are not usually construed to deprive the court of the power of general supervision of the enforcement of its decrees. Moreover, our statute expressly authorizes: "A defendant against whom a judgment has been rendered, or any person interested therein, having matter of discharge which has arisen since the judgment, may upon motion, in a summary way, have the same discharged, either in whole or in part, according to the circumstances." * * * The original decree determined that McCook held title as trustee, which might be divested upon the payment of a fixed amount by Tyrrell. If, because of matters transpiring subsequent to the entry of decree, McCook had been partially or fully paid, either from rents and profits by him collected, or from any other source, plaintiff or Tyrrell had the undoubted right to invoke the jurisdiction of the court, either under the statute quoted, or by virtue of the inherent powers a court of equity may exercise over its decrees, and have the demand, to that extent, satisfied. That this was done by a pleading denominated a

"supplemental petition," instead of a motion, ought not to deprive them of the remedy.

* * * * *

The decree of the district court is affirmed, with direction that the cause be remanded only for the purpose of taking an accounting between the heirs and defendant for rents and profits from the date of the last decree up to the present time, and thereupon entering judgment for the amount found owing either party. *Affirmed and remanded.*

SHERWIN, J., took no part.

(e) *Modification.*

IN RE FREDERICK.

Supreme Court of the United States. 1893.

149 United States, 70.

This is an appeal from an order denying an application for a writ of *habeas corpus* addressed to the court below by Albert Frederick, a prisoner confined in the penitentiary of the state of Washington, at Walla Walla, in that state. See 51 Fed. Rep. 747.

The case, as made by the petition and accompanying exhibits, is as follows: On the 17th of June, 1891, the prisoner was duly indicted by the grand jury of King county, Washington, for the murder of one Julius Scherbring, and upon said indictment he was subsequently arraigned, pleaded not guilty, was tried by a jury, and on the 26th of September, 1891, was found guilty of murder in the first degree. A motion for a new trial having been overruled, he was sentenced to be hung. From this judgment of death, and the order overruling his motion for a new trial, the accused appealed to the supreme court of the state, which reversed the judgment of the trial court, and remanded the case, with a direction to set aside and vacate the judgment imposing the sentence of death, but to let the verdict stand, and to enter a new judgment thereon for murder in the second degree.

that being, in the opinion of the state supreme court, the proper degree of his crime, inasmuch as the evidence in the case did not show such deliberate and premeditated malice as would sustain a conviction of murder in the first degree. *State v. Freidrich*, 4 Wash. 204, 29 Pac. Rep. 1055, 30 Pac. Rep. 328, and 31 Pac. Rep. 332.

This judgment of the supreme court was rendered under and in pursuance of the following provision of Hill's Code of the state, (volume 2:)

"Sec. 1429. The supreme court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings."

Pursuant to this order of the supreme court, the prisoner, on the 16th of June, 1892, was again brought before the trial court, and adjudged to be guilty of murder in the second degree, and he was thereupon sentenced to imprisonment in the state penitentiary for the term of 20 years. This sentence having been carried into execution, and the prisoner incarcerated in the penitentiary, he thereupon, on the 9th of August, 1892, made this application for a writ of *habeas corpus*, claiming that he was deprived of his liberty without due process of law, in violation of the provisions of the fourteenth amendment to the constitution of the United States.

The grounds upon which this application is based are that the supreme court of the state was without jurisdiction, and did not have any authority, under said section 1429 of the Code, or under any other law, to render the judgment it did; that all that court could do was either to affirm the judgment of the trial court outright, or to reverse it outright, and, under proper instructions, remand the cause for a new trial by a jury; that therefore its judgment was absolutely void, and the judgment of the trial court in carrying out the directions of the supreme court was, of necessity, void; and that the prisoner ought therefore to be discharged.

The court below practically agreed with the petitioner that the supreme court of the state had misinterpreted said section 1429 of the Code, and that what it had actually done, by its decision and judgment, was to modify the verdict of the jury, which, under legal and proper proceedings, it had no authority to do; that its judgment, and the subsequent

judgment of the trial court carrying it into effect, were both void; and that, therefore, the petitioner's imprisonment was without due process of law, and in violation of the fourteenth amendment to the federal constitution. The circuit court further ruled, however, that the petitioner's proper remedy was not by writ of *habeas corpus* in the federal courts, in the first instance, but that he should first raise the question of his illegal imprisonment in the state courts, and, if it was finally decided against him by the state supreme court, he could then have it reviewed and corrected by the supreme court of the United States on a writ of error; and it accordingly denied the application. 51 Fed. Rep. 747.

JACKSON, J. At common law the general rule undoubtedly was that where an erroneous judgment was entered by a trial court, or an erroneous sentence imposed, on a valid indictment, the appellate court, on error, could not itself render such a judgment as the trial court should have rendered, or remit the case to the trial court with directions for it to do so, but the only thing it could do was to reverse the judgment and discharge the defendant. This rule was recognized in England in the case of *Rex v. Bourne*, 7 Adol. & E. 58, where the court of king's bench reversed the judgment of the court of quarter sessions, and discharged the defendants, because the sentence imposed upon them by that court was of a lower grade than that which the law provided for the crime of which they had been convicted.

Some of the states in which the common law prevails, or is adhered to, have adopted the same rule; but in most of the states it is expressly provided by statute that when there is an error in the sentence which calls for a reversal the appellate court is to render such judgment as the court below should have rendered, or to remand the record to the court below with directions for it to render the proper judgment, and this practice seems to prevail in the state of Washington. The whole subject is discussed in Whart. Crim. Pl. §§ 780, 927, where the authorities are collected and cited.

But whether this practice in the state of Washington is warranted, under a correct construction of said section 1429 of the Code, or whether, if it is, that section violates the fourteenth amendment to the federal constitution, in that it operates to deprive a defendant whose case is governed by it

of his liberty without due process of law, we do not feel called upon to determine in this case, because we are of opinion that for other reasons the writ of *habeas corpus* was properly refused.³³

* * * * *

³³ The other reasons referred to relate to the use of a writ of error as a more suitable remedy than a writ of *habeas corpus*. These are given in full in the portion of the case given in Chapter V, Sec. 5, *supra*. It does not appear that the constitutional objection to the practice here suggested has been approved by the Supreme Court of the United States.

³⁴ Under modern statutes and rules of court modification of judgments in actions at law by appellate courts is a common occurrence and takes place in many forms. Thus formal or clerical errors in the judgment below may be corrected,—*Belford v. Woodward*, (1895) 158 Ill. 122; *Hamilton v. Ames*, (1889) 74 Mich. 298; the amount of the judgment may be changed to correspond to the findings,—*Lewis v. Sellick*, (1887) 69 Tex. 379; the judgment may be conformed to the pleadings,—*Weed v. Lee*, (1868) 50 Barb. (N. Y.) 354; a several judgment may be changed to a joint judgment,—*Wagenaar v. Beeman-Woodward Co.*, (1913) 65 Ore. 109; a party defendant may be dropped where the record shows a discontinuance as to him,—*Stevens v. Saunders*, (1909) 34 App. D. C. 321; a judgment for possession of land will be modified to reduce the amount of land covered,—*Guilmartin v. Padgett*, (Tex. Civ. App.) 138 S. W. 1143; a mistake as to interest may be corrected on appeal by a modification of the judgment,—*Fellows v. Dorsey*, (1913) 171 Mo. App. 289; the amount of a money judgment may be reduced to harmonize with the evidence,—*Stuart v. Lumber Co.*, (1913) 66 Ore. 547.

SCOPE OF STATUTORY PROVISIONS. The following examples will illustrate the wide powers which statutes have given to appellate courts:—

Pennsylvania. "The Supreme Court shall have power in all cases to affirm, reverse, amend or modify a judgment, order or decree appealed from, and to enter such judgment, order or decree in the case as the Supreme Court may deem proper or just, without returning the record for amendment or modification to the court below." P. L. 1901, 101, sec. 2. Construed in *Smith v. Machesney*, (1913) 238 Pa. 538.

Missouri. "The supreme court, St. Louis court of appeals and Kansas City court of appeals, in appeals and writs of error, shall examine the record and award a new trial, reverse or affirm the judgment or decision of the circuit court, or give such judgment as such court ought to have given, as to them shall seem agreeable to law." R. S. 1919, § 1514.

California. "The Supreme Court may affirm, reverse or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered or direct a new trial or further proceedings to be had." Code Civ. Pro. § 53.

Illinois. "The Supreme Court or Appellate Court, in case of a partial reversal, shall give such judgment or decree as the inferior court ought to have given, and for this purpose may allow the entering of a remittitur, either in term time or in vacation, and remand the cause to the inferior court for further proceedings, as the case may require." St. ch. 110, § 111.

New York. "In any action, on an appeal to the court of appeals, the court may either modify or affirm the judgment or order appealed from,

award a new trial, or grant to either party such judgment as such party may be entitled to." Civ. Prac. Act, 1920, § 604.

"Where there is a case stated, or special verdict, the court of error must not only reverse the judgment below, if found erroneous, but enter a correct and final judgment."—Graham v. Bayne, (1855) 18 How. (U. S.) 60.

RICHMOND v. ATWOOD.

United States Circuit Court of Appeals, First Circuit. 1892.

52 Federal Reporter, 10; 2 Circuit Court of Appeals, 596.

[Bill by Atwood against Richmond for infringement of a patent. The circuit court sustained the patent, found infringement, and decreed a perpetual injunction and an accounting. On appeal from the order granting the injunction the merits of the patent were considered, and the order granting the injunction was reversed. 48 Fed. 910. On a motion for rehearing the appellate court raised the question whether, in view of the want of merits in the complainant, the mandate should be confined to the order granting the injunction, or should be made broad enough to dispose of the whole case.]

Before COLT, Circuit Judge, and CARPENTER and ALDRICH, District Judges.

ALDRICH, District Judge. * * *

Section 7, of the act of March 3, 1891, creating the circuit court of appeals, provides:

"That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals." * * *

It will be observed, from an examination of the cases in the supreme court of the United States, that a decree in patent cases, declaring the patent in question valid, and that it has been infringed, and for an injunction and an ac-

counting, has uniformly been referred to as an interlocutory decree. * * *

* * * We must assume that congress, in furnishing equitable remedy by appeal, had reference to the equity system as understood and practiced in England, and as adopted and applied to our own institutions; and, in determining the power and the duty which result from this legislation, we must look to the English system, usage, and practice, and to the decisions of our state courts, where a similar right of appeal from such decrees has been conferred by statute. It is, of course, well understood that a court of equity is to decide on the law and fact, (*Le Guen v. Gouverneur*, 1 Johns. Cas. 500, 506;) and that an appeal in equity is an appeal upon the law and fact involved in the case, (*Adams*, Eq. 375;) and that, "in absence of any restrictive clauses, every appellate tribunal is clothed with all the powers of the tribunal appealed from, and is bound to exercise them upon the same principles," (*Briggs' Petition*, 29 N. H. 553;) and "ordinarily, from the nature of judgments, the decision of an appellate tribunal must have as great force, at least, as the judgment of the inferior tribunal upon the same matter would have had if no appeal had been taken," (*Blake v. Orford*, 64 N. H. 302, 10 Atl. Rep. 117.)

Unquestionably the circuit court upon the hearing therein might have found the facts against the complainant and dismissed the bill, and the question presented is whether this court, having an appeal before it involving the same record and the same facts, may, if error is found upon the general question of right, proceed to do what the court below should have done; or shall this court, although it has examined the record, and determined the right under the patent the other way, simply dissolve the injunction, permit the accounting to go on, and, after the useless expense and annoyance incident to such an investigation, upon re-examination of the same record, by the same court, put in execution the right which it had necessarily determined in the appeal theretofore considered? In our view, the accounting could in no way aid the final execution of the right already ascertained, by this court, and under such circumstances would be worse than idle; and a rule which would permit such circuitry and circumlocution is unnecessary, and would not be useful to either the parties or the court. Now, this case must be dis-

tinguished from the class of cases where the injunction is preliminary, and granted upon the bill, or where there is only a partial hearing upon the merits, or where the record is incomplete, or evidence is excluded which should have been considered. We are not called upon to decide as to the scope of the mandate under such circumstances, but it is probable that no one would contend that, as an invariable rule, it should go to a final disposition of the cause upon its merits. *Deas v. Thorne*, 3 Johns. 543; *Huntington v. Nicoll*, Id. 566.

* * * In the case under consideration, the hearing in the circuit court upon the merits, as to the validity and the infringement of the patent, was full and complete, and the general property right was determined, so far as it could be done by that court; and the perpetual injunction, the order to account, and the appointment of the special master were based upon such determination of the property right. The record before us is complete. Everything is here for our consideration which was before the court below. We must go to the full merits, as shown by the record, in order to determine whether the interlocutory decree for a perpetual injunction is founded in error, and, if we determine the property right adversely to the complainant, the injunction should be dissolved; and no sufficient reason has been suggested why the accounting—to which the complainant is not entitled, and which would be an invasion of a right, and therefore inequitable and improper, under our view of the case—should proceed.

* * * * *

In England, any person aggrieved by a decree or order of the court of chancery is entitled as a matter of right to appeal to the house of lords, (2 Daniell, Ch. Pr., 4th Ed., 1471;) and, in practice, this right extends to interlocutory decrees, (Id. 1492; *Forgay v. Conrad*, 6 How. 201, 205;) and later (14 & 15 Vict. c. 68, § 10) this right was extended to decisions, decrees, and orders of the court of appeals. Mr. Daniell, speaking of the right of appeal from interlocutory decrees, says, (page 1492, Id.):

“Appeals from courts of equity by petition differ from appeals by writ of error from the judgments of the courts of law, which will only lie where the judgment is final. The reason for this distinction is stated to be that courts of

equity often decide the merits of a case in intermediate orders, and the permitting of an appeal in the early stage of the proceedings frequently saves the expense of further prosecuting the suit."

See, also, 2 Smith, Ch. Pr. (2d Ed.) p. 40; *McNeill v. Cahill*, 2 Bligh, (N. S.) 316.

Indeed, it seems to have been the practice, from an early period, in the house of lords, to direct a final disposition of causes before it with a full record, upon appeal from interlocutory orders and decrees based upon a hearing upon the merits below, whenever it was found that there was no equity in the complainant's cause. * * *

This practice is by no means new in the equity jurisprudence of our own country. In a very early case in New York, involving interests of great magnitude,—*Le Guen v. Gouveneur*, 1 Johns. Cas. 436, (1800,)—and at a period when Chancellor Kent was a member of the court of errors, the question was under consideration as to the measure of relief to be afforded upon an appeal from an interlocutory order directing the trial of an issue at law. The appellate court determined that the complainant had no equity, and after much argument and full consideration, which involved a review of the English cases and the practice of the house of lords, proceeded to final judgment, and dismissed the bill. The question was one of new impression in the American courts, and three judges rendered opinions in the cause; Kent, J., in the course of a luminous opinion, (page 508,) saying:

"It is the settled rule of the house of lords in England, upon appeals, always to give such a decree as the court below ought to have given. This is the great and leading maxim in their system of appellate jurisprudence, and instances are, accordingly, very frequent, in which the lords, on appeals from interlocutory orders in chancery, have reversed the order, and decided fully on the merits."

* * * * *

Under the authorities, and the equity practice to which we have referred, and upon principle, it seems to us clear that, while the appellate court is not bound by an inflexible rule so to do, it may in its discretion, and should, when equity so requires, make full directions as to the manner in which the cause shall be disposed of below. No special or peculiar

conditions have been suggested as existing in this case, as a reason why the mandate should not be as broad as the decree in the circuit court; but, on the contrary, as it seems to us, there are strong equitable reasons why an accounting in a patent case, which is incident to and based upon a finding and a decree which upon the record appears to the appellate court to be erroneous, should not proceed; and it is our conclusion, as the full record is before us, upon appeal from an injunction granted by an interlocutory decree, after a full hearing, and a finding which undertakes to finally dispose of the property right involved, that we should direct a final disposition of the cause in accordance with the view which we hold upon the substantial merits. It therefore follows that the findings of the circuit court are reversed, the decree for an injunction and for an accounting is vacated, and it is ordered that a mandate issue accordingly, and with further direction that the bill be dismissed.³⁵

³⁵ In harmony with this case are cases in the second, third, seventh eighth and ninth circuits, and opposed to it are cases in the fifth and sixth circuits. This conflict of authority was settled in *Smith v. Vulcan Iron Works*, (1896) 165 U. S. 518, in favor of *Richmond v. Atwood*, after a full consideration and citation of all the prior decisions.

No modification of a character beyond the jurisdiction of the trial court can be made by the appellate court.—*Cross v. Eaton*, (1882) 48 Mich. 184.

(f) *Reversal.*

STOTLER v. CHICAGO & ALTON RAILWAY CO.

Supreme Court of Missouri. 1906.

200 Missouri, 107.

LAMM, J. Suit for personal injuries at a road crossing. The defendant railway company is incorporated under the laws of Illinois and operates a railroad running from Louisiana, Mo., through the city of Laddonia, in Audrain county, to Kansas City. Defendants Wiseman and Haines are residents of Missouri and servants of their corporate codefend-

ant, acting respectively as conductor and engineer on the train doing the injury. * * *

6. * * * There was no evidence of any probative force tending to show that the conductor, Wiseman, was guilty of negligence. * * * In this condition of things, we are met with the contention on appeal that the judgment must necessarily be reversed because there was no evidence to sustain a verdict against Wiseman. * * *

We consider it established on reason and authority that we may reverse as to one tort-feasor and affirm the judgment as to others. Rev. St. 1899, § 866. The earlier doctrine was to look on a judgment as an entirety, and to be reversed as to all, if reversed as to one. But the later and better rule is to go deeper than the mere shell of the judgment and look into the nature of the case itself, and, where the interests of parties to an appeal may be rightfully severed, where the errors do not affect the parties jointly, and where the rights of one party are not dependent upon those of another, then it is not necessary to reverse the entire judgment. Elliott on Appellate Procedure, §§ 574, 575. The case at bar comes within the foregoing rule, and the doctrine of this court is well established that in such case the judgment may be reversed as to one party and affirmed as to the other parties. * * *

We are of opinion there is no reversible error in the case as to defendants Haines and the railway company, and that the judgment should therefore be affirmed as to them, but reversed as to the defendant Wiseman.

It is, accordingly, so ordered. All concur.³⁶

³⁶ But this will not be done where it will work an injustice.—Washington Gas-light Co. v. Lansden, (1898) 172 U. S. 534.

See extensive note in 27 L. R. A. (N. S.) 209, citing cases for and against the rule of the principal case.

Where a strictly joint judgment, as on a joint contract liability, is rendered against two, it must be affirmed or reversed as to both.—Schoenberger v. White, (1903) 75 Conn. 605.

"The rule that a judgment against two or three defendants is a unit and if erroneous as to one defendant must be reversed as to all, does not apply to decrees. But when the nature of the decree is such that the same reasons apply, the same rule must be held applicable."—Pittsburgh, etc., RR. Co. v. Reno, (1905) 123 Ill. App. 273.

LOOMIS v. LEHIGH VALLEY RAILROAD CO.

*Court of Appeals of New York. 1913.**208 New York, 312.*

The action was brought to recover the cost of lumber which the plaintiffs, as shippers of produce over defendant's railroad, bought and used for the purpose of making certain freight cars furnished by the defendant suitable for such shipments. At the Trial Term the court directed a verdict for the amount of the plaintiffs' claim, and denied defendant's motion for the direction of a verdict in its favor.

* * *

* * * The defendant relies upon the assertion (1) that it was under no common-law duty to furnish to the plaintiffs cars equipped with grain doors, bin doors, or bulkheads, and (2) that even if such a duty had ever existed, it had been abolished by the provisions of the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), and the Elkins Act of February 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1911, p. 1309), and the Public Service Commissions Act of the state of New York (L. 1907, ch. 429), pursuant to which the defendant had filed tariffs of rates which contained no provision for payments or allowances to shippers for grain doors, bin doors, or bulkheads placed in cars by them.

WERNER, J. The first question to be considered is whether, independently of the federal and state statutes, the defendant was subject to a common-law duty to its shippers to furnish them cars equipped with bin doors or bulkheads for the shipment of grain and other produce in bulk. This question need not be discussed at length. It is the settled law that a common carrier must provide itself with vehicles which are safe and sufficient for the purpose intended. * * * As to the shipments set forth in the schedule annexed to the complaint, the defendant refused, after demand by the plaintiffs, to equip its cars with the necessary appliances. Without them the cars were practically useless. We think that, in these circumstances, the plaintiffs were justified in furnishing the necessary lumber, and that for the concededly reasonable expense incurred by them they are entitled to

recover from the defendant, unless the provisions of our Public Service Commission Law or of the Interstate Commerce Act have established a different rule.

In view of the legislation to which we have referred, the subject under discussion naturally divides itself into two distinct branches. The one relates to intrastate shipments, and the effect of our state legislation upon the common-law rights and obligations of the parties, and the other refers, of course, to interstate transportation, in respect of which the effect of the federal statutes is to be considered.

* * * * *

These views lead to the conclusion that the plaintiffs are entitled to recover the money expended by them in equipping with grain doors and bulkheads the intrastate cars set forth in the schedule annexed to the complaint.

The view which we are to take of the rights of the plaintiffs in respect of their interstate shipments is necessarily governed by considerations entirely different from those which have led to our conclusion as to the intrastate shipments. Here we are upon different ground, for we are now dealing with federal statutes and with the decisions of federal courts in demarking their effect and interpretation. If the subject is covered by the enactments of Congress, and if the federal courts or tribunals are invested with jurisdiction over it, our jurisdiction is at an end, without regard to what it may have been at common law or under our own statutes.

* * *

* * * Congress has made it a question of rates over which the Interstate Commerce Commission has exclusive control, and in respect of which any justiciable controversy is referred exclusively to the federal courts. * * *

We have yet to consider whether we can divide the single judgment recovered by the plaintiffs, so as to sustain that part predicated upon the intrastate shipments, and to disallow for lack of jurisdiction that part which rests upon the interstate shipments. The general rule in actions at law is that upon appeal from a single judgment the Appellate Court must affirm or reverse as to the whole of the recovery and as to all the parties. *Goodsell v. Western Union Tel. Co.*, 109 N. Y. 147, 16 N. E. 324; *Wolstenholme v. Wolstenholme File Mfg. Co.*, 64 N. Y. 272; *Nat. Bd. of Marine Underwriters v. Nat. Bank or the Republic*, 146 N. Y. 64, 40 N. E. 500. The

reason of the rule is that it would produce endless confusion and embarrassment in the administration of justice to permit single causes of action and judgments to be split up so that different parts thereof could be in litigation in different courts at the same time. We do not think this case is within the reason of the rule. Although there is no separation of causes of action, either in the complaint or in the judgment, there are manifestly two such causes if we are right in holding that there is a distinction between intrastate shipments and interstate shipments. They are easily separable. The result of our decision is that the plaintiffs are entitled to recover upon one and not upon the other. In these circumstances it is both logical and just to make an end to the litigation by directing that the judgment shall be reduced to \$64.45, and as thus modified affirmed, without costs of this appeal to either party. *Wolstenholme v. Wolstenholme File Mfg. Co., supra; Board of Underwriters v. Nat. Bank of the Republic, supra.*⁸⁷

⁸⁷ Accord, see *Seevers v. Cleveland Coal Co.*, (1914) 166 Ia. 284.

STROTTMAN v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.

Supreme Court of Missouri. 1910.

228 Missouri, 154.

GRAVES, J. This cause is here for a second time. There was at least an attempted adjudication of it in *Strottman v. Railway Co.*, 211 Mo. 227, 109 S. W. 769. We have purposely used the word "cause" instead of the word "case." The cause when first here came by appeal from Jefferson county. Plaintiff, the widow of an engineer in the employ of defendant, sued for the alleged negligent killing of her husband. The negligence charged was the failure of a telegraph operator to deliver a train dispatcher's message, through which failure a collision occurred and plaintiff's husband was killed. When that case came on for hearing in this court, by majority opinion it was held that the deceased engineer and telegraph op-

erator were fellow servants under the act of 1897 (Laws 1897, p. 96), but further held that such act of 1897 did not give the widow a right of action. This court upon an examination and hearing upon both the facts and the law entered a simple judgment of reversal, in words as follows: "Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in the form aforesaid, by the said Jefferson county circuit court rendered, be reversed, annulled, and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment. It is further considered and adjudged by the court that the said appellant recover against the said respondent its costs and charges herein expended, and have execution therefor. (Opinion filed.)"

The present case was instituted in the circuit court of the city of St. Louis by a petition containing two counts. The two counts are the same save and except in the second there is an allegation of wanton and willful negligence and a prayer for punitive as well as other damages. Both counts of said petition contain the following allegations: "Within six months next after said accident, injury, and death of the plaintiff's husband, she brought her action against the defendant in the circuit court of Jefferson county to recover damages therefor, and to recover upon the cause of action sued for herein, and subsequently, on May 14, 1903, recovered a judgment against the defendant therein, and said cause was thereupon taken by the defendant to the Supreme Court of Missouri, on appeal, and said judgment was by the Supreme Court of Missouri on the 2d day of April, 1908, reversed.

* * *

To this petition, the defendant filed a demurrer * * *

This demurrer the trial court sustained, and entered its judgment for the defendant and from such judgment the plaintiff has appealed. The cause was briefed and argued here both upon the merits, and upon the question of *res adjudicata*. Such sufficiently states the case.

In our judgment the present case is determined without a rediscussion of the merits of the cause. The present case, whilst here upon petition and demurrer, is as if it were here upon all the original facts with an answer pleading former

adjudication. The petition was evidently so drawn as to force this situation. It avers all the facts necessary to be set out in an answer pleading former adjudication, and the demurrer raises the issue by conceding the pleaded facts. The demurrer performs a further office by raising a clear issue of law, *i. e.*, that the petition upon its face shows a former adjudication of the cause of action stated, and for that reason discloses no right of action in the present case. We are, therefore, brought to the single question as to the force and effect of a simple judgment of reversal in an appellate court in a case where such court passed upon the entire cause, including both the law and the facts. The exact question is here for the first time. In all the history of the court, this is the first time a judgment of reversal in a case of this character has been treated as a nonsuit, and a suit reinstituted, carried to judgment and appealed to this court. It is therefore interesting because of its novelty, if for no other reason.

The question must turn somewhat upon our statutory provisions. The various statutes are: Rev. St. 1899, § 639 (Ann. St. 1906, p. 658) which reads: "The plaintiff shall be allowed to dismiss his suit or take a nonsuit at any time before the same is finally submitted to the jury or to the court sitting as a jury, or to the court, and not afterward." * * *

Laws 1905, p. 138, which were enacted in lieu of Rev. St. 1899, § 2868, read thus: "Every action instituted by virtue of the preceding sections of this chapter shall be commenced within one year after the cause of action shall accrue: Provided, that if any action shall have been commenced within the time prescribed by this section, and the plaintiff therein suffer a nonsuit, or, after a verdict for him, the judgment be arrested, or after a judgment for him the same be reversed on appeal or error, such plaintiff may commence a new action. from time to time, within one year after such nonsuit suffered or such judgment arrested or reversed." * * *

The real question is the proper construction of the new section 2868 as enacted in 1905, when taken with section 639. Under such sections, in a case where this court has passed upon both the law and facts of a case and reversed the judgment *nisi*, can the plaintiff bring and maintain a new suit, if brought within the year specified in section 2868? We think not, and for reasons which follow.

* * * * *

* * * The plaintiff contends that a judgment of reversal is equivalent to a nonsuit. That it amounts to nothing more than a nonsuit, and that a new suit can be reinstituted within a year after such judgment. In the *Berning* Case, 56 Mo. App. 449, Judge Rombauer does say that this court has said that a judgment of reversal was equivalent to a nonsuit, but he cites us to no case, and if it has been so held where the question was an issue, we have been unable to find the case. Nor is it equivalent to a nonsuit. It is true that at common law the plaintiff could take a nonsuit at any time before verdict. 14 Cyc. 401. But this rule is modified by our statute, section 639, quoted *supra*, by which the nonsuit must be taken before the cause is submitted to the jury or to the court. A judgment of reversal comes after a submission. Not only so, but in many cases it comes after an investigation of both law and facts, and after a judicial conclusion has been reached as to the merits of the case under the law and facts. When we consider section 639 along with section 2868, we cannot say that there is any similarity between a nonsuit and a judgment of reversal. Nor can we say, in all cases, that a judgment of reversal is equivalent to a judgment on either a voluntary or involuntary nonsuit. In nonsuits there is no adjudication of the issues involved in the case, whereas in most of the cases wherein the appellate courts simply reverse the case, there has been an adjudication of the issues on the law and facts of the case. There might be cases wherein we could reverse the case without remanding, and yet leave the issues upon the merits untouched. Thus in *McQuitty v. Wilhite et al.*, 218 Mo. 586, 117 S. W. 730, we reversed the case without remanding, and yet never passed upon the merits of the case at all.

By the first count of her petition the plaintiff, McQuitty, sued the administrators of W. R. Wilhite, deceased, for the value of her services. In the second count, she sued for the specific performance of a contract to convey real estate. The trial court found against plaintiff on the first count, but she failed to appeal. But the trial court found for plaintiff on the second count and the administrators appealed. This judgment we reversed on the ground that plaintiff had sued the wrong parties. In other words, such action should have been against the heirs and not the administrators. We have no doubt in a case like this the plaintiff could sue again, but where upon appeal we examine the facts and apply the law,

and reverse the case for the reason that plaintiff upon the merits is not entitled to recover, such judgment of reversal is a finality. It ends the case for all time.

* * * * *

In the case at bar, it is not claimed that the plaintiff is relying upon any new facts, but is relying upon the same facts adjudicated in the former case. But if she had new facts, she has lost her opportunity. She might have asked for a modification of the judgment, as such has been permitted in some instances. Thus in *Rutledge v. R. R.*, 123 Mo., loc. cit. 140, 24 S. W. 1053, 27 S. W. 327, this court thus spoke in an opinion on a motion to modify a judgment of reversal: "On motion to modify the judgment, it has been suggested that plaintiff may have a cause of action upon further proof that the signal on which the engineer acted originated with the yardmaster. Plaintiff hence prays that the judgment be modified so as to remand the cause; and thus give him an opportunity to amend, and present that phase of the case to the trial court, the statute of limitations having intervened as against any new action he might bring. On consideration of this motion we are of opinion that it should be granted. *Bowen v. Railroad* (1893) 118 Mo. 541, 24 S. W. 436; *Lilly v. Tobbein* (1891) 103 Mo. 477, 15 S. W. 618, 23 Am. St. Rep. 887. Accordingly, the final judgment of this court will be that the judgment of the circuit court be reversed, and the cause remanded."

It would appear that both plaintiff and the court in that case understood that the judgment of reversal was a finality, and unless modified no further action could be taken by plaintiff. Other cases of like tenor might be cited.

* * * * *

5. A thought or two more and we dismiss the subject, save and except to note some cases outside of Missouri cited by the plaintiff. An examination of our cases shows that we have indiscriminately used judgments of reversal, and judgments of reversal and dismissal of the petition. For instance, in *Gatewood v. Hart*, 58 Mo., loc. cit. 265, we disposed of the case, thus: "The judgment is reversed, and as it is evident that a new trial could be of no avail to the plaintiffs, their petition will be dismissed; all the judges concur." In *Rutledge v. Railway Company*, 123 Mo., loc. cit. 137, 24 S. W. 1057, 27 S. W. 327, at the conclusion of the opinions written

in Division 1 we used this language: "We hold that plaintiff's injuries cannot justly be ascribed to the want of such a rule as their juridical cause; and that the trial court should have given the defendant's instruction in the nature of a demurrer to the evidence. It follows that the judgment should be reversed (*Carroll v. Transit Co.* [1891] 107 Mo. 664 [17 S. W. 889]), and it is so ordered."

Thus it will be observed that we have reached the same object, i. e., a disposition of the merits of the controversy through different wordings of our opinions and judgments. Other similar instances could be cited but these serve to illustrate.

There can be no doubt that a reversal of the judgment and a dismissal of the plaintiff's petition finally determines the cause. So too may the simple judgment of reversal, if it appear that the merits of the cause were submitted and adjudicated. What was held in judgment does not always appear from the judgment itself, but may be gathered from the pleadings and whole record of the case. In the case at bar it appears from the plaintiff's petition that we held in judgment at the prior hearing both law and facts, and therefore the merits of the controversy.

6. Plaintiff in addition to the cases in this state has cited us the following: *Smith v. Adams*, 130 U. S. 167, 9 Sup. Ct. 566, 32 L. Ed. 895; *Gardner v. Railroad*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107; *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; *Spring Valley Coal Co. v. Patting*, 210 Ill. 342, 71 N. E. 371; *Railroad v. Bentz*, 108 Tenn. 670, 69 S. W. 317, 58 L. R. A. 690, 91 Am. St. Rep. 763.

* * * * *

It will be observed that in each of the five cases the judgment under discussion was one wherein the judgment *nisi* had not only been reversed, but the cause had been remanded. The cases are therefore absolutely foreign to the question at issue in this case. No one would contend that a judgment of this court which reversed the judgment *nisi*, and remanded the cause, would be a final judgment.

* * * * *

We shall not consume further time and space. It follows from what has been said that the judgment of the lower court is right and should be affirmed.

It is therefore ordered that the judgment be affirmed. All concur.

WHALEN v. SMITH.

Supreme Court of California. 1912.

163 California, 360.

SHAW, J. This is a proceeding to compel the defendant, as judge of the superior court, to render judgment in the matter of the action to determine heirship in the estate of George Roach, deceased, entitled "*Martin Whalen et al. v. Joshua B. Webster et al.*," in accordance with the decision of this court on appeal therein, as reported in 159 Cal. 260, 113 Pac. 373, and without taking further evidence upon the issue as to the number of surviving children of Thomas Roach, a deceased brother of said George Roach.

The contention of the petitioners is that the appeal in *Whalen v. Webster, supra*, was from a part only of the judgment in the proceeding—a part which presented but one question, namely, whether the language of the will of George Roach gave to the descendants of his brothers and sisters one-half of his estate or only one-fourth thereof; that all other matters determined by the judgment remained unaffected, and are finally adjudicated, and, hence, that this court on said appeal had no jurisdiction to reverse the whole judgment, or any part of it, except the part appealed from; and that the mandate of reversal, although general in terms, can apply only to the part appealed from. And, further, they claim that, even if the Supreme Court had jurisdiction to reverse the entire judgment on appeal from a part only, yet, in view of the record in the case, the nature of the proceeding, the judgment rendered, and the narrow question presented by the appeal, the general mandate should not be construed to apply to the whole judgment in the proceeding below, but only to that part from which the appeal was taken.

There are doubtless cases of appeals from a part of a judgment where the part appealed from is so interwoven and connected with the remainder, or so dependent thereon, that the

appeal from a part of it affects the other parts, or involves a consideration of the whole, and is really an appeal from the whole, and if a reversal is ordered it should extend to the entire judgment. The appellate court, in such cases, must have power to do that which justice requires, and may extend its reversal as far as may be deemed necessary to accomplish that end. The Code provides that a party may appeal from a specific part of a judgment. Code Civ. Proc. § 940. Ordinarily such an appeal would leave the parts not appealed from unaffected, and it would logically follow that such unaffected parts must be deemed final, being a final judgment of the facts and rights which they determine. The decisions are to the effect that upon such an appeal, where the parts not appealed from are not so intimately connected with the part appealed from that a reversal of that part would require a reconsideration of the whole case in the court below, the court upon such partial appeal can inquire only with respect to the portion appealed from. Thus, in *Early v. Mannix*, 15 Cal. 150, it was said that a plaintiff in forcible entry could appeal from an order denying his motion for treble damages and, in the meantime, enforce his judgment for restitution of the premises. In *Pacific Mutual L. I. Co. v. Fisher*, 106 Cal. 237, 39 Pac. 758, it was said that the Supreme Court is not at liberty to review a part of a judgment which is not appealed from. In *Estate of Burdick*, 112 Cal. 391, 44 Pac. 734, the court below made a decree, upon the executor's petition, settling his final account and making distribution of the estate. He appealed from all of the decree, except the part thereof settling his final account. Upon the appeal he applied to review the order settling the final account; but the court refused to consider the question of its accuracy, saying: "We must not interfere with it. To attempt to do so would be an arbitrary proceeding without authority." In *Ricketson v. Richardson*, 26 Cal. 154, there were several defendants, and one alone appealed. A reversal as to all of the defendants was asked. The error consisted of a defective service of summons and affected the appellant only. A reversal as to the other defendants was refused; the court saying that it was bound to presume that there was no error as to them, since they had not taken any appeal. In *Kelsey v. Western*, 2 N. Y. 505, the court said: "It is well settled that only that part of a decree which is appealed from is brought before the appellate court for review." In *Bush v. Mitchell*,

28 Or. 92, 41 Pac. 155, the court referring to an appeal from a part of a judgment, quoted the following language from *Shook v. Colohan*, 12 Or. 243, 6 Pac. 503: "The trial of the suit anew would be confined to a trial of the case affecting the part of the decree specified in the notice of appeal." In that state the appellate court had power to try the suit anew. The following cases recognize and apply the general principle that an appeal from a distinct and independent part of a judgment does not bring up the other parts for review in the appellate court, and that a reversal of the part appealed from does not affect the portions not dependent thereon, but that they will stand as final adjudications: *Ikerd v. Postlewhaite*, 34 La. Ann. 1235; *Nelson v. Hubbard*, 13 Ark. 253; *Scutt's Appeal*, 46 Conn. 38; *Ervin v. Collier*, 3 Mont. 189; *Hess v. Winder*, 34 Cal. 270; *Sands v. Codwise*, 4 Johns. (N. Y.) 602, 4 Am. Dec. 305; *In re Davis' Estate*, 149 N. Y. 548, 44 N. E. 185; *Leavison v. Harris* (Ky.) 14 S. W. 343; *Meadow, etc., Co. v. Dodds*, 6 Nev. 261; *Robertson v. Bullions*, 11 N. Y. 245; *Moerchen v. Stoll*, 48 Wis. 307, 4 N. W. 352.

This principle is decisive of the case. If the decree appealed from in *Whalen v. Webster* had been a decree distributing the estate, it might plausibly be argued that the distribution was the final judgment, and that the decision as to the persons who are the heirs at law was a mere finding of fact, upon which the final judgment followed as matter of law, in which case a general order of reversal would open the whole matter for a new trial as to the facts. But that proceeding was instituted under section 1664 of the Code of Civil Procedure. This section provides a special proceeding for the purpose of ascertaining and determining, in advance of distribution, the persons who have succeeded to the estate and the portions inherited by or devised to each of them. Upon the trial thereof, the court must "determine the heirship to said deceased, the ownership of his estate, and the interest of each respective claimant thereto or therein, and persons entitled to distribution thereof." No other judgment is to be rendered, and no disposition whatever is to be made of the estate. It is a determination, first, of the persons entitled as heirs, devisees, or legatees, or as their successors, if any have died; and, second, the interest of each one in the estate of the decedent.

The will of George Roach gave an interest in his estate, af-

ter the death of his wife, to be equally divided among his brothers and sisters or their descendants. The petition of Whalen and others, plaintiffs in the proceeding, alleged: First, that the decedent had only one brother and one sister, both of whom were dead, and that plaintiffs were the only descendants; and, second, that, as such, they were entitled to one-half of the estate under the will. The heirs and successors of the widow of the decedent appeared and answered, denying that plaintiffs were descendants of the brother and sister, and claiming that they, as heirs and successors of the widow, were entitled to succeed to three-fourths of the estate. The judgment therein declared, first, that the plaintiffs were the devisees and heirs at law of Roach, the descendants of his brothers and sisters referred to in his will and the persons entitled to take as devisees under his will; second, that each of them was entitled to a specific interest, the aggregate of all of them being only one-fourth of the estate; and, third, that certain named defendants, as successors of the widow, were entitled to the remaining three-fourths. There is nothing in the record to indicate that there was any claim that there were other descendants of the brothers and sisters. The principal dispute was upon the question of law whether the fourth clause of the will gave the plaintiffs one-half of the estate or only one-fourth thereof. The plaintiffs appeal only from that part of the judgment which declared that they were entitled to take only one-fourth, and that certain defendants were entitled to three-fourths of the estate. No appeal was taken from the part declaring that the plaintiffs were persons entitled, as descendants of the brother and sister, to take as devisees under the will. The question whether or not said brother and sister left other descendants, and whether or not there were other brothers and sisters, was in effect determined in the negative by the judgment. The plaintiffs were satisfied with that determination, no one appeared to dispute or question it, and its accuracy was not reviewed, considered, or discussed by this court in its opinion on the appeal; nor was it presented for review by the record. The only question discussed or decided was whether the fourth clause disposed of one-half of the estate or one-fourth thereof. The decision was that it gave one-half, and the judgment on that subject was accordingly reversed. The mandate did not go into specific particulars, but consisted simply of the words, "The

judgment is reversed." The part of the judgment appealed from determined no question of law, except the proper construction of the will. No question of fact was involved in the appeal. The determination of the construction of the will did not require any inquiry concerning the persons who were entitled as members of the class described as descendants of the brothers and sisters of the decedent. The court was therefore without authority to consider the latter question, and it did not make any attempt to do so. In view of these considerations, the words of the mandate should be understood and construed to refer only to the part of the judgment appealed from—the part which the Supreme Court had jurisdiction to review—and to reverse that part only, without affecting the other parts not specified in the notice. It follows that the court below has no authority to retry the question whether there were other descendants of the brothers and sisters than those included in the decree previously rendered. The decision left no matter of fact to be determined, and the only duty of the court below upon the going down of the *remittitur* was to enter judgment in the proceeding in accordance with the facts previously found and with the decision of the Supreme Court on appeal.

It is therefore ordered by the court that a writ of mandate issue, directing the superior court of San Joaquin county to enter judgment in the proceeding of *Whalen v. Webster* upon the facts found in accordance with the opinion of the Supreme Court, and without proceeding to retry any issues of fact determined upon the former hearing in that court.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.

HENSHAW, J. I dissent. The *power* of this court to reverse the whole of a judgment, when a part only has been appealed from, is conceded by the prevailing opinion to exist.

The judgment delivered by this court in *Whalen v. Webster*, 159 Cal. 260, 113 Pac. 373, is in the following language, "The judgment is reversed." Language so plain and so free from ambiguity neither requires explanation nor permits construction. It either means what it says, or it means nothing. It follows, therefore (the power of the court so to do being conceded), that this court deliberately reversed, not a part, but the whole, of the judgment appealed from; for, as is said in *Glassell v. Hansen*, 149 Cal. 511, 87 Pac. 200, where a similar

question was presented: "In reversing the case, this court might have directed what issues should again be tried, and what should be deemed finally settled by the first trial; however, it did not do so, and the judgment was merely in the general terms, 'The judgment and order are reversed.' This clearly left the whole case to be tried anew, as if it had not been tried before. *Falkner v. Hendy*, 107 Cal. 54 (40 Pac. 21, 386)." In *Cowdery v. London, etc., Bank*, 139 Cal. 298, 73 Pac. 196, 96 Am. St. Rep. 115, this court, in effect, refused to put any construction upon a judgment such as the one here under consideration, or to attempt to modify its plain meaning in any way. The judgment of this court in the *Cowdery* Case was: "The judgment * * * is reversed and the cause remanded, with directions that the trial court enter judgment in accordance with the views here expressed." Says this court: "The legal effect of the order of the Supreme Court was to reverse and vacate the judgment, and not merely to modify it. Upon a decision of the Supreme Court that there was material error in the action of the court below, that court may direct the character of the subsequent proceedings in the lower court, and its mandate will vary according to its views as to the proper course to be pursued. It may conclude not to reverse the judgment, but to modify it, by eliminating some portion, or by adding something to it, leaving the remaining part of the judgment below to stand affirmed and in full force and effect from the date of its original entry or rendition; or it may reverse the judgment, which means to entirely vacate it, and may remand the cause for a new trial; or, if a new trial is not necessary, it may upon the reversal remand it, with directions to the lower court to enter a particular judgment."

What this court is here doing is changing in essential particulars a judgment which it has solemnly given, which judgment by lapse of time has passed from its control and become an absolute finality. It is doing this under the guise of construing language so plain as to forbid construction. The direct consequence, the legal effect, of this is to impair, without warrant of law, the stability and security of every judgment which this court has rendered. If this court in one case can say that its formal decree reversing the whole of the judgment of a trial court means merely the reversal of some portion of that judgment, it may say so in any case.

The judgment which this court rendered in 159 Cal. 260, 113 Pac. 373, was either mistaken or not mistaken. If it was not mistaken, there is no need for its correction. If it was mistaken, this is not a legal method for its correction. Nothing but hopeless confusion in the law and a just contempt for the law can follow, if its highest interpreters, under conditions such as those here present, shall be permitted to say that their own deliberately chosen language does not mean that which alone the words must mean to any comprehending mind. I therefore dissent under the conviction that the prevailing opinion and judgment are not alone without the sanction of the law, but are a dangerous innovation upon the law.

I concur: MELVIN, J.³⁸

³⁸ "Where a decree is jointly binding on several defendants, so that each is liable for the whole, a reversal on the appeal of one defendant vacates the same as to all the defendants; but when the decree, in form, is joint, but is several in its effect, it may be reversed as to a part of the defendants."—Syllabus in *Pittsburgh, Fort W. & C. Ry. Co. v. Reno*, (1887) 123 Ill. 273.

DONNELL v. WRIGHT.

Supreme Court of Missouri. 1906.

199 Missouri, 304.

[Donnell brought an ejectment suit in the circuit court against Wright and others, and defendants obtained a judgment on the ground of fraud in connection with Donnell's deed. On appeal the judgment was reversed on the ground of *res adjudicata*, it being contended that the issue of fraud was determined in Donnell's favor in the prior suit of *Lynch v. Donnell*, 104 Mo. 521. But although the supreme reversed, it did not expressly remand, the following clause being shown on the record to have been *erased* from the usual form of mandate: "That the said cause be remanded for further proceedings to be had in conformity with the opinion of the court herein delivered." Three years later, on the theory that the case was pending in the circuit court, Donnell undertook by *scire facias* to revive the proceedings against the heirs and executors of one of the defendants who had died.]

LAMM, J. * * *

* * * An order was made that said heirs and representatives appear and show cause. They did appear, and filed a return or pleading to the writ of *scire facias*, wherein (for cause) it was alleged: First, that the suit was not pending in that court, judgment having been rendered therein, from which plaintiff appealed; that the judgment was simply reversed, and the cause was not remanded. * * * To the foregoing return plaintiff filed a plea, admitting the judgment was reversed by this court, but denied the cause was not remanded, and alleged that, in law and in fact, it was remanded, and is now properly and legally pending in the circuit court of Jackson county. * * * The trial court, * * * adjudged as follows: "Therefore the court doth hold that plaintiff was not entitled to have his suit as revived, and doth find and adjudge that the same be not revived, and the plaintiff take nothing by his suit."

Defendant's learned attorney * * * seeks to sustain the lower court on the theory the cause was not pending in that court at the time the writ of *scire facias* was sued out, and was not so pending because this court did not award a new trial and remand the cause for further proceedings.

Plaintiff's learned attorney insists that the reversal of the judgment in favor of defendants *ipso facto*, as a matter of law, without more, itself operated as a remanding of the cause, a *procedendo* under an award of a new trial, and that the circuit court thereby become possessed of jurisdiction to go on and try the case anew. The foregoing contentions of counsel call for an adjudication of the effect and office of a formal award of a new trial, with a remanding of a cause for further proceedings in the lower court, and the single question presented may be stated in this way: If a circuit court loses jurisdiction of a case on its merits, by an appeal from its judgment, does it regain jurisdiction of the case on its merits by a mere reversal here without an award of a new trial and a remanding?

The exact point, to wit, the effect of a reversal of defendant's judgment on appeal by plaintiff without remanding, seems new, while the kindred question, viz., the question of a reversal without remanding of plaintiff's judgment on defendant's appeal, is not new. The right of appeal being a creature of statute, the duties and powers of appellate courts

on appeals in Missouri are referable to the same source. Looking thereto, we find the duty of such court in cases on appeal is to "examine the record" and, first, "award a new trial," or, second, "reverse," or, third, "affirm the judgment or decision of the circuit court," or fourth, "give such judgment as such court ought to have given," or as to this court "shall seem agreeable to law." Rev. St. 1899 § 866; Laws 1903, p. 105. Each one of these four duties is a separate and distinct step, though it is obvious that award of a new trial and a reversal go together as twin steps to be taken on the same appeal. If, for instance, a new trial is awarded, the judgment below is also reversed in order that a new trial be had; but a reversal may be an independent step, complete in itself, and not to be followed by a new trial. So, too, it is apparent that, in awarding a new trial, it may be on the whole case or on a certain issue, or a new trial may be awarded, with directions to eliminate pointed out errors, or to try the case on a certain theory of the law, or with the exclusion or inclusion of certain evidence; the award adjusting itself to meet the ends of justice. But it will be observed that in whatever form it be made, whether with or without directions, yet the statute contemplates it should be made, and also that the judgment, standing in the way of a new trial, should be brushed aside by reversal in order that one be had.

Take a case: A. sues B. and recovers; but his judgment was the product of erroneous instructions, or improper evidence commingling with proper evidence. On that account the judgment is reversed here on appeal. In such case the clear duty of this court, consistent with the inherent common sense of the thing, was to award a new trial and remand for further proceedings. But this court inadvertently neglected to do so—reversing only, without remanding. In the supposed case there was no reason under the sun why the case should not have been remanded, as well as reversed, so that it might have been followed in subsequent proceedings below to a finality. Take another case: C. sues D., and D. has judgment against C. C. appeals, and secures a reversal of the judgment against him without remanding. In that case there was no reason under the sun why the case should not have been remanded so the circuit court could proceed with a new trial to a finality. But the entry was not made. Now, while in other supposable cases the reversal of a judgment in favor

of a plaintiff might stand on a footing to itself; a footing entirely distinct in principle from the reversal of a judgment in favor of a defendant; yet in the two hypothetical cases of A. v. B. and C. v. D., we fail to see why they do not stand on the same footing; and, if the court may not proceed below to a new trial and judgment in A. v. B., because jurisdiction was not handed back, by the same token the court below should not proceed in the case of C. v. D., unless jurisdiction was handed back by this court.

Let us approach the case from another standpoint. At common law, where a case came up on a writ of error, it was the custom to hand back jurisdiction, if at all, by an entry and a mandate called a "*procedendo*," or a "*venire facias de novo*," or a "*remittitur* of record." Now, from the institution of this court down to the present hour, for 85 years, the same end has been attained by awarding a new trial, and reversing and remanding the case, where defendant's judgment was not allowed to stand. Thus, in *Edwards v. McKee*, 1 Mo. 123, 13 Am. Dec. 474, decided here at the October term, 1821, Edwards and another sued McKee, and the jury found for defendant. Thereupon the plaintiffs appealed, and the case was sent below for a new trial on the following entry: "Let the cause be remanded to the circuit court for a new trial of the issue made on the first count in the declaration, not inconsistent with this opinion." From that case until *Matlock v. Wil., G. & St. L. Ry. Co.* (not yet officially reported) 95 S. W. 849, decided here June 19, 1906, wherein a judgment in favor of defendant was reversed, and the cause was remanded, there has been deemed a necessity for a uniform use of appropriate phraseology which (in some plain form) grants a new trial, and reverses and remands the cause, before the trial court may go on. We are now asked to hold that, in the absence of entry of such judgment here, with a formal mandate remanding the cause, the trial judge may (or must) read our opinion and judgment entry, and if he concluded, on the reasoning of the opinion, the cause should have been remanded by this court, or, to put it another way, that it was the clear duty and intention of this court to remand the cause, but by slip it failed to do so, then the trial court thereby became possessed of jurisdiction to proceed *de novo*. If this be the law, then to the perplexing troubles now awaiting on a *nisi prius* judge there is added a new train of vexations hitherto

beyond the ken of his philosophy—vexations which, putting the boot on the wrong foot, lays upon him the duty of correcting (by avoiding the effect of) our errors, as we do his. Hitherto, while a court *nisi* has been charged with the duty of reading our opinion into the mandate, where the cause is reversed and remanded to be tried in accordance with such opinion, yet he has been relieved from any duty of laboriously ascertaining by induction or deduction whether or not the cause has been sent below for further proceedings; for that fact has been set forth in our judgments and mandates in unmistakable terms, so that one who runs may read.

Should we unsettle the practice, and now hold that a cause is reversed and remanded, not because our judgment and mandate say so, but because they *should* have said so, and by such holding take a step to one side of the beaten path? We think not. * * *

* * * It cannot be doubted, moreover, that during the term this court holds in its breast its own judgments, and, on a suggestion of error, it may recall its own mandate and see to it that its judgment is amended so as to conform to its opinion. A judgment is the application of the law to the facts found, "the sentence of the law upon the record," the determination of the cause, the act of the whole court to effectuate the reasoning and findings of the opinion. If, through slip, our judgment be faulty, why may it not be corrected by a *nunc pro tunc* entry on seasonable application? In a lawsuit one must certainly watch, and, withal, may profitably pray. When, therefore, this court, on the appeal of plaintiff, reversed a judgment for the defendants, it should have remanded the case for a new trial; but when it did not the burden was on Donnell to be alert, and to come here betimes and pray us to correct our judgment and mandate. This he failed to do, sleeping on his rights for three years in a slumber so profound as to be likened (in figure) to that of Rip Van Winkle, or to that in which our great ancestor lost a rib (thereafter reconstructed in another and much more desirable form).

* * * * *

Because there was no jurisdiction in the court below to try the case at bar, the judgment of the circuit court on the issue

raised on the *scire facias* and return was right, and is therefore affirmed.³⁹

³⁹ Some cases take a contrary view. Thus in *Becker v. Becker*, (1878) 50 Ia. 139, it was held that the reversal of a case which is retriable below restores the case as pending there. In *Benzinger Twp. Road*, (1890) 135 Pa. 176, it was held that a case properly requiring further proceedings should be taken up again after reversal, notwithstanding the failure of the supreme court to award a procedendo, but the court calls attention to the fact that its own opinion on reversal indicated the necessity of further proceedings. In *Gerard v. Gateau*, (1884) 15 Ill. App. 520, the voluntary appearance of the defeated party in the court below after an affirmance of a decree dissolving an injunction, was held to be a waiver of a remanding order to assess damages, in view of a statute making it the duty of the court to assess damages after the dissolution of any injunction.

Reversals may be self-executing in their nature so as to require no order of remand to authorize the trial court to go on with the case. See *Woodruff v. Bacon*, (1868) 35 Conn. 97, where an order striking a cause from the files was merely reversed, and it was held that this was enough to reinstate the case for trial below, without a remanding order.

(g) *Final Judgment or Remand.*

FIELDER v. ADAMS EXPRESS CO.

Supreme Court of Appeals of West Virginia. 1911.

69 West Virginia, 138.

POFFENBARGER, J. Fielder & Turley brought this action against the Adams Express Company, in a justice's court, to recover the value of certain goods shipped to them over said company's line from New York and lost. In that court they recovered a judgment for \$111.30. The defendant took an appeal to the intermediate court of Kanawha county. There a jury was dispensed with, and the case submitted to the court on a statement of facts agreed to, and a judgment was rendered for \$114.55, with damages according to law. To this judgment the circuit court of Kanawha county awarded a writ of error, on which it was reversed and the case remanded to the intermediate court for further proceedings and final determination. Complaining of this, Fielder & Turley procured a writ of error from this court to the judgment of the circuit court, on which * * * the remand of the case to the inter-

mediate court, and reversal by that court are assigned as grounds of error. * * *

The circuit court erred in refusing to retain and finally decide the case, and in remanding it to the intermediate court. As it was fully made up and could not be in any respect changed, since the facts had been agreed, there was no reason for remanding it, and we think final judgment should have been rendered. Though section 21 of chapter 25 of the Acts of 1907 says "the circuit court may retain the case for trial or remand the same back to the said intermediate court to be further proceeded in and finally determined," these general terms must be so construed as to make them operate reasonably and justly. It must be assumed the Legislature did not intend a useless and detrimental proceeding. After an appellate court has ascertained what judgment should have been rendered in a case fully made up, a remand for judgment involves both delay and risk of additional error as well as double work. Hence it is an idle, useless, and injurious proceeding, which the Legislature cannot be deemed to have intended, if the clause quoted can perform some other substantial purpose or function. While some effect must be allowed to all words in a statute, or other writing, if possible (*State v. Harden*, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394), it is not always necessary nor proper to allow them effect to the full extent of the letter thereof (*Coal & Coke Ry. Co. v. Conley*, 67 S. E. 634). It is improper to do so, if such construction leads to an absurd or unjust result. *Hasson v. Chester*, 67 S. E. 731; *B. & L. Ass'n v. Sohn*, 54 W. Va. 101, 46 S. E. 222. Words may be referred to their proper connections, giving each in its place its proper force, in seeking the legislative intent. *B. & L. Ass'n v. Sohn*, cited. Reversals take place in two well-known general classes of cases, one in which new jury trials must take place, or additional evidence be heard, or further orders made to carry the judgment or decree into effect, and one in which none of these things are necessary. In the former class the cases are remanded, under general appellate law, and, in the latter, finally disposed of in the appellate court. The classification and usual mode of disposition were, we must assume, known to the Legislature, and it has dealt with both in very general terms. Power to remand in both involves idle, useless, and practically absurd action or procedure. Hence we may well say, "*reddendo singula singulis*," under the rule de-

clared in *B. & L. Ass'n v. Sohn*, the power to remand is applicable to the former class and the power of retention to the latter. Whether the act confers power to retain all cases we do not say, that question not being involved, but we are clearly of the opinion that the circuit court must act finally in complete cases, requiring nothing other than the rendition and entry of judgment.

* * * * *

⁴⁰ A final judgment for damages will be rendered by the appellate court where the amount is fixed by statute,—*Hink v. Sherman*, (1911) 164 Mich. 352; or is undisputed,—*Moore v. Calvert*, (1899) 8 Okl. 358; *Lacey v. O. R. & N. Co.*, (1913) 63 Ore. 596.

Where special findings cover all the issues, an erroneous judgment entered thereon will be reversed but the case will not be remanded for a new trial, but final judgment will be entered or directed,—*Fort Scott v. Hickman*, (1884) 112 U. S. 150. So, where a judgment is erroneously entered contrary to the verdict upon answers to special interrogatories, it will be reversed and final judgment ordered on the verdict,—*Brown v. Ohio & Miss. Ry. Co.*, (1894) 138 Ind. 648.

But where it did not affirmatively appear that upon a new trial the plaintiff might not be able to show a liability, the case was reversed and remanded for a new trial,—*Fuller v. Mining Co.*, (1908) 64 W. Va. 437. In *Guernsey v. Miller*, (1880) 80 N. Y. 181, the court said: "It is not sufficient that it is improbable that the defeated party can succeed upon a new trial; it must appear that he certainly cannot, to justify an appellate court in rendering a final judgment against him."

Where there are material issues which have not been passed on a new trial, partial or entire, is the proper practice.—*Phelan v. Quinn*, (1900) 130 Cal. 374; *Cullinane v. Bank*, (1904) 123 Ia. 340; *Bryan v. Straus Bros. Co.*, (1909) 157 Mich. 49.

Remanding for partial new trial. The right to remand for a partial new trial involves the same principles as the granting of a partial new trial by the trial court. See *Simmons v. Fish*, (1912) 210 Mass. 563, given in the text *supra*.

ARHELGER v. MUTUAL LIFE INSURANCE CO.

Supreme Court of Arizona. 1899.

6 Arizona, 245.

SLOAN, J. This cause has for the third time been before this court on appeal. At the January, 1894, term the cause was reversed, and remanded to the court below for a new trial. 36 Pac. 895. Upon the second appeal the cause was reversed, and remanded to the court below with

instructions to enter its judgment in favor of the Mutual Life Insurance Company of New York, appellee here. No opinion was filed by the court upon this second appeal. From the judgment entered in accordance with the mandate of this court, issued under the latter judgment, appellant has again appealed.

It is contended by appellant that this court has no power to reverse a cause without rendering a written opinion, or, upon reversal, to direct the lower court to enter a judgment without awarding a new trial. Upon the first contention, it is sufficient to say that paragraph 948, Rev. St., provides that "the opinion in all cases which are reversed and remanded for a new trial, shall be in writing." So that, even were this section to be regarded as mandatory and jurisdictional, inasmuch as the judgment of this court on the second appeal reversed the cause, without remanding it for new trial, the statute does not apply. The purpose, doubtless, for requiring the written opinion in any cause that is reversed and remanded for new trial is that the trial court may be apprised of the rulings of the appellate court, and be guided thereby upon the subsequent trial. We may add, however, that we see nothing in the statute which makes the filing of an opinion in any case a jurisdictional prerequisite to the entering of a valid and enforceable judgment.

Upon the second contention, paragraph 949, Rev. St., provides that, "when the judgment or decree of the court below shall be reversed, the supreme court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained or the damages to be assessed or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for a new trial to the court below." Under this section this court is granted full power to enter its own judgment upon the reversal of the cause, unless a new trial be found necessary or proper in order that material facts affecting the judgment may be determined. Appellate courts have almost uniformly favorably regarded the practice of directing the trial court to enter the judgment which the appellate court finds should be rendered. This practice amounts to nothing more, in effect, than sending a case down for the trial court to enforce and carry out the judgment or decree of the appellate court. We

do not regard, therefore, section 949 as prohibiting this practice, nor do we construe it otherwise than as directory. That this is the proper construction is indicated by the provisions of paragraph 951, Id., which requires the issuance of a mandate on all judgments rendered by this court, and also by paragraph 953, which requires that every judgment of this court shall be certified down to the clerk of the court below to be attached to the judgment roll, and a minute of which is required to be by said clerk entered on the docket. These provisions of the statute would appear to be without meaning or utility if the judgment of this court may not be enforced and carried out by the process of the trial court. We think this court had ample power to enter the judgment it did on the second appeal, and to direct the trial court to enter judgment in accordance with the order of this court. The judgment is therefore affirmed.

GILLEY v. HARRELL.

Supreme Court of Tennessee. 1907.

118 Tennessee, 115.

SANSOM, Special Judge. The complainant, A. T. Gilley, appeals to this court from the decree of the Court of Chancery Appeals dismissing his bill. The original bill in the case was filed in the chancery court at Murfreesboro to collect a note for \$300 alleged to have been executed by the defendant J. R. Harrell to one Robert B. Meeks, and by Meeks transferred and assigned to the complainant, and seeking to foreclose a mortgage or deed of trust given to secure the payment of the note and to set aside a previously executed trust deed resting upon the property.

* * * * *

The third and fourth assignments of error, which go to the point that the Court of Chancery Appeals was in error in not having remanded this case for further proof, or, at least, dismissed the bill without prejudice, may be treated together; and upon this subject the Court of Appeals say:

"As a petition to remand the case for further proof or to

dismiss it without prejudice, we have to say that this is not, in our opinion, a proper case for this course to be pursued, for two reasons: (1) Under the undisputed facts as sworn to by the complainant himself, we think he could not recover, because he had not paid the revenue license authorizing him to deal in notes. (2) Because, on the question as to whether or not he was an innocent purchaser, under our view of the law, he could not be an innocent purchaser, because the note was not, under the law as it now stands, a negotiable note, and therefore he necessarily took the note affected by all the equities that existed between the original parties. This part of the case could not be changed by any proof that could be introduced, if the case were remanded or a new suit were brought. (3) It is not proper to remand a case, nor to allow it to be dismissed without prejudice, on the issue of there being no consideration for the note, because this was one of the principal issues, plainly formed and stated in the pleadings, and upon which the case was fought out. The defendant, in his answer, expressly stated that the note was without consideration, and positively swore to this fact; and this statement was not overcome by any evidence offered on behalf of the complainant. There was a statement by complainant himself that there was a consideration for the note; but this was excepted to, and counsel's attention was plainly called to the point, and no better evidence was offered. It will not do to remand cases for new trial on an issue that had been clearly made and fought out by the parties. If this was done, there never could be an end to litigation."

Under the findings and statement of facts by the Court of Appeals, we quite agree with that court in the conclusion it has reached upon this branch of the case, and overrule the third and fourth assignments of error.

* * * * *

⁴¹ Where the parties have fully presented their whole case, and it is legally insufficient to warrant a judgment for the plaintiff, final judgment for defendant will be rendered upon reversal of plaintiff's judgment.—*Sanford v. Herron*, (1900) 161 Mo. 176; *Hutchinson v. Sperry*, (1913) 158 N. Y. App. Div. 704; *Wetherby's Adm'r v. Twin State Gas. Co.* (1910) 83 Vt. 189; *Lefingwell v. Miller*, (1905) 20 Colo. App. 429; *Brillion Lumber Co. v. Barnard*, (1907) 131 Wis. 284.

So, where, in a negligence case, a verdict for plaintiff is supported by no evidence of negligence on defendant's part,—*Robinson v. Tower Co.*,

(1910) 204 Mass. 191; *Arlington Hotel Co. v. Tanner*, (1914) 111 Ark. 337. Where the evidence conclusively shows a defense to plaintiff's action, final judgment will be entered for defendant upon reversal of plaintiff's judgment,—*Fisher v. Radford*, (1908) 153 Mich. 385.

FOSSETT v. TURK.

Supreme Court of Alabama. 1911.

171 Alabama, 565.

SOMERVILLE, J. The bill of complaint was filed by the appellant for the enforcement of a vendor's lien on certain land. The appellees set up in their answer that they were subvendees and *bona fide* purchasers for value as to a one-half interest in the land without notice of the original vendor's lien for unpaid purchase money. The testimony shows conclusively the existence of a lien for unpaid purchase money in favor of the appellant upon the entire interest as against the appellees' vendors. It therefore devolved on the appellees, in order to avoid the lien, to affirmatively show, among other things, that they had not only purchased their interest for value, but that they had actually paid value therefor before they had any notice of the lien. *Buford v. McCormick*, 57 Ala. 428; *Masterson v. Pullen*, 62 Ala. 145. The testimony shows clearly that appellees purchased and took title without notice of the lien, but there is nothing to show that they paid anything of value therefor. It is elementary law that the recitals of the deed are not even *prima facie* evidence of such payment as against a remote vendor. *Buford v. McCormick*, 57 Ala. 428. Nor do the several statements in the testimony of the appellee W. P. Turk that he "purchased" or "traded for" the land even tend to supply the missing element. The decree of the chancellor was therefore erroneous in limiting the enforcement of the lien to a one-half interest in the land, and must be reversed. It is insisted for the appellant that this court in reversing should also render the decree which the chancellor should have rendered on the testimony before him.

In cases like the present it is always in the discretion of this court to either render or remand, and there are numer-

ous cases in which upon reversal a final decree has been here rendered. *Gulf Coal & Coke Co. v. Appling*, 47 South. 730; *Ansley v. King*, 35 Ala. 278; *Gentry v. Rogers*, 40 Ala. 442, 450; *Williams v. Barnes*, 28 Ala. 613; *Edwards v. Edwards*, 30 Ala. 394; *Flake v. Day*, 22 Ala. 132; *McKinley v. Irvine*, 13 Ala. 681. These cases indicate that the policy of rendering a final decree without remandment is based upon the fact that the ground of reversal was specially brought to the notice of the appellee in the court below, or that remandment could not benefit the appellee unless he were allowed to amend his bill or pleadings in the court below, thereby making a new case, or for some similar and sufficient reason. In some cases this court has simply dismissed a bill without prejudice to the complainant so as to preserve his cause of action if any he had. *Munchus v. Harris*, 69 Ala. 506, 510. As a general rule, the discretion of courts should be so exercised as to advance justice and right, and not to promote their miscarriage. In the present case, we infer from the record that counsel for appellees simply overlooked the matter of making direct proof of a valuable payment, and that most likely the omission was not pressed upon the chancellor's attention before he rendered his decree. While, therefore, our action in this case is not to be taken as a pledge of indulgence for the ordinary derelictions of counsel, we think the cause should be remanded for further proceedings under the orders of the chancellor. The costs of this appeal will be paid by the appellees.

*Reversed and remanded.*⁴²

⁴² See *Allen v. Parmalee*, (1906) 142 Fed. 354, 73 C. C. A. 402, where the court was unwilling to refuse a new trial even though the appellees had an opportunity to put in their whole case but chose rather to rely upon their motion for the direction of a verdict in their favor.

BENEDICT v. ARNOUX.

*Court of Appeals of New York. 1898.**154 New York, 715.*

[One William Campbell died seized of certain property known as No. 64 S. 5th Ave., in New York City. His executors were given a power of sale but not power to mortgage. They conveyed the property by a deed absolute on its face to George T. Arnoux, the defendant, who mortgaged it to the plaintiff's testator Booth. This action was brought to foreclose this mortgage given by Arnoux to Booth. There was evidence on the trial tending to show that the deed from Campbell's executors to Arnoux was only a mortgage and had been made in the form of a deed in order to evade the provisions of the will, and it was claimed that since Booth's agent knew these facts, Booth obtained no title under his mortgage. The trial court found that the transaction was an actual sale and decreed foreclosure.]

HAIGHT, J. * * *

The appellate division reversed the judgment, both upon the law and the facts, and directed final judgment for the defendants. It does not appear from the record that that court assumed to make any findings of fact; but it does appear from the opinion filed that the conclusion was reached that the deed from the executors to George T. Arnoux was intended and understood to be a mortgage. It is now contended that the case comes before this court with all the issues of fact raised by the pleadings found in favor of the defendants, and that the sole question left for the determination of this court is whether, upon the facts so found, the determination of the appellate division is erroneous. We cannot assent to this proposition. The power of the appellate division to reverse upon the facts is limited to cases in which the findings of the trial court are unsupported by testimony, or are made against the weight of evidence. Where the findings of the trial court are in accordance with the conceded facts or the uncontroverted testimony, the appellate division is not authorized to reverse upon the facts; and, if it does, a question of law is presented which this court may properly review. *Otten v. Railway Co.*, 150 N. Y. 395-400,

44 N. E. 395. The appellate division may reverse or affirm wholly or partly, or may modify, the judgment appealed from, and may, if necessary or proper, grant a new trial. Code Civ. Proc. § 1317. But we think in this case the appellate division had no power to order final judgment; that, in case it saw fit to reverse, its duty was to order a new trial. The deed was absolute in form, and it could only be found to be a mortgage where such was intended to be its force and effect. This intention had to be determined from the oral testimony of the witnesses. Evidence was given tending to show that it was the understanding of the parties that, after the money had been obtained from Booth, the premises were to be redeeded to the executors; but this evidence was sharply converted, and the trial court found for the plaintiffs upon this issue, and it cannot now be said that other evidence may not be found which will sustain the plaintiffs' contention in the event of a new trial.

It is one of the fundamental principles of our law that questions of fact are to be tried and determined in a court of original jurisdiction, and it is not the appropriate function of an appellate court to determine controverted questions of fact, and render final judgment upon such determination. It is only in cases where the facts are conceded or undisputed, or are established by official record, or found by the trial court, that such a court is justified in awarding final judgment. This subject was considered in the case of *Edmonston v. McLoud*, 16 N. Y. 543, in which it was held that when a verdict or the report of a referee for the plaintiff is set aside upon a case, and it appears that no possible state of proof applicable to the issues will entitle him to judgment, the appellate court may render final judgment for the defendant. This rule has been followed in analogous cases, such as *King v. Barnes*, 109 N. Y. 267-282, 16 N. E. 332; *Brackett v. Griswold*, 128 N. Y. 644-648, 28 N. E. 365; *Fischer v. Blank*, 138 N. Y. 669, 34 N. E. 397. In the case of *Schenck v. Dart*, 22 N. Y. 420, Comstock, C. J., says: "Under the former system of procedure, where a judgment in an action at law was reversed upon writ of error, a *venire de novo*, or new trial, was always granted. In equity causes, on the other hand, the appellate court, if it reversed the decree appealed from, proceeded to make a new and complete adjudication, such as the pleadings and proofs in the

cause warranted and required. According to the new code of practice, actions at law and suits in equity are no longer distinguishable as such; and the question has several times arisen as to the power and duty of an inferior appellate court where the judgment reviewed is reversed. We have followed the analogy of the practice in legal actions, and have determined that in such cases a new trial must be granted, unless, indeed, it is apparent, in the very nature of the case, that the party against whom the reversal is pronounced can never succeed in the action." The recent amendment of section 1022 of the Code of Civil Procedure has not, in our judgment, changed the practice in this particular. The provision that "the appellate division shall review all questions of fact and of law, and may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party the judgment which the facts warrant," should be considered in connection with section 1317, and construed in harmony therewith. The court may grant the judgment which the facts warrant. This has reference to facts conceded, uncontroverted, established by records, or found by the trial court. It was never intended to include controverted facts upon which issue had been joined, and in which parties were entitled to a trial by a jury. We are aware that this is an action in equity, but actions at law and in equity under the Code are no longer distinguishable as such, and the practice on review in such actions is the same. This question was settled in the case of *Schenck v. Dart*, to which reference has been made, and since that decision, has been the settled doctrine of this court.

* * * * *

The judgment of the appellate division should be reversed and that entered upon the decision of the special term affirmed, with costs. All concur, except O'BRIEN, J., not voting. *Judgment reversed.*⁴³

⁴³ *Accord*, as to same rule at law and in equity,—*Mead v. Burk*, (1900) 156 Ind. 577.

ELLIOT v. WHITMORE.

*Supreme Court of Utah. 1901.**23 Utah, 342.*

ROLAPP, District Judge. The appellant in this case invokes the doctrine that this court "may go behind the findings of a trial court, and consider all the evidence, decide on which side the preponderance thereof is, ascertain whether or not the proof justifies the findings and decree, and make such findings and decree as should be made in the judgment of the appellate court." *Whittaker v. Ferguson*, 16 Utah, 240, 51 Pac. 980. We reaffirm that doctrine, and assert that this court has full power to review all questions of law and fact in equity cases, and if, in our opinion, the judgment of the lower court in such cases is not supported by the evidence, we may and will set such judgment aside. Still, that doctrine is governed by the further principle that "when such cases have been regularly tried before a court of chancery, and if it has found on all material issues, we will not disturb such findings unless they are so manifestly erroneous as to demonstrate oversight or mistake which materially affects the substantial rights of the appellant." *McKay v. Farr*, 15 Utah, 261, 49 Pac. 649. After a careful investigation of the record in the case before us, we have, however, absolutely failed to find any reason for setting aside the judgment of the lower court.

* * * * *

⁴⁴ This is the usual rule in equity cases, and in applying it appellate courts lay stress on the fact that the chancellor saw and heard the witnesses.—*Watkins v. Watkins*, (1909) 39 Mont. 367; *Commonwealth v. Stevens*, (1897) 178 Pa. 543; *Millinor v. Thornhill*, (1912) 63 Fla. 531 (according less weight to decision below when evidence taken before a master); *Charbadjeff v. Groff*, (1912) 69 Wash. 699; *Sifford v. Cutler*, (1911) 248 Ill. 340; *Pallard v. Am. Freehold Land Mtg. Co.*, (1903) 139 Ala. 183; *Herlihy v. Coney*, (1905) 99 Me. 469; *Reed v. Reed*, (1874) 114 Mass. 372; *Stevenson v. McFarland*, (1901) 162 Mo. 159; *Stevens v. Magee*, (1902) 81 Miss. 644; *State Bank v. Barnett*, (1911) 250 Ill. 312 (hearing de novo on same evidence when it is taken before a master).

BOTHWELL v. BOSTON ELEVATED RAILWAY CO.

Supreme Judicial Court of Massachusetts. 1913.

.215 Massachusetts, 467.

RUGG, C. J. The plaintiff seeks damages for the death of his intestate under St. 1907, c. 392, which authorizes recovery from a street railway company, whose servants in the conduct of its business negligently cause the death of a person, not a passenger or an employé, "in the exercise of due care." The point to be decided is, whether a finding was warranted that the plaintiff's intestate was "in the exercise of due care" as required by the statute as a condition of recovery. It is not contended that there is any evidence of active exercise of care by the deceased. It has been settled after elaborate consideration that the words "due care" in this statute mean something more than a negative and passive freedom from fault and require reasonably intelligent and energetic attention to safety, and stand on the same basis as if they were used in an indictment under the same statute. It follows that the defendant's request should have been granted to the effect that a verdict be directed in its favor.

It is urged by the defendant that this is a proper case for this court to exercise the power vested in it by St. 1909, c. 236, and to direct by its rescript that judgment be entered for the defendant.⁴⁵ The case appears to have been fully and fairly tried with an intelligent appreciation by counsel on each side of the issues involved and of the principles of law applicable to it, and its merits on the ample report of the evidence contained in the exceptions seem plain. Therefore it appears to be a case where the statute properly may be invoked. *Archer v. Eldredge*, 204 Mass. 323, 327, 90 N. E. 525; *Grebenstein v. Stone & Webster Engineering Corp.*, 205 Mass. 431, 440, 91 N. E. 411; *Newhall v. Enterprise Mining Co.*, 205 Mass. 585, 91 N. E. 905, 137 Am. St. Rep. 461; *Burke v. Hodge*, 211 Mass. 156, 163, 97 N. E. 920, Ann. Cas. 1913B, 381.

This course would be followed without discussion but for the decision of *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, which holds that "the

right of trial by jury" secured by article 7 of the amendments to the Constitution of the United States does not permit the entry, after a verdict in favor of one party, of a judgment for the opposing party under circumstances like those in the case at bar. The question there arose in reviewing the action of the Circuit Court of Appeals which, under the conformity act (U. S. Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]) and following a Pennsylvania statute, had entered judgment in favor of the party for whom the trial court erroneously refused to direct a verdict. The substance of that decision is that it is an unconstitutional exercise of the power of legislation to authorize the entry of judgment in a case where a trial by jury has been had, except in conformity to the verdict, and that, although the error committed by the trial court may consist solely in its refusal to direct a verdict in favor of one party, yet after a verdict wrongly rendered in favor of the adversary party as the direct result of such erroneous refusal, the only method for correcting that error within the reach of the legislative or judicial departments of government is to order a new trial, and this because of the scope of the meaning of "trial by jury," as secured by the seventh amendment to the federal Constitution. That decision is not a final or binding authority on this court for the reason that the seventh amendment does not control the action of the several states in abridging trial by jury within their own jurisdiction. It applies only to the courts and Congress of the United States. *Pearson v. Yewdall*, 95 U. S. 294, 296, 24 L. Ed. 436; *Twinning v. New Jersey*, 211 U. S. 78, 98, 29 Sup. Ct. 14, 53 L. Ed. 97. The decision of *Slocum v. N. Y. Life Ins. Co.* was rendered by a bare majority of a divided court, four of the justices, among whom is a former chief justice of this court, joining in a dissenting opinion. But the deference due to a decision by the highest court of the nation when it challenges the constitutionality of our statutes (as it does because our own Constitution secures the right of trial by jury) renders necessary thorough consideration, even though it has been acted upon heretofore in numerous instances without question of its validity.

* * * * *

The essence of trial by jury is that controverted facts shall be decided by a jury. The constitutional right to trial

by jury is preserved in this regard when each party has one fair opportunity to present to a jury the evidence on which he claims to raise an issue of fact. If he fails utterly to improve that opportunity, there is no constitutional guaranty that he shall be given another chance. He has had his day in court. One feature of ideal administration of justice by the jury system is that correct rulings of law shall be made by the presiding judge. If the record is so framed and preserved that the same result may be reached at a later time as would have been attained by such correct rulings at the trial that end is attained by constitutional means. The function of the jury is to pass upon the facts involved in an action. The statute now under review does not infringe upon this province in any degree. A trial judge always has had power to direct a verdict provided the law required it. The statute simply permits that to be done by this court which ought to have been done at the trial. The hypothesis by which alone it permits the order to be made is that at the trial no question of fact was in truth presented, but only one of law which the court should have ruled as such. It does not disturb the plain boundary between fact which a jury must determine and law which the court must rule. It permits the right ruling to be given at a time later than that at which it should have been made when no substantial rights have accrued in the meantime.

We are of opinion that the history of our practice as to trial by jury both before and since the adoption of the Constitution shows that the trial by jury of our Constitution has slightly more flexibility in its adaptation of details to the changing needs of society without in any degree impairing its essential character than is ruled by the majority of the court in *Slocum v. N. Y. Life Ins. Co.* We are constrained not to adopt the reasoning or the conclusion of that opinion as correctly defining the scope of legislative power under our Constitution. St. 1909, c. 236, is not in violation of our Constitution. This result is in harmony with the decisions of many other courts.⁴⁶ We do not rest this judgment upon their authority, however, for we have not undertaken the historical study of the several constitutional provisions under which they have arisen to determine their weight.

The defendant's exceptions are sustained, and in accordance with St. 1909, c. 236, judgment is to be entered in the

superior court for the defendant and rescript is to go to that effect. *So ordered.*

⁴⁵ The statute here referred to, appearing as ch. 231, sec. 122, G. L. 1921, is as follows:—"When the justice presiding at a trial is requested to rule that upon all the evidence the plaintiff cannot recover, and such request is refused, and exception by the defendant to such refusal is duly taken, and a finding or verdict returned for the plaintiff, then if the defendant's said exception is sustained in the supreme judicial court, and the exceptions, if any, taken in said trial by the plaintiff are all overruled, the supreme judicial court may, by rescript, direct the entry in the trial court of judgment for the defendant, and thereupon judgment shall be so entered." Sec. 123 provides a similar procedure where the plaintiff asks for a directed verdict.

⁴⁶ The court cited:—Anderson v. Fred Johnson Co., 116 Minn. 56, 133 N. W. 85; Muench v. Heinemann, 119 Wis. 441, 448, 96 N. W. 800; Hay v. Baraboo, 127 Wis. 1, 105 N. W. 654, 3 L. R. A. (N. S.) 84, 115 Am. St. Rep. 977; Cornette v. Baltimore & Ohio R. R., 195 Fed. 59, 115 C. C. A. 61; Bailey v. Willoughby, 33 Okl. 194, 124 Pac. 955; McVeety v. Harvey Mercantile Co., (N. D. Jan. 1913) 139 N. W. 586; Fishburne v. Robinson, 49 Wash. 271, 95 Pac. 80; Roe v. Standard Furniture Co., 41 Wash. 546, 83 Pac. 1109; Cruikshank v. St. Paul Fire & Marine Ins. Co., 75 Minn. 266, 77 N. W. 958; Dalmas v. Kemble, 215 Pa. 410, 64 Atl. 559; American Car & Foundry Co. v. Alexandria Water Co., 221 Pa. 529, 70 Atl. 867, 128 Am. St. Rep. 749, 15 Ann. Cas. 641; Manning v. Orleans, 42 Neb. 712; Smith v. Jones, 181 Fed. 819, 104 C. C. A. 329; Fries-Breslin Co. v. Bergen, 176 Fed. 76, 99 C. C. A. 384; Carstairs v. American Bonding & Trust Co., 116 Fed. 449, 54 C. C. A. 85; Richmire v. Andrews & Gale Elevator Co., 11 N. D. 453, 92 N. W. 819.

See a very exhaustive and able discussion of *Slocum v. New York Life Ins. Co.*, (1912) 228 U. S. 364 by Ezra Ripley Thayer,—*Judicial Administration*, 63 Univ. of Penn. L. Rev. and Am. L. Reg. 585-608.

(h) *Mandate.*

HORTON v. STATE EX REL. HAYDEN.

Supreme Court of Nebraska. 1901.

63 Nebraska, 34.

POUND, C. This proceeding was brought to obtain a writ of *mandamus* commanding certain officers of the Greater American Exposition to draw, issue, and deliver to relators an unconditional warrant upon the treasurer of said corporation for the payment to them of the sum of \$10,000. The district court allowed the writ. Error was taken to this

court, which held that the proceedings below were unwarranted, and the writ improvidently allowed, reversed the judgment, and remanded the cause. *Horton v. State*, 60 Neb. 701, 84 N. W. 87. A motion for rehearing having been filed on behalf of relators, which was not disposed of until the opening of the January, 1901, term, of this court, a mandate issued on January 28th. This mandate was not filed or docketed in the district court until March 23d. Two days before, on March 21st, the relators appeared in that court, and procured an order of dismissal. When the mandate was filed, this order was set aside *ex parte*, at the instance of defendant, on the ground that it had been rendered prematurely; and on the same day, March 23d, on motion of the defendant Horton, supported by an affidavit showing that \$10,000 of the moneys of the corporation had been paid to, and obtained by, relators under and by virtue of said writ of *mandamus* an order issued requiring relators to show cause, on or before March 30th, why restitution of said moneys and interest thereon should not be awarded. The relators, having been served with said order, appeared specially, and objected to the jurisdiction of the court. At the hearing, the district court held that it had jurisdiction to render the order of dismissal on March 21st, that it had no jurisdiction to set such order aside on March 23d, nor to enter the order to show cause on the same date, and sustained the objections. Error is prosecuted from this ruling.

The argument made on behalf of relators is that as soon as the cause was determined in this court, and a mandate issued, the district court was reinvested with jurisdiction, and might properly act without having the mandate before it; that the right of a plaintiff to dismiss, in the absence of some pleading, showing, or claim of the adverse party on file entitling the latter to relief, is absolute, and that the order of March 21st was made with full jurisdiction, giving effect to this absolute right of dismissal; that even if the order was prematurely made, and the court had the power to set it aside, in the absence of some application by the defendants for relief, on file at the time, it should not have done so, and hence, in any event, the final action of the court was right. We are unable to agree to these propositions, under the circumstances disclosed by the record. While it is true that the Code of Civil Procedure provides in express

terms only for a special mandate, which is to issue where a judgment is reversed and a new judgment entered in the supreme court, it does not follow that mandates are abolished or rendered unnecessary in all other cases. Under various names, "mandate," "*remittitur*," or "*procedendo*," such process from the appellate court to the lower tribunal is in general use in all common-law jurisdictions. Where a judgment is affirmed, indeed, the mandate has no office to perform, and may be dispensed with. *State v. Sheldon*, 26 Neb. 151, 42 N. W. 335. But where a judgment is reversed a mandate is the usual, and, it seems to us, the only, legal method of communicating the ruling of the one court to the other with authority. It is the judgment of this court which the lower court is to look to, not its opinion, and it must be obvious that some authentic and official notification of the judgment affords the only sure basis for further proceedings. This is furnished by the mandate, which is "the official mode of communicating the judgment of the appellate court to the lower court." 13 Enc. Pl. & Prac. 837. Such, moreover, is the settled and recognized practice in this state. *State v. Sheldon*, 26 Neb. 151, 42 N. W. 335; *State v. Omaha Nat. Bank*, 60 Neb. 232, 82 N. W. 850. As between the opinion and such official statement of the judgment in a mandate, the district court must be guided by the latter. *Merriam v. Gordon*, 20 Neb. 405, 408, 30 N. W. 410. Hence we are not able to assent to the proposition advanced by counsel that, in the absence of an express statutory requirement of a mandate, "any way in which the court can be satisfied of the action of the supreme court will answer the purpose." It has been held that, where no mandate is issued, the lower court will not act on a certified copy of the judgment of the appellate court. *Navigation Co. v. Hertzberg*, 26 Or. 216, 37 Pac. 1019. The statute recognizes a mandate as the proper legal mode of communication, and, assuming this, provides for a special mandate in certain special cases. The very use of the term "special mandate" implies that for ordinary cases there is to be a general mandate. The cases which have been cited as leading to a contrary conclusion are not inconsistent with this view, as we shall show in another connection.

The jurisdiction of the supreme court over its own judgments and orders is, in general, the same as that of any

other court of record, and hence it may alter or modify such judgments or orders, and correct its mandates accordingly at any time during the term at which they are rendered, unless its mandate has been filed and acted upon in the lower court prior to the end of the term. *Bronson v. Schulten*, 104 U. S. 410, 415, 26 L. Ed. 797; *People v. Village of Nelliston*, 79 N. Y. 638; *Trowbridge v. Sickler*, 48 Wis. 424, 428, 4 N. W. 563. Obviously there must be some point of time at which the jurisdiction of the one court ceases and that of the other court attaches, and, while the subject is not free from judicial conflict, we think the sounder rule draws the line at the time when the mandate is acted upon and carried into effect. *Merriam v. Gordon*, 20 Neb. 405, 30 N. W. 410; *People v. Village of Nelliston*, *supra*. But it may be observed that the weight of authority fixes the transfer of jurisdiction at the time when the mandate has been filed in the court below. *Leese v. Clark*, 20 Cal. 387; *Zorn v. Lamar*, 71 Ga. 85; *King v. Ruckman*, 22 N. J. Eq. 551; *Whaley v. Bank*, 5 Rich. 262; *Ward v. Insurance Co.*, 12 Wash. 631, 42 Pac. 119. And such rule would be equally consistent with the view we take of this case. Counsel in contending that the issuance of a mandate terminates the jurisdiction of the appellate court, and gives jurisdiction to the lower court, point out what the practice in altering or modifying a judgment is to recall the mandate. But we think the object of this is to stay action thereon while the appellate court is considering what modification shall be made, and that the acknowledged power to recall the mandate before it is carried into effect argues jurisdiction in the appellate court. For these reasons, and in order to prevent unseemly conflict of authority, we think that a district court whose judgment has been reversed should defer action until the mandate of the supreme court is before it. 13 Enc. Pl. & Prac. 837; *Trowbridge v. Sickler*, 48 Wis. 424, 4 N. W. 563; *Wright v. King*, 107 Mich. 660, 65 N. W. 556; *Barnwell v. Marion*, 56 S. C. 54, 33 S. E. 719; *Lafferty v. Rutherford*, 10 Ark. 453; *Navigation Co. v. Hertzberg*, 26 Or. 216, 37 Pac. 1019; *McAlpin v. Bennett*, 21 Tex. 535. If, however, both parties proceed without objection in the absence of a mandate, if the provisions of the judgment of reversal are carried out, and trial had, we do not doubt that the irregularity is not to be taken advantage of by either party in appellate proceedings. It is

fundamental that no error is available in such proceedings unless prejudicial, and such an irregularity would be technical only, and without serious results. Many cases of that character have been cited to us, and we fail to perceive that they militate against our conclusion in any way. As the district court entered its first order at a time when the mandate was not before it, and in the absence of any authentic record of what had been done in the supreme court, we think it did right in treating such order as it would any other unadvised and improvident action, and setting it aside at once. All judgments and orders of the court are under its control during the term at which they are rendered. In ordinary cases the proper, and perhaps even the necessary, course is by motion and notice. But, when it is manifest on the face of the record that the court has acted irregularly and unadvisedly, it may and should, so long as its power over the act in question continues, undo it as soon as the facts come to its notice. *Alsbaugh v. Ionia Circuit Judge* (Mich.) 85 N. W. 244. And it may do this regardless of the form in which application for such action is made. *Bradley v. Slater*, 58 Neb. 554, 78 N. W. 1069.

We think the general rule that the court has full power and control over its judgments and orders during the term at which they are rendered applies to an order of dismissal entered at the instance of a plaintiff, the same as to any other order. If the right of a plaintiff to dismiss were absolute, and the action of the court following thereon ministerial only, the rule might not apply. But this right is not absolute, in the sense that the court has no power over, or discretion with respect to, its exercise. On the contrary, the court, in its discretion, may refuse to dismiss whenever justice to the court or its officers, or to any of the parties, requires imposition of terms, or retention of the cause upon the docket. *Sheedy v. McMurtry*, 44 Neb. 502, 503, 63 N. W. 23; *Beals v. Telegraph Co.*, 53 Neb. 602, 74 N. W. 54. In the case first cited this court said: "The existence of the right of a plaintiff to dismiss at any time during a pendency of a cause, as a general proposition, must be qualified, and is not absolute, in the sense that it takes the subject without the control of the court in which the cause is pending, so that it cannot, within its discretion, impose the condition of the payment of costs as obligatory and precedent to a dismissal

of the action." This discretion has been exercised to require payment of costs (*Sheedy v. McMurtry*, *supra*); to protect rights of attorneys under agreements as to fees (*Byron v. Durrie*, 6 Abb. N. C. 135); to protect a defendant in his plea of estoppel from the danger of possible transfer of a lien (*Stevens v. Railroads* [C. C.] 4 Fed. 97); and to enable a defendant to obtain restitution (*Lane v. Morton*, 81 N. C. 38). Of course, there must be some real and substantial right which has accrued to the adverse party in the very cause sought to be dismissed. Collateral consequences, such as subjection of the defendant to further litigation, or purposes not connected with the action in question, will not be allowed to interfere with the right given to plaintiffs by statute. *Banks v. Uhl*, 6 Neb. 145. Hence, ordinarily, the dismissal will be allowed as of course. *Beals v. Telegraph Co.*, 53 Neb. 602, 74 N. W. 54. But we know of no case appealing to a court more strongly for application of its discretionary power than one in which money or property has been taken under an unwarranted and improvident judgment, which has been reversed, and the adverse party is entitled to restitution. It would require convincing argument and strong weight of authority to persuade us that a dismissal could be had as a matter of right in such case, before mandate filed, and without reasonable opportunity to direct the court's attention to the claim for restitution, and the defendant thus deprived of his summary remedy, and driven to the difficult and expensive remedy of another action. The discretion of the court in such cases is grounded on the requirements of justice to itself, its officers, and the adverse parties. It depends upon the existence of rights which would be jeopardized by dismissal, not upon the manner in which the court becomes cognizant of such rights. The absence of a formal claim or assertion thereof upon the record does not necessarily give the plaintiff advantage. It was within the discretion of the district court to refuse to dismiss the cause in order to protect the defendant's right of restitution. That being so, it had power, during the term, to set aside an unadvised dismissal for the same purpose.

Where a party to a cause has obtained money or property under or by virtue of a judgment which is afterwards reversed, the court has power to compel restitution by summary proceedings in that cause. *Association v. Hier*, 55

Neb. 557, 558, 75 N. W. 1111; *Fuel Co. v. Brock*, 139 U. S. 216, 11 Sup. Ct. 523, 35 L. Ed. 151; *Bickett v. Garner*, 31 Ohio St. 28; *Eames v. Stevens*, 26 N. H. 117. Such restitution is a matter of right, and does not depend upon the merits of the controversy between the parties, the probabilities of another judgment to the same effect, or the solvency of the party entitled to the restitution. *Hier v. Association*, 60 Neb. 320, 83 N. W. 77; *Bickett v. Garner*, 31 Ohio St. 28; *Morgan v. Hart*, 9 B. Mon. 79. "The defendant having been put out of possession by an abuse of the process of the law, the law must be just to itself, as well as to the defendant, by restoring him to that of which he was wrongfully deprived. When the defendant is restored to the possession, then, and not until then, will the court be in condition in which it can honorably to itself pass upon the further rights of the parties." *Hier v. Association*, *supra*. In the common-law practice, whenever the record showed that money had been collected by virtue of, and applied upon, the reversed judgment, a writ of restitution issued as of course. If the facts were not sufficiently disclosed by the record, a writ of *scire facias* issued. *United States Bank v. Bank of Washington*, 6 Pet. 8, 17, 8 L. Ed. 299; *Gay v. Smith*, 36 N. H. 435; *Martin v. Woodruff*, 2 Ind. 237. Under our practice, the order to show cause entered by the district court would be the equivalent of the latter proceeding. In the case at bar there is only a return of the sheriff that he served the peremptory writ of *mandamus* upon the defendants. There is no further return, and the record does not disclose whether the warrant was drawn, issued, and delivered, nor whether it was paid in whole or in part. Did the record show compliance with the writ, and payment and receipt of the money in obedience thereto and in consequence thereof, restitution should be awarded as of course, and we should feel bound to direct a judgment of that nature in the district court. *Association v. Hier*, 55 Neb. 557, 75 N. W. 1111. But, as such facts are made to appear *aliunde*, we think the course entered upon by the district court, namely, the order to show cause why restitution should not be made, was right, and that the court erred only in not pursuing the path it had taken.

It is recommended that the judgment be reversed, and the cause remanded for further proceedings, under the order to

show cause why restitution should not be adjudged not inconsistent with this opinion.

SEDGWICK and OLDHAM, CC., concur.

PER CURIAM. For the reasons set forth in the foregoing opinion, the judgment of the district court is reversed, and the cause is remanded for further proceedings under the order to show cause why restitution should not be adjudged not inconsistent with said opinion.⁴⁷

⁴⁷ *Form of Mandate.* In *Ball v. Rankin*, (1909) 23 Okl. 801, the mandate was as follows:—"Whereas, the Supreme Court of the territory of Oklahoma did at the June, 1907, term thereof, and on the 14th day of June, 1907, render an opinion in the above entitled cause appealed from the district court of Logan county, reversing the judgment in said district court in said cause at the cost of appellee and remanding the same thereto with instructions to proceed in conformity with said Supreme Court opinion: Now, therefore, you are hereby commanded to cause a reversal of the judgment of said district court in said cause to be entered of record therein, and take such other and further proceedings in the matter as shall accord with said Supreme Court opinion."

WASHBURN & MOEN MANUFACTURING CO. v.
CHICAGO FENCE CO.

Supreme Court of Illinois. 1886.

119 Illinois, 30.

SCHOLFIELD, J. The first, in our opinion the controlling, question arising upon this record is whether, when the case was here at the former term (109 Ill. 71) it was remanded for a hearing, or only to modify the decree of the superior court in conformity with specific directions then given. In cases where a modification of the decree below is deemed necessary, it is discretionary whether the court shall, by an order to be entered on its records, make the modification, or whether it shall remand the cause to the lower court with specific directions to that court to make modifications. Section 81, c. 110, Rev. St. 1874. In either case it is proper that the order of this court, be, first, that the decree below be reversed. *Hunter v. Hatch*, 45 Ill. 178. But whether the effect of such order of reversal shall be to open up the case for rehearing will depend entirely upon the modification of the decree made, or

directed to be made; for the only purpose for the order of reversal being that the modification shall be made, the substantial rights of the parties to the record, so far as concerns any question now before us, are precisely as if, from the moment of the entry of the judgment of the court, the decree actually read as it would read after making the record entries in the different courts essential to the modification. And since the direction that one part of the decree be modified is, by necessary inference, an approval of that part omitted from that direction, the substantial rights of the parties to the decree are not perceptibly different from what they would be were it expressly ordered, in the formal entry upon the record, that such omitted part of the decree is affirmed. No statute requires that the specific modification directed shall be embodied in the formal order of the court entered of such record by the clerk of this court; and it is conformable with our practice, and sufficient, if the modification be specifically directed in the written opinion of the court filed in the case; and so it is held that it is the duty of the lower court to examine the opinion, and conform its action to it. *Wadhams v. Gay*, 83 Ill. 253; *Boggs v. Willard*, 70 Ill. 315; *Hough v. Harvey*, 84 Ill. 308. The specific directions here given are all in the written opinion of the court, and the meaning intended to be conveyed in the language employed for that purpose will be better comprehended by restating the questions under consideration to which that language was applied.

The tenth condition in the license issued by appellant to appellee has this clause: "And the royalty to be paid under this license shall not be greater than that charged to any other party licensed after the first day of January, A. D. 1881, under said several letters patent," named in the license; and that in case a license should be given to any other party at a less royalty, that "then thereafter that royalty to be paid under this license shall be the same as such reduced royalty." The bill was filed for the purpose of obtaining the specific performance of this condition, alleging a certain settlement made subsequent to the first day of January, A. D. 1881, by appellant with Jacob Haish, under the terms of which Haish was licensed to manufacture barbed fence wire to the extent of 4,000 tons annually, free of royalty, under appellant's patent; and the bill prayed allowance to appellee of the benefit of all reduction of royalty made to Haish. The allegation was put

in issue by answer. Evidence was heard, and the court decreed as prayed in the bill.

The opinion, after giving a history of the settlement with Haish, proceeds thus:

* * * "but Haish was not bound to manufacture more than 4,000 tons annually, and to the extent of 4,000 tons yearly he had a free license. Whether he would manufacture in excess of that was optional with him. The proof shows that, up to the time of the hearing of the superior court, his yearly manufacture did not exceed 4,000 tons, so that upon what he manufactured he paid no royalty, upon the theory of the decree, and so far the decree was right in exempting appellee from the payment of the royalty; but if in the future, subsequent to the hearing, Haish should manufacture in excess of 4,000 tons yearly, he would have to pay royalty, under the provisions of his license, which, if he manufactured to the limit of his license, would be fifty cents per one hundred pounds on the second two-fifths of his manufacture, and seventy-five cents per one hundred pounds on the last one-fifth. As respects, then, any future manufacture by Haish which might be in excess of 4,000 tons yearly, we are inclined to think appellee should be required to pay the same proportionate royalty as Haish would have to pay, so that there should be the same ratio of royalty to tonnage manufactured in the case of appellee as in that of Haish, and that in the respect of any such future manufacture the decree should be modified accordingly."

* * * We can add nothing to make more perspicuous the language, "For the purpose of a modification of the decree in the manner above indicated, the decree will be reversed, and the cause remanded," etc. We understand, and we do not know that it is at all controverted, that this, under a familiar rule of construction, clearly means that the decree was reversed, and the cause remanded, only for the purpose of such modification, and thus excludes all interference for any other purpose. Assuming that we are not in error in this, it was the duty of the superior court, in the performance of which it had no discretion, to modify its decree as thus directed; * * *

* * * We concede that directions by appellate courts to trial courts, in particular cases, as expressed in written opinions, are ordinarily in general terms, giving the substance in

outline,—simply of what is required to be done,—and leaving matters of detail to the trial courts; but we understood the rule to be, when a case is remanded to the lower court with specific directions to modify the decree therein, that the lower court is not authorized to include anything in the modified decree which is not either actually expressed in the language of the opinion directing the modification, or necessarily implied from that language. The reason is obvious. The lower court is not acting on its own motion, but in obedience to the order of its superior. What the superior says it shall do, it must do, and that alone. Where the doing of one thing necessitates the doing of others as necessary incidents, the order that they shall be done is implied in the order to do that to which they are incidents.

After the case, upon being remanded, was redocketed in the superior court, appellant asked leave to file a supplemental answer, setting up that "on or about the eighteenth day of December, A. D. 1883, an agreement was entered into and made by the parties to this suit, in and by which a new license was issued by the defendant to the complainant. * * *" The court refused to allow it to be filed, and this ruling also counsel insists was erroneous.

* * * * *

We concede that where a decree is reversed, and the cause is remanded, with directions to the trial court to proceed in conformity with the opinion then filed, and it appears from the opinion that the grounds of reversal are of a character to be obviated by subsequent amendments of the pleadings, or the introduction of additional evidence, or both, it is the duty of the trial court to permit the cause to be redocketed, and then to allow amendments to be made, and evidence to be introduced on the hearing, just as if the cause was then before the court for the first time; and under such a state of facts, upon the second hearing, new questions of law or fact may arise, as to which no opinion was or could have been expressed in the written opinion of this court, pursuant to which the former decree was reversed and the cause remanded. But where, as here, the cause is remanded with directions to make a specific modification of the decree, not requiring any change in the pleadings, nor the introduction of additional evidence, but only with the view to have the decree conform to the case made by the record, nothing remains to be done but to make

that modification, and then execute the decree. The decree is affirmed.⁴⁸

⁴⁸ "The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate; and either upon a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate and to act accordingly,"—*In re Sanford Fork & Tool Co.*, (1895) 160 U. S. 247.

MUTUAL LIFE INSURANCE CO. v. HILL.

Supreme Court of the United States. 1904.

193 United States, 551.

BREWER, J. A preliminary matter is this: When the case was here before we held that, upon the record, there was disclosed an abandonment of the insurance contract by both the insured and the beneficiaries, and on that ground the judgment was reversed. It is now contended that "the only question left open by the mandate of this court was a submission of this question;" that our decision was substantially an adjudication that the plaintiffs had a right to recover unless it was shown that there had been an abandonment of the insurance contract, and that upon this trial it was shown that there had been no such abandonment, the insured having always expressed a wish to continue the policy, the beneficiary named in the policy having died before the second premium became due, and her children, who became entitled thereafter as beneficiaries, being minors and in actual ignorance of its existence. That decision was based upon the averments of the pleadings, and these pleadings were amended after the judgment was reversed and the case returned to the trial court. Clearly, the contention of the plaintiffs is not sustainable. When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. While undoubtedly an affirmance of a judgment is to be considered an

adjudication by the appellate court that none of the claims of error are well founded,—even though all are not specifically referred to in the opinion,—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. An actual decision of any question settles the law in respect thereto for future action in the case. Here, after one judgment on the pleadings had been set aside, on amended pleadings a trial was had, quite a volume of testimony presented, and a second judgment entered. That judgment is now before us for review, and all questions which appear upon the record and have not already been decided are open for consideration.

* * * * *

⁴⁹ *Effect of affirmance on plea of res adjudicata.* "It must be conceded that, if there had been no appeal from the judgment first rendered by the Circuit Court, this action would not lie. It would have been a complete and final adjudication of the plaintiff's right to the property in controversy. * * * The affirmance in this court * * * left the judgment and the rights of the parties precisely the same as though no appeal had been taken."—*Finch v. Hollinger*, (1877) 46 Ia. 216.

WALLACE v. SISSON.

Supreme Court of California. 1896.

114 California, 42.

HARRISON, J. Upon a former trial of this cause, the court made findings of fact, and rendered judgment thereon in favor of the defendants. This judgment and an order denying the plaintiffs' motion for a new trial were subsequently reversed by this court, upon the ground that certain findings of fact were not justified by the evidence. 33 Pac. 496. Upon the second trial of the cause, the court made similar findings of fact, and again rendered judgment in favor of the defendants. From this judgment, and an order denying a new trial, the plaintiffs have appealed. It was contended by the plaintiffs at the trial, and is also contended by them here, that the

evidence is substantially the same as upon the former trial, and that the former decision of this court that this evidence was insufficient to justify the findings then under consideration became the law of the case, and that the trial court was thereby precluded from making the present findings, although its own judgment concerning the effect of this evidence might be contrary to the decision of this court. Both of these propositions are controverted by the defendants.

An unbroken line of decisions, commencing with *Dewey v. Gray*, 2 Cal. 374, has established the rule in this state that a decision of this court upon any question of law in a case appealed to it from an inferior court becomes thereby the law of that case, and is thereafter, in all subsequent stages of the case, binding, not only upon the inferior court, but also upon this court if again brought before it. It has never been held, however, that the decision of this court upon a question of fact is subject to this rule. On the contrary, it has been frequently said that the rule is limited to questions of law, and is not applicable to questions of fact. * * * In *Mattingly v. Pennie*, 105 Cal. 514, 39 Pac. 201, the court said: "It is settled beyond controversy that a decision of this court on appeal as to a question of fact does not become the law of the case." It frequently happens that the sufficiency of the evidence to justify the decision depends upon the competency of the evidence, or the effect of an act or admission, or the construction to be given to a written instrument. If, in such a case, the appellate court holds that the evidence was incompetent, or received an erroneous construction by the trial court, and that for this reason the evidence was insufficient to justify the decision, such ruling of the appellate court becomes the law of the case, since the sufficiency of the evidence depends upon the question of law which is thus decided. See *Leese v. Clark*, 20 Cal. 387. But, when the fact which is to be decided depends upon the credit to be given to the witnesses whose testimony is received, or the weight to which their testimony is entitled, or the inferences of fact that are to be drawn from the evidence, the sufficiency of the evidence to justify the decision must be determined by the tribunal before which it is presented, and is not controlled by an opinion of the appellate court that similar evidence at a former trial of the cause was insufficient to justify a similar decision. This results from the relative functions of the trial court and the

appellate court, the former alone being authorized to determine questions of fact, and the latter being limited to determining questions of law. The appellate court cannot itself make a finding of fact when the evidence is all before it, or find the ultimate fact from other probative facts, unless such ultimate fact follows as a conclusion of law therefrom; and if, in the opinion which it renders, it assumes that the evidence sustains any fact, it is only the opinion of the court, and not a finding of that fact. *Kimball v. Semple*, 25 Cal. 455. "We do not pass upon the weight or preponderance of evidence, nor in a case where opposing inferences may be drawn can we review a finding because, in our judgment, the inference deduced by the trial court is improbable, or more unlikely to be true than the opposite one." *Reynolds v. Robinson*, 82 N. Y. 106.

Whether the evidence in a case tends to prove a fact is a question of law which arises when the admissibility of such evidence is questioned, or when it is relied upon for the purpose of establishing a controverted fact; and the decision of the appellate court that such evidence does or does not tend to establish the fact is a decision upon a question of law which is conclusive upon the trial court; but whether the evidence is sufficient to establish the fact is a question of fact, which must be determined by the tribunal to which it is submitted. A declaration by the appellate court that it does establish the fact would be outside of its functions, and would not be binding upon the trial court. So, too, whether a particular inference can under any circumstances be drawn from certain evidence is a question of law; but whether the inference shall in any particular case be drawn from the evidence is a question of fact. "An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect." Code Civ. Proc. § 1958.

Whether there is any evidence in support of a finding, or whether there is a conflict of evidence upon a controverted fact, must be determined by the appellate court when presented to it upon an examination of the record. This includes the right to determine whether any of the evidence tends to support the decision, since that is a question of law; and, if it determines that it has no such tendency, that evidence is excluded from consideration. If, upon an examination of the record, the appellate court determines that there is no evi-

dence in support of the decision, it reverses the judgment, for the reason that the court committed an error of law in finding a fact without any evidence in support thereof. *Domico v. Casassa*, 101 Cal. 411, 35 Pac. 1024; *Mason v. Lord*, 40 N. Y. 484. "When there is a total want of evidence upon some essential fact, but the jury nevertheless finds such fact, the finding is erroneous as matter of law; but, when there is slight evidence in support thereof, a finding thereon would be one of fact, upon which men might differ in opinion. But for a court to attempt the correction thereof upon writ of error would be but a correction of errors in fact, and not in law,—a power which this court does not possess." *Conely v. McDonald*, 40 Mich. 159.

A comparison of the opinion rendered upon the former appeal herein with the record upon the present appeal shows that, in making its decision upon the evidence before it, the superior court did not disregard the decision of this court upon any question of law determined by it upon the former appeal. Indeed, upon that appeal the decision of this court was in the main in reference to questions of fact, rather than questions of law. The question chiefly discussed in the opinion, and which is termed by the appellants the pivotal question of the case, was whether there was any contract relating to Chinamen between Sisson, Wallace & Co. and the railroad and construction companies, or whether Sisson, Wallace & Co. had any contract right by virtue of the arrangement made with Koopmanschap for bringing the Chinamen to San Francisco. The statement in the opinion "that a written contract was made between one of the construction companies, Koopmanschap, and Sisson, Wallace & Company concerning such importation is *clear*, though such written contract was not produced on the trial, nor shown to be then in existence"; and the expression in the opinion, after giving the evidence in support of the above statement, and that Douty's testimony was corroborated by the Haswell letter, that "it is *inconceivable* that he (Douty) would direct the agent of the steamship company to draw drafts upon Sisson, Wallace & Company for each of the two contemplated shipments, amounting to \$40,000 each, without a contract right so to do," can neither of them be considered as a decision upon a question of law, but, at most, only an inference of fact drawn from the other evidence in the case. * * * It was for the reason that in

the opinion of this court the trial court had erroneously decided these questions of fact that its decision was reversed, but this court did not assume to direct that court how it should again decide the questions. And, as we have seen above, that court, when the questions should again be presented to it for decision, was authorized and required to exercise its own judgment in determining the facts which were justified by the evidence. If the evidence had been identical with that given at the former trial, and the trial court had still been of the opinion that it justified the former findings, it would not be precluded from so finding merely because this court had reversed its former decision. This court might again reverse the decision, but, before doing so, would consider whether it might not be that that portion of the evidence which could not be reproduced in printed form—the demeanor of the witnesses, as well as their credibility, the weight to be given to contradictory testimony, the inferences to be drawn from different portions of the evidence—was such as to support the conclusion of the trial court. If it should appear to this court that it was possible for the trial court, under these considerations of the evidence, to so decide the issues, it might deem it its duty to yield to that court, even though the decision were contrary to its own opinion, since the trial court is the ultimate arbiter upon all questions of fact.

* * * * *

* * * There was, moreover, at the last trial, additional evidence before the trial court which was not before this court upon the former appeal; and even if it be conceded, as is claimed by the appellants, that this evidence was cumulative, still it was not for that reason to be disregarded. * * * A careful examination of the record herein fails to show that the evidence before the superior court was insufficient to justify its decision. The judgment and order are affirmed.⁵⁰

⁵⁰ *Accord*, *Hartford Fire Ins. Co. v. Enoch*, (1906) 79 Ark. 475; *Phelps County Ins. Co. v. Johnston*, (1902) 66 Neb. 590.

Obiter dicta do not become the law of the case,—*Wixson v. Devine*, (1889) 80 Cal. 385.

"What was decided by a case subsequently overruled continues to be the law of the case as between the parties and those claiming under them,"—*Habbits v. Jack*, (1884) 97 Ind. 570; and if on a second appeal the court should become dissatisfied with its former opinion, it nevertheless will remain as the law of the case,—*Westerfield v. N. Y. Life Ins. Co.*, (1910) 157 Cal. 339.

"In the absence of statute the phrase, law of the case, as applied to

the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power,"—*Messenger v. Anderson*, (1911) 225 U. S. 436.

Law of the case on second appeal. "The sole reason for the existence of the doctrine is that the court, having announced a rule of law applicable to a retrial of facts, both parties upon that retrial are assumed to have conformed to the rule and to have offered their evidence under it. Under these circumstances it would be a manifest injustice to either party to change the rule upon the second appeal."—*Allen v. Bryant*, (1909) 155 Cal. 256.

"An appeal will not be entertained by this court from a decree entered in the circuit or other inferior court, in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to ourselves."—*Stewart v. Salamon*, (1878) 97 U. S. 361.

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