tended location of the alleged Banker's Daughter lode, ever since have been, and now are, part and portion of the city of Helena, county of Lewis and Clarke, and state of Montana, the same being an incorporated city; and said premises, and the whole thereof, then did, and ever since have been, and now do, lie within the corporate limits of the said city; and that these defendants were at the date last aforesaid, ever since have been, and now are, the owners and actual occupants of the surface ground of said premises, and the whole thereof, and have actually had the possession thereof during all the period last aforesaid."

There is no claim in these allegations that the city has acquired any title to said premises, or taken any steps to acquire the same through its officers. It is not claimed that the same has been reserved by any order of the president of the United States. There is no claim that it has been usually occupied as a place of business, or in fact any allegation in the above that would show that it might not be taken as a mining claim if valuable for the minerals therein contained. This objection is therefore good, and this allegation should be stricken from the answer.

MILLER *v.* CLARK *et al.*

(Circuit Court, D. Connecticut. August 8, 1892.)

No. 619.

1. APPEAL—DISMISSAL—PROCEEDINGS BELOW—JURISDICTION OF CIRCUIT COURT.
One of six legatees entitled under the will to equal shares in the residuary estate filed a bill against her colegatees to compel them to pay to the executor $5,377.83, which they claimed by gift *inter vivos* from the testatrix. The circuit court dismissed the bill on the merits, and, plaintiff having appealed, the supreme court dismissed the appeal, holding that the interest of plaintiff was only one sixth of that sum, and insufficient to give that court jurisdiction. *Held*, that this decision was also decisive against the jurisdiction of the circuit court, and on a bill of review the original decree should be reversed, and the bill dismissed for want of jurisdiction, without prejudice; but plaintiff is not entitled to have the proceedings erased from the docket.

2. SAME—COSTS.
In thus reversing its decree and dismissing the bill, the circuit court had no power to order restitution of the costs of the appeal, the same having been paid by plaintiff in pursuance of the mandate of the supreme court.

3. SAME.
Nor, under the circumstances, would the circuit court order restitution of costs paid by plaintiff under its original decree dismissing the bill on the merits, for plaintiff was in fault in invoking a jurisdiction to which she had no right to resort; and for the same reason the costs of the bill of review should not be taxed in her favor.

In Equity. On motion for judgment on a bill of review.

The original proceeding was a suit brought by Martha A. Miller, as legatee under the will of Mrs. Irene Clark, against five other legatees, who were entitled with her to equal shares in the residuary estate. The purpose of the bill was to compel defendants to pay to the executor $5,377.83, which they claimed by gift *inter vivos* from the testatrix. The court ren-

dered a decree dismissing the cause on the merits. 40 Fed. Rep. 15. Complainant appealed to the supreme court, which dismissed the appeal, holding that, as plaintiff's interest in the sum in litigation was only one sixth thereof, or $896.30½, the amount was insufficient to confer jurisdiction. 138 U. S. 225, 11 Sup. Ct. Rep. 300. The mandate of the supreme court required complainant to pay the costs of appeal. Thereafter complainant brought this bill of review, praying that the decree of the circuit court should be set aside, and a decree entered dismissing the cause for want of jurisdiction. Defendants specially demurred to this bill, on the ground that it did not show that the costs had been paid in pursuance of the mandate, or give any excuse for their nonpayment. The court (SHIPMAN, J.) overruled the demurrer, but held that the costs must be paid before complainant was entitled to a hearing on the bill of review. 47 Fed. Rep. 850. No order was made or asked fixing a time within which the costs must be paid, but they were paid and accepted by defendant's counsel over two months thereafter, and the court subsequently held that this was not such delay as would debar complainant from filing a supplemental bill alleging such payment. 49 Fed. Rep. 695. The hearing is now on a motion for judgment on the bill of review, complainant also asking that the costs of the original suit paid by her in this court and in the supreme court be ordered to be refunded to her, and that the costs of the bill of review be taxed in her favor.

Simeon E. Baldwin, for plaintiff.

W. B. Stoddard, for defendants.

TOWNSEND, District Judge. This is a motion for judgment on complainant's bill of review, praying for a reversal of the decree in the original cause, and that said decree be declared void, and all proceedings therein taken from the files of this court, and for other relief. Defendants demurred to the bill of review, and the demurrer was overruled. The original case is reported in *Miller* v. *Clark*, 40 Fed. Rep. 15. Defendants object to a reversal of the decree. They claim that the circuit court has jurisdiction of the cause, and they therefore ask that the bill of review be dismissed. It seems to me that the opinion of the supreme court of the United States, dismissing the appeal in the original cause on the ground that it had no jurisdiction of the appeal, is decisive as to the jurisdiction of this court. The court there finds that the interest of the plaintiff in the amount in dispute is only $896.30½. *Miller* v. *Clark*, 138 U. S. 225, 11 Sup. Ct. Rep. 300. Furthermore, all the questions, with perhaps a single exception, discussed upon this motion, appear to have been raised on the hearing of the demurrer to the bill of review. The decision of Judge SHIPMAN overruling said demurrer holds that the reasoning of the supreme court, deciding that it had no jurisdiction, is applicable to this case, and is conclusive on that point.

Complainant also asks that defendants be ordered to refund to her the costs of the original action paid by her in this court, and in the supreme court of the United States, and that the costs of the bill of review be taxed in her favor. To award restitution of the costs in the supreme

court would be a practical reversal of the judgment of that court, and a nullification of its mandate. See *Miller* v. *Clark*, 47 Fed. Rep. 851.

In claiming restitution of the costs paid under the former decree in this court, complainant has more show of authority. It may now be considered as settled that a circuit court has the power, in a proper case, to order a restitution of money paid under a decree which it had not the jurisdiction to make. *Fuel Co.* v. *Brock*, 139 U. S. 216, 11 Sup. Ct. Rep. 523. When cases brought originally to the circuit court are dismissed for want of jurisdiction in such court, no costs are allowed in the circuit court. *Hornthall* v. *Collector*, 9 Wall. 560; *Pentlarge* v. *Kirby*, 20 Fed. Rep. 898. With the light now afforded by the decision of the supreme court dismissing the appeal, it is seen that this case should never have been brought to the circuit court, and should have been dismissed at the outset for want of jurisdiction, and therefore without costs to either party. It was, in fact, tried and dismissed on the merits, and costs were awarded the defendants; and, except for the want of jurisdiction, that decision was presumably and apparently correct. Before having that decision reviewed and set aside, complainant was obliged to pay the costs so awarded, as well as the costs in the supreme court. *Miller* v. *Clark*, 47 Fed. Rep. 850. It seems just that defendants should retain these costs. The supreme court gives the defendants costs in such cases wherever it thinks it has the power to do so. *Winchester* v. *Jackson*, 3 Cranch, 514; *Assessor* v. *Osbornes*, 9 Wall. 567; *Montalet* v. *Murray*, 4 Cranch, 46; *Railroad Co.* v. *Swan*, 111 U. S. 379, 4 Sup. Ct. Rep. 510. The latter case was one of an improper removal from a state court to a circuit court. By a special statute the circuit court is directed, in such cases, to make such order as to costs as shall be just. The defendant obtained the removal of the case to the circuit court, and, after being defeated on a trial of the merits, obtained by writ of error a reversal of judgment on the ground that the circuit court had no jurisdiction. The court say:

"It is clear that the plaintiffs in error, having wrongfully caused the removal of the case from the state court, ought to pay the costs incurred in the circuit court. Although in a formal and nominal sense the plaintiffs in error prevail in obtaining a reversal of the judgment against them, the cause of that reversal is their own fault in invoking a jurisdiction to which they had no right to resort, and its effect is to defeat the entire proceeding which they originated and have prosecuted. In a true and proper sense, the plaintiffs in error are the losing, and not the prevailing, party."

In the present case the complainant selected this court as the tribunal to determine the question of her right to this fund. The defendants were forced to come into this court against their objection, raised by a demurrer, and to contest the claims of the complainant before this court. Now, complainant, having been defeated in the tribunal of her choice, seeks to have these proceedings set aside, and to prosecute her claims before another tribunal. The underlying principle by which the question of costs is to be determined is that they shall be taxed in favor of the prevailing party. In the cases of restitution which have been cited

there appears to have always been an erroneous judgment for a substantial sum. This court ought not to order the costs returned unless it is absolutely compelled to do so by strict law, and I think it is not. The same reasons apply to the claim for costs of the bill of review.

Complainant claims that the original cause should be erased from the docket. Defendants claim that this court cannot erase the cause from the docket, because of the mandate of the supreme court directing execution for costs, and cite the case of *Bridge Co.* v. *Stewart*, 3 How. 413, in support of this claim. In *Iron Co.* v. *Stone*, 121 U. S. 631, 7 Sup. Ct. Rep. 1010, the circuit court had rendered a decree dismissing the bill on its merits. The supreme court, on appeal, held that the circuit court had no jurisdiction, and awarded costs in the supreme court. The circumstances, so far as regards the case in the circuit court, seem to have been substantially the same as in the present case, and the judgment ordered in that case appears to be proper here.

The motion for writ of restitution and for costs is denied. The decree of this court in the original action brought by this complainant against these defendants is reversed, and the bill in that action is dismissed for want of jurisdiction, and without prejudice.

EELLS *v.* ST. LOUIS, K. & N. W. RY. CO., (KELLY, Intervener.)

(Circuit Court, S. D. Iowa, E. D.)

1. CARRIERS OF FREIGHT — LIABILITY FOR NEGLIGENCE — LIMITATION BY CONTRACT — VALUATION.
   The shipper, by rail, of a horse worth $1,500, signed a live-stock contract providing that "the liability of the company for valuable live stock shall not exceed $100 for each animal." *Held*, that this was not merely an agreed valuation of the animal, but an attempt to limit the carrier's responsibility for negligence, and was therefore void. *Hart* v. *Railroad Co.*, 5 Sup. Ct. Rep. 151, 112 U. S. 351, distinguished. *Railroad Co.* v. *Lockwood*, 17 Wall. 357, followed.
2. SAME — FOLLOWING STATE DECISIONS.
   The question whether a carrier can stipulate for exemption for liability for its own negligence is a matter of general law, upon which the federal courts will exercise their own judgment, independent of state decisions, although jurisdiction attaches merely by virtue of the citizenship of the parties, and the contract was made and to be performed within the state.

In Equity. Bill by Dan P. Eells, trustee, etc., against the St. Louis, Keokuk & Northwestern Railway Company. Intervening petition by Isaac Kelly against the receiver, W. W. Baldwin, to recover the value of a horse alleged to have been killed by the receiver's negligence while in course of transportation. Heard on exceptions to the master's report. Overruled.

W. J. Roberts, for intervener.

H. H. Trimble and *Palmer Trimble*, for receiver.

WOOLSON, District Judge. Pending the proceedings in the original action, Isaac Kelly, by leave of the court, filed his petition of inter-