DOWNS and Husband *v.* ALLEN and another, Surviving Partners, etc.

SAME *v.* ALLEN.

ALLEN *v.* DOWNS and another.

(Circuit Court, D. Connecticut. January 5, 1885.)

1. JUDGMENT OF ANOTHER STATE—ACTION ON—DEFENSE.
   Judgments of a court of one state can, in an action thereon in another state, be inquired into only in respect to the jurisdiction over the person or subject-matter embraced in the judgment, and in respect to notice to the defendant.
2. SAME—EXTENT OF INQUIRY—RECORD.
   Such inquiry can be made, although the record of the judgment shows a service upon or an appearance by the defendant.
3. SAME—JUDGMENT AGAINST SEVERAL—ALABAMA CODE.
   Under the Alabama Code a judgment against two or more is several as well as joint, and, in the event of the death of one of the joint obligors pending the suit, a judgment may be rendered against the survivors. It seems that an omission to suggest the death of one of the parties upon the record does not make the judgment void against the survivor.
4. SAME—JUDGMENT AGAINST SURVIVORS NOT NAMED.
   In Alabama a judgment against the parties named therein, "or such of them as are now surviving," is a valid judgment against the survivors.
5. SAME—SERVICE ON MEMBER OF LAW FIRM AFTER DISSOLUTION.
   The mere fact of the dissolution of a law firm does not necessarily dissolve the agency of each member, and the service of a notice of appeal, after such dissolution, on a member of the firm, who was both attorney and counsel, and who equally with his partner was charged with the management of the suit, will be sufficient to bind the client.
6. SAME—JUDGMENT OBTAINED THROUGH NEGLIGENCE OF ATTORNEY.
   The laches or the negligence of an attorney, when there is no fraudulent combination or collusion with the opposing counsel, will not render void a judgment in favor of the successful party.
7. SAME—ERRORS IN RECORD—JURISDICTION.
   In an action on a judgment obtained in another state, it is of no avail to show that there are errors in the record, unless they be such as prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power.
8. SAME—ALLOWANCE OF INTEREST.
   In an action on a judgment, the amount of which was doubled by 8 per cent. interest, a portion of which was compounded, the court may refuse to allow interest on the judgment.

At Law.

Charles R. Ingersoll, for plaintiffs.

William Hamersley and *Orville H. Platt*, for defendants.

SHIPMAN, J. The first two named causes are actions at law upon judgments rendered by the chancery court for the Eighth district, Southern chancery division, of the state of Alabama, in favor of Mary A. Downs; one being against the members of the firm of Hopkins, Allen & Co., and the other against John Allen, one of said firm. The third case is a bill in equity, by said Allen, to restrain the defendants from prosecuting said actions at law, upon the ground that said judgments

were fraudulently obtained and are void. A trial by jury of said actions at law having been duly waived by written stipulation of the parties, said causes were tried by the court, and the following facts were found to have been proved and to be true:

On the first of July, 1855, the firm of Hopkins, Allen & Co., theretofore existing in the city of New York, and composed of Lucius Hopkins, William Allen, John Allen, Walter H. Bulkley, and James McLean, ceased to do business, and existed thereafter only for the purpose of liquidation. Lucius Hopkins and John Allen, in pursuance of the articles of partnership, settled the business of the firm, and used the partnership name for that purpose. Mr. Bulkley died before March 14, 1872. William Allen died on May 25, 1874. Mr. Hopkins died on September 27, 1876. Mr. McLean was not served with process in these actions at law. On September 27, 1855, George Cowles mortgaged to the said Hopkins, Allen & Co. a parcel of land in Montgomery, Alabama, to secure his note to said firm for $4,205.63, dated January 1, 1855, payable, with interest, on January 1, 1856; and on January 22, 1858, mortgaged the same land to James S. Brooks, administrator of E. A. Cowles, to secure a debt to the estate of said Cowles of about $10,000; and afterwards sold said land to William Cowles, who took and retained possession of the same until February 22, 1868. On March 17, 1868, in pursuance of their said mortgage, and after the 30 days' public notice, Hopkins, Allen & Co. sold said land at public auction, at the court-house door in Montgomery, and John Allen, being the highest bidder therefor, became the purchaser for the sum of $5,000. The purchase was made by Mr. Allen in pursuance of legal advice. By an instrument under seal, dated March 17, 1868, and signed "Hopkins, Allen & Co., by Lucius Hopkins," said firm purported to convey to John Allen their title to said land. About October 6, 1869, J. H. Lakin went into possession of said premises, under a contract with Mr. Allen, to buy the same for the sum of $7,250. On September 19, 1870, Mr. Allen and his wife duly executed a deed of the premises to said Lakin, which deed was to be held in escrow until he should pay the purchase money. On March 14, 1872, Lakin owed Allen about $1,100 on this contract.

By the law of Alabama a foreclosure sale of mortgaged property to a mortgagee is voidable at the election of the proper party in interest in a reasonable time after the sale. On March 14, 1872, Mary A. Downs, the daughter and sole heir of E. A. Cowles, and who became of age on June 27, 1871, and who was married while she was an infant, brought her bill in equity before the court of chancery in the Southern division of Alabama, praying, among other things, that the sale of said real estate by Hopkins, Allen & Co. to John Allen be set aside, and that they be required to account for the rents and profits of said premises, and for an account of said first-mortgage debt to the time of the said sale, and for a decree for the surplus of the proceeds of sale after satisfying the said mortgage. Hopkins, Allen & Co., the five members of said firm, being named, Lakin, William Cowles, and George Cowles were made defendants. Service was not made upon any of the members of said firm. John Allen employed Stone and Clopton, lawyers in Montgomery, to appear for him, and for Hopkins, Allen & Co., and to answer for them. These lawyers had also appeared for Lakin. After the answers had been filed, Mr. Troy, the attorney for the plaintiff, became satisfied that an administrator should be appointed upon the estate of E. A. Cowles, and should be made a party plaintiff, and so told Mr. Clopton, and asked him, for the purpose of saving delay and expense, to admit that if Hopkins, Allen & Co. were liable to anybody, they were liable to the plaintiff. Mr. Clopton asked Mr. Troy to elect to affirm the sale to Lakin; Troy replied that he had thus elected; whereupon the following stipulation was signed on or about January 24, 1874:

"*Mary A. Downs, by next friend,* v. *Hopkins, Allen & Co. et al.* In Chancery, at Montgomery.

"In this case it is admitted, to save costs and unnecessary litigations, that if the defendants, Hopkins, Allen & Co., or John Allen, are liable to any person on account of the matters alleged in the bill, or any of them, (which liability is not admitted,) that the complainant Mary A. Downs is entitled to the recovery for such liability, and complainant Mary A. Downs consents to affirm the sale of the mortgaged premises to J. H. Lakin, and waives any right she may have to set aside said sale; and we consent to a reference to the register to ascertain and state the matters of account between the parties.

"WATTS & TROY,
"For Complainant, and for Wm. and Geo. Cowles.
"STONE & CLOPTON,
"For Hopkins, Allen & Co. and Lakin."

John Allen had no knowledge of this stipulation. Such proceedings were afterwards had that, upon a finding that the total amount received by Hopkins, Allen & Co. above the mortgage debt, (treating the payments by Lakin to Allen as made to Hopkins, Allen & Co.,) with interest to November 20, 1875, was $1,852.18, a decree against said firm for that amount was entered on November 26, 1875; but the chancellor refused to charge the firm or John Allen with the rents or the rental value of the property while it was in the possession of the latter. Mr. Allen, who was then living in Connecticut, was asked by a Connecticut lawyer to pay this judgment, and refused. Thereupon, on January 3, 1877, the plaintiff appealed from the decree of the chancery court to the supreme court of Alabama. Notice of this appeal was served on January 6, 1877, upon Mr. Clopton; Stone & Clopton having dissolved partnership on March 6, 1876, upon the appointment of Mr. Stone to a judgeship in the supreme court. The statutes of Alabama in regard to appeals provide that they can be taken within two years from the date of the decree, and that service of the citation shall be made upon the appellee or his attorney. The supreme court held that the rents and profits after the sale must be applied to the reduction of the mortgage debt, reversed the decree of the chancellor, and remanded the cause. There was no argument before the supreme court in behalf of Mr. Allen, or of Hopkins, Allen & Co., and he was not informed of the appeal. Such proceedings were thereupon afterwards had that the net rents of said premises received by Mr. Allen while in possession thereof from March 17, 1868, to October 1, 1869, after deducting taxes, insurance, etc., were found to amount at the latter date to $710.23, and with interest to April 25, 1882, to $1,424.21; and it was further found that the $1,852.18 found to be due from Hopkins, Allen & Co. was, with interest from November 20, 1875, to April 25, 1882, $2,804.97. The court thereupon decreed as follows:

"It is therefore ordered, adjudged, and decreed that complainant have and recover of the said defendant John Allen said sum of fourteen hundred and twenty-four 21-100 ($1,424.21) dollars, for which execution may issue. It is thereupon further ordered, adjudged, and decreed that complainants have and recover of said defendants, Lucius Hopkins, William Allen, John Allen, James McLean, and Walter H. Bulkley, or such of them as are now surviving, said sum of twenty-eight hundred and four 97-100 ($2,804.97) dollars, for which execution may issue."

By the report made before the first decree, which report was confirmed, it was found that Hopkins, Allen & Co. had been overpaid their mortgage debt, on October 1, 1870, the sum of $665.41; $521.07, as interest on $665.41; and on the other payments after October 1, 1870, were included in the amount of $1,852.18. After the appeal to the supreme court, Mr. Allen's attorney does not seem to have been vigilant in the further conduct of the case. There

was no fraud at any time, on his part, by collusion with the opposing counsel, as charged in the bill. There was no opportunity to defend successfully against a judgment for some amount against Allen, Hopkins & Co., provided suit was brought in the name of the proper plaintiff. There was an opportunity, by testimony in regard to the rents and profits and the disbursements, to attempt to reduce the amount against Mr. Allen. The reason which probably induced the attorney's conduct after the appeal was that he had not received any money from Mr. Allen, from whom, however, he had not asked compensation.

Upon the foregoing finding of facts, divers questions of law arise, which remain to be considered. The plaintiff places her case upon the established principle that judgments of a court of one state of the United States can, in an action thereon in a court of another state, be inquired into only in respect to the jurisdiction of the foreign court over the person or subject-matter embraced in the judgment, and in respect to notice to the defendant. *Christmas* v. *Russell*, 5 Wall. 290; *Thompson* v. *Whitman*, 18 Wall. 457. Such inquiry can be made, although the record of the judgment shows a service upon or an appearance by the defendant. *Knowles* v. *Gas-light Co.* 19 Wall. 58. In this case service was not made upon any member of the firm of Hopkins, Allen & Co., and Mr. Allen had no legal authority to authorize an appearance for the other members; but he voluntarily and fully appeared for himself, through his attorneys, and by such general appearance he submitted himself to the jurisdiction of the court, and became personally bound by a valid judgment against himself individually. *Hull* v. *Lanning*, 91 U. S. 160; *Cooper* v. *Reynolds*, 10 Wall. 308; *Hill* v. *Mendenhall*, 21 Wall. 453. The question, therefore, is, are the judgments, or either of them, absolutely void, as against Mr. Allen, by virtue of any inherent defects therein?

The defendant says that the judgment against the five members of the firm of Hopkins, Allen & Co. by name, "or such of them as are now surviving," three of them being dead at the date of the rendition of the judgment, and no suggestion of the death of a defendant having been made on the record, is void; because a judgment against two or more, one of whom is dead, is a nullity against the dead defendant, and being void against one is void against all; and because of its uncertainty—it being in the alternative—and the survivors not being found nor named. It is true, that at the ancient common law a judgment against three, one of them having died pending the suit, would be reversed upon writ of error as against all, upon the principle that a judgment is an entirety, and is invalid against all if invalid against one, (2 Bac. Abr. "Error," M.; *Gaylord* v. *Payne*, 4 Conn. 190;) a principle still recognized in states where the common law has not been modified by statute. *Wright* v. *Andrews*, 130 Mass. 149. In many states, however, the effect of statutes has been to alter the nature of a joint judgment, and to make it several as well as joint, while in other states the principle has been relaxed.

Sections 2905 and 2913 of the Alabama Code are as follows: