

not necessary to refer to the child or children, each individually, by his or her Christian name. Any designation which necessarily applies to them, without omitting any one of them, is all that the law requires.

I regard the foregoing as rules so well settled by the concurrence of judicial opinions as to be entitled to respect as rules of property, and binding upon this court in the interpretation to be given to the statute in this state in the case under consideration; and, tested thereby, this will appears to me to be valid. The complainants are heirs of their father. By the clause in his will giving one dollar to each of his heirs, he refers to them. There is no ambiguity or possibility of two opinions as to the application of said clause in the will to these complainants. If, instead of one dollar, a liberal bequest had been left to each of the testator's heirs, no one would hesitate to believe that it was intended for each of these complainants to share in his bounty. The language used, with equal certainty, forces the mind to accept the more distasteful conclusion that it was the testator's intention, deliberately formed, to cut his children off with but the nominal sum of one dollar. The rule that a man's children shall be his heirs is of such universal application that it is impossible for an intelligent, sane person, who knows himself to be a father of children, to refer to his heirs without consciously to himself including them in the reference. These considerations constrain me to sustain the defendant's demurrer to the bill of complaint.

MILLER v. CLARK *et al.*

(Circuit Court, D. Connecticut. November 3, 1891.)

1. BILL OF REVIEW—PAYMENT OF COSTS.

The circuit court having dismissed a bill on the merits, plaintiff took an appeal to the supreme court, which dismissed the same because the amount was insufficient to confer jurisdiction, without formally deciding that the circuit court was without jurisdiction. The mandate required appellant to pay the costs. He thereafter brought a bill to review the decree of the circuit court, and have the cause dismissed for want of jurisdiction, instead of on the merits. *Held*, that he was not entitled to a hearing thereon until he paid the costs pursuant to the mandate, or gave an excuse for not doing so; and that Act Cong. March 3, 1875, (18 St. at Large, 472,) requiring the circuit court not to proceed further with a cause if at any time it should appear that it did not involve a dispute within its jurisdiction, did not relieve him from this obligation.

2. SAME—PLEADING—STAY OF PROCEEDINGS.

The rule requiring payment of costs on a bill to review is one of procedure rather than of jurisdiction, and hence failure to aver payment or excuse is no ground of demurrer, but should be taken advantage of by motion to stay proceedings.

In Equity. On demurrer to a bill of review.

J. M. Buckingham, for plaintiff.

Wm. B. Stoddard and *Wm. L. Bennett*, for defendants.

SHIPMAN, J. This is a bill of review praying that the decree heretofore rendered in the case of *Miller v. Clark*, by which the bill in equity was dismissed upon the merits, with costs, should be set aside and the

bill be dismissed for want of jurisdiction. The facts in the case are stated in 40 Fed. Rep. 15. The plaintiff appealed to the supreme court, where the defendants moved to dismiss the appeal for want of jurisdiction, because the matter in dispute as to each of the defendants, other than the executor, did not exceed the sum or value of \$5,000. The court dismissed the appeal upon the ground that the interest of the plaintiff did not exceed \$5,000, but was about one-sixth thereof. *Miller v. Clark*, 138 U. S. 223, 11 Sup. Ct. Rep. 300. The court did not formally decide that this court had no jurisdiction. The mandate required the payment of costs, which have been taxed, by the appellant. The bill of review in this court does not state that these costs have been paid, or give an excuse for their non-payment. Because the costs in this court have not been paid, as well as upon other grounds, the defendants have specially demurred.

In my opinion it is the duty of the plaintiff either to pay the costs in the supreme court, or to obtain an amendment of the mandate, or to give an adequate excuse for the non-payment, before the bill of review can be considered upon its merits. As the rule requiring payment of the decree or of the costs, or an excuse for the non-payment, is one of procedure, rather than jurisdictional, it seems that the omission in the bill is not a subject of demurrer, but can be properly taken advantage of by a motion to stay proceedings until the decree has been performed, or by a motion to strike from the files. *Davis v. Speiden*, 104 U. S. 83; 2 Daniell, Ch. Pr. 1635. The plaintiff gave upon the argument of the demurrer two reasons for silence in regard to the non-payment of costs. The first was that the old chancery rule in regard to the performance of a decree as a condition precedent to the filing of a bill of review is not now applicable, because the statute of March 3, 1875, (18 St. at Large, 472,) requires the circuit court not to proceed further with a suit, if at any time after such suit has been brought it should appear that it did not involve a dispute within the jurisdiction of such circuit court. This statute "imposes upon the circuit court the duty of dismissing the suit, if it appears at any time after it is brought, and before it is finally disposed of, that it does not involve a controversy of which it takes cognizance." *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. Rep. 289. It does not, in terms, relate to the duty of the court upon a bill of review, after a suit has been disposed of by final decree. The plaintiff also says that the provision in regard to costs should not have been inserted in the mandate of the supreme court. I suppose that the provision was inserted in pursuance of the reasons contained in, or the authority of, *Blacklock v. Small*, 127 U. S. 96, 8 Sup. Ct. Rep. 1096, and *Bradstreet Co. v. Higgins*, 114 U. S. 262, 5 Sup. Ct. Rep. 880. Whether properly or improperly inserted, I think it must be obeyed, so long as it is in force.

Before a decision upon the other questions contained in the demurrer, proceedings under the bill of review should be stayed, until the mandate of the supreme court has been complied with, or an adequate excuse has been given for non-compliance.

GRATTON *v.* WEBER.

(Circuit Court, D. Washington, N. D. October 26, 1891.)

1. COMMUNITY PROPERTY—RIGHTS OF NON-RESIDENT WIFE.

The community property act of Washington Territory, 1879, making lands purchased by the husband the common property of husband and wife, applies as well to property within the territory, acquired by non-residents, as that purchased by residents.

2. DECREE OF FOREIGN COURT—TRANSFER OF TITLE—ESTOPPEL.

A decree for divorce, entered by the state court of Oregon, provided that the husband should pay the wife the sum of \$5,000 in satisfaction of her interest in such of the husband's lands as lay without the state, on condition that the wife should accept such sum in full satisfaction of her interest in those lands, and file a conveyance to the husband of such interest, with the clerk of the court. The wife caused execution to be issued on the decree, and sold the husband's lands in Oregon to satisfy the same, which lands the husband redeemed by paying the amount of the execution to the wife. No conveyance or release of interest in the Washington lands was ever executed by the wife, as directed by the decree. *Held*, that such decree of the state court of Oregon could not operate to transfer plaintiff's interest in community lands in Washington, nor estop her from recovering them from her husband's widow by a second marriage.

In Equity.

In the year 1884, the complainant's husband, Emil Weber, purchased 3,400 acres of land situated in Clallam county, in this state. The plaintiff claims that by said purchase the lands became community property, and that she is now the owner of an undivided one-half thereof. In 1886, by a decree of a circuit court of the state of Oregon, the complainant was granted a divorce from the said Weber. At the time the lands were purchased, and until after the divorce, the parties were domiciled in the state of Oregon. After the divorce Weber died in the state of Oregon. The defendant claims to be his widow, having been married to him very soon after the divorce, and she now claims to own an interest in said lands, and denies that the complainant has any interest therein. The lands are unoccupied, and this suit in equity has been brought to determine the disputed questions as to plaintiff's interest. The validity of the defendant's marriage to Weber is disputed, but I do not find it necessary to decide that question. In her complaint against Weber filed in the divorce suit, the plaintiff alleged that he owned 2,600 acres of land in Washington Territory, but did not give any description thereof, and she prayed for a division of all his property, and a suitable award to her out of the same, including his lands situated outside of the state of Oregon. By the decree the court gave the complainant one-third of Weber's real estate in Oregon, and a judgment for \$5,000 in money for her own maintenance; and, as to the property outside of Oregon, the decree contains the following clauses:

"It is further considered and adjudged that the said sum of five thousand (\$5,000) dollars awarded to the plaintiff is granted upon condition that it shall be accepted by the plaintiff in lieu and in full satisfaction of all her right, title, and interest of, in, and to the lands and property described in the complaint in this suit, owned by the defendant, Emil Weber, and situated without the state of Oregon. It is further considered and adjudged that, upon the