

act," the reference is to the classes of cases specially enumerated in the first clause of section 6; and, unless a given case can be brought within some one or more of the classes therein defined, the judgment or decree of the supreme court of the territory cannot be reviewed by a circuit court of appeals. Unless this be the construction given to the statute, we would have, following the contention of counsel for the plaintiff in error, the absurd result that the judgments of the supreme courts of the territories could be appealed to the circuit courts of appeals in all cases wherein the amount in controversy does not exceed \$1,000, but in all cases wherein the amount in controversy exceeds that sum no appeal could be taken. No possible reason can be advanced in support of the proposition that congress intended to create a right of appeal applicable to cases involving small amounts, and to deny the right in cases involving large sums. The absurdity of the result is the strongest possible argument against the correctness of such a construction of the statute; for, as is said in *Lau Ow Bew v. U. S.*, 144 U. S. 47-59, 12 Sup. Ct. Rep. 517, "nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd result." We reaffirm, therefore, the conclusion reached in the case of *Mining Co. v. Ripley*, supra, that the appellate jurisdiction of this court over the judgments and decrees of the supreme court of the territory of New Mexico is strictly limited to cases coming within some one or more of the classes enumerated in the first clause of section 6 of the act of March 3, 1891, and in regard to which it is expressly declared that the judgment of the circuit courts of appeals therein is final.

As it does not appear that the case at bar comes within any one or more of the enumerated classes, it follows that the writ of error must be dismissed, at cost of plaintiff in error, for want of jurisdiction.

MERRILL v. FLOYD.

(Circuit Court of Appeals, First Circuit. November 10, 1892.)

No. 23.

1. APPEAL—TRIALS NOT ACCORDING TO COMMON LAW.

When a case is tried in a federal court otherwise than according to the strict course of the common law, the circuit court of appeals has no jurisdiction as to exceptions taken at the trial, or as to the effect of the facts found, except as given by Rev. St. §§ 649, 700, in cases where a jury is waived.

2. SAME—WAIVER OF JURY.

But to authorize a review under these sections the waiver of a jury trial must be unconditional, and by a writing which sets forth the whole agreement; and hence, where the stipulation is merely that the case shall be marked, "Jury waived tentatively," there can be no such review, although the parties have acted on the agreement, and thus rendered it absolute.

In Error to the Circuit Court of the United States for the District of Massachusetts.

Action by Byron B. Floyd against Ezra F. Merrill for fraudulent representations. Trial to the court, which filed its "findings of fact and verdict." A motion to set aside the "verdict" was thereafter overruled.

Defendant brought error, and a motion to dismiss the writ of error was denied. See 5 U. S. App. —, 2 C. C. A. 58, 50 Fed. Rep. 849, where a full statement of the facts will be found. The case is now heard on the merits. Affirmed.

William A. Macleod and Robert D. Trask, for plaintiff in error.

Benjamin F. Butler and T. Henry Pearse, for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PUTNAM, Circuit Judge. No question can be raised in this court on the pleadings in the case at bar, because there is no assignment of errors relating thereto; and we do not understand that plaintiff in error calls our attention to any alleged insufficiencies in the declaration, or intends to do so. It has been decided too often to need reiteration that an appellate court cannot, on error, according to the course of the common law, re-examine a motion for a new trial, based on the weight or insufficiency of evidence, or any exceptions to the action of the court below denying such motion. Therefore we have no jurisdiction over the first and second exceptions, nor over the first, second, and third assignments of errors, and no occasion to open the record so far as it recites the proofs or the proceedings at the trial in the circuit court. This, of course, does not include questions as to the effect of findings of fact. But when a case is tried in the circuit court otherwise than according to the strict course of common law, we have no jurisdiction as to exceptions taken at the trial, or as to the effect of the facts found, except under Rev. St. §§ 649, 700. Here we do not find the waiver these sections require, which is an absolute one, while the agreement filed was merely "tentative," or in effect conditional. The fact that it was apparently afterwards acted on, and thus by the conduct of the parties apparently relieved, so far as concerns them, of its "tentative" feature, does not aid the plaintiff in error. The statute demands precision, and intends that the record shall leave no doubt as to the exact nature of the trial. Therefore it requires that the agreement of waiver, and the whole of it, shall be in writing, and does not permit it to be supplemented in any part by parol or by acts in pais. It is intended for the protection and guidance of the court, as well as of the parties, and it cannot be waived by the latter. The provisions of the statute are simple, and can easily be complied with in such manner as to leave behind no uncertainty, and we must enforce them according to their letter. While, for the reasons stated, we have no jurisdiction over some of the questions raised, we have jurisdiction over the case, as was decided by this court in this case, June 30, 1892, (5 U. S. App. —, 2 C. C. A. 58, 50 Fed. Rep. 849,) and the judgment of the circuit court is affirmed.

GRAY v. HAVEMEYER et al.

(Circuit Court of Appeals, Eighth Circuit. October 31, 1892.)

No. 133.

1. APPEAL—NECESSARY PARTIES—JOINT DECREE—MECHANICS' LIENS—PRIORITIES.

In a foreclosure suit to which a subsequent mortgagee and certain mechanics' lienors were made parties, the court directed a sale of the property and an application of the proceeds to the payment, first of costs, next of the mortgages in their order, and next of the mechanics' liens; and decreed the amount due each lienor, and the equality of all the mechanics' liens in point of time. *Held*, that the decree was not joint as respects the mechanics' lienors, so as to prevent an appeal by one alone, but was several as to each.

2. SAME—NECESSARY PARTIES—OTHER MECHANICS' LIENORS.

But where one of the mechanics' lienors appealed, seeking to have his lien given priority, the others were necessary parties, since the court could not subordinate their liens to his in their absence.

3. SAME—OWNER OF PROPERTY—PROVINCE OF COURT—ESTOPPEL.

The appealing lienor being a subcontractor, and seeking by his appeal to have his lien adjudged prior to the mortgages, as well as to the other mechanics' liens, the owner of the land was also a necessary party to the appeal, since he would be personally liable for a balance due on the mortgage notes, but not on the amount of the subcontractors' lien; and the court could assume the possible failure of the land to sell for enough to meet both lien and mortgages, and the consequent injury to the owner, since the decree appealed from could be injurious to the subcontractor only by assuming the same possibility.

4. FEDERAL COURTS—FOLLOWING STATE PRACTICE—COSTS OF FORECLOSURE.

In a suit to foreclose a mortgage given on realty in Nebraska, and executed by a resident of that state, it was error for the circuit court to allow attorneys' fees, as an item of costs, under a provision of the mortgage for such an allowance in case of foreclosure, since the supreme court of Nebraska had determined that such a provision in a mortgage was invalid. *Bendey v. Townsend*, 9 Sup. Ct. Rep. 482, 109 U. S. 665, and *Dodge v. Tulleys*, 12 Sup. Ct. Rep. 728, 144 U. S. 451, followed.

Appeal from the Circuit Court of the United States for the District of Nebraska.

In Equity. Bill to foreclose a mortgage, brought by Sarah A. Havemeyer against J. H. Van Closter, mortgagor; O. F. Davis Company, subsequent mortgagee; Fred W. Gray, mechanic's lienor; and other lienors. Decree for complainant. Defendant Gray appeals, causing citation to issue only to complainant, Havemeyer, and defendant O. F. Davis Company. Modified and affirmed.

John C. Wharton and William Baird, for appellant.

John L. Kennedy and M. L. Learned, for appellees.

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

SHIRAS, District Judge. On the 6th day of December, 1889, J. H. Van Closter executed and delivered to Sarah A. Havemeyer a mortgage on certain lots in the city of Omaha, Neb., to secure the payment of a promissory note for the sum of \$2,500. The mortgage was recorded in the office of the register of deeds of Douglas county, Neb., on the 17th day of January, 1890. On the 6th of December,