faithful to the interests of their clients. The cause has very often been before the court, and it has seemed to me that there has been more contention than necessary. I have never seen the slightest disposition on the part of any of the counsel in the case to compromise or surrender any interest or advantage of their clients.

MORTON v. KNOX COUNTY.

(Circuit Court, E. D. Missouri, N. D. December 7, 1894.)

1. COUNTY WARRANTS—LIMITATION.
Rev. St. Mo. 1889, § 3195, providing that county warrants not presented for payment within five years of their date, or being presented within that time, and protested for want of funds, and not presented again within five years after funds are set apart for payment thereof, shall be barred, prescribes a special limitation for actions on such warrants, within section 6791, providing that the limitation of 10 years, prescribed by section 6774 for action on any writing for the payment of money, shall not extend to any action which shall be otherwise limited by special statute.

2. SAME—ACKNOWLEDGMENT OF DEBT.
The indorsement by a county treasurer on a county warrant of a refusal to pay for want of funds, as prescribed by Rev. St. Mo. § 3193, is an acknowledgment of the debt, within section 6793, providing that a written acknowledgment of a debt shall take it out of the operation of the statute of limitations.

This was an action by William H. Morton against Knox county upon a county warrant for the payment of $4,497.41. The defendant, in its answer, set up the general statute of limitations. Plaintiff demurs to the answer.

W. C. Hollister and F. L. Schofield, for plaintiff.
Chas. D. Stewart, for defendant.

PRIEST, District Judge. This is an action upon a county warrant of Knox county for the sum of $4,497.41, issued on the 9th day of August, 1879, by order of the county court of said county, directed to the treasurer of that county, ordering him to pay to the plaintiff, or bearer, the sum above mentioned out of money in the treasury belonging to the M. & M. R. R. fund, and is duly signed by the president of the county court, and attested by the clerk of the county. This warrant was issued in payment of two separate judgments obtained by the plaintiff in the circuit court of Knox county for the aggregate sum of $4,497.41, upon coupons attached to bonds subscribed by the county in aid of the M. & M. Railroad, and payable out of the special and limited fund authorized to be collected for that purpose. This warrant was presented to the treasurer of the county on the 12th day of August for payment, and was, in form authorized by statute (Rev. St. 1889, § 3193), protested for want of funds. Annually thereafter the warrant was presented, and like action taken by the treasurer, the last protest for want of funds being made October 12, 1894, just prior to the institution of this suit. The answer admits these several protests or refusals of payment by the treasurer of the county for want of funds, and pleads that

the action upon the warrant is barred by the statute of limitations of 10 years (Rev. St. 1889, § 6774); and again, that the warrant had not been presented for payment within 5 years after money had come into the hands of the county treasurer for the purpose of paying said warrants. These two pleas are challenged by a demurrer, and we will deal with them on the demurrer in the order in which they have been stated.

The statutes of Missouri prescribing the general period of limitations of personal actions (Rev. St. 1889, § 6774), provide that all actions upon any writing for the payment of money shall be commenced within 10 years. This statute recognizes, because of its generality, that there were and would be special acts of limitation more closely related to special subjects than to limitations, and hence provides (section 6791) that it shall not extend to any action which shall be otherwise limited by such statute. The complainant contends that section 3195, Rev. St. 1889, is such special statute, and as such affords the only limitation which can be enforced as against county warrants. Section 3195 is as follows:

"Whenever any warrant drawn on any county treasurer shall have remained in the possession of the county clerk for five years unclaimed or not called for by the person in whose favor it shall have been drawn, or his or her legal representative, the county court shall, by proper order enter of record, annul and cancel the same; and whenever any such warrant, being delivered, shall not be presented to the county treasurer for payment within five years after the date thereof, or being presented within that time and protested for want of funds to pay it, shall not be again presented for payment within five years after funds shall have been set apart for the payment thereof, such warrant shall be barred and shall not be paid; nor shall it be received in payment of any taxes or other dues."

On the part of the county it is contended that the section thus quoted is in the nature of a regulation for the government of the officers of the county rather than as a limitation to an action predicated upon county warrants; that there is neither a natural nor necessary repugnance between this statute and the general statute affecting limitations of actions; and that, therefore, section 3195 cannot, by implication, effect a repeal of the general statute. We are unable to give our sanction to this contention. The rules which control repeals by implication are not appropriate to the interpretation of this statute, but we should rather inquire whether it was the intention of the legislature to add a special limitation to a peculiar character of obligations. Indeed, we think, even if we were to disregard the express language of section 3195, and look alone to the legislation which formulated that section into its present terms, we should be constrained to hold that its purpose was to fix a special limitation to these warrants which are obligations sui generis. Prior to 1877, county courts, after auditing claims against the county, were empowered to issue warrants therefor, drawn upon the treasurer, signed by the president, and attested by the clerk. In 1877 the legislature passed an act (Sess. Acts 1877, p. 202) authorizing county courts, upon proper notice, to cancel all warrants in the hands of the county clerk which had not been called for by the payees within five years after they had been issued. The necessity

of this legislation is not apparent upon its face. It no doubt had its origin in much inconvenience occasioned by the neglect of parties to call for warrants allowed them upon demands against the county, for its provisions are directed against the rights of such parties, and confer an authority upon the county court, upon proper notice, to annul the warrants on account of such neglect to call for them. This section is in no wise a regulation of the ministerial duties of any county officer. In 1879, a further addition was made to the same idea, and it was incorporated in section 5398, Rev. St. 1879, in the form in which it now stands in Revised Statutes 1889. The addition made in 1879 was to the effect that:

"After the delivery of the warrant, if it shall not be presented to the county treasurer for payment within five years after its date, or being presented within that time and protested for want of funds to pay it, shall not be again presented for payment within five years after funds shall have been set apart for the payment of it, it shall then be barred and shall not be paid, nor shall it be received in payment of any taxes or other dues."

This was a still further limitation upon the right of the holder of the warrant to exact its payment. It was a limitation upon his right, and not a direction in any manner to the officers of the county, except that it prohibited the acceptance of the warrant in payment of taxes or dues to the county. The occasion for the amendments of 1879 ingrafted upon the original idea of 1877, finds its justification in an opinion of the supreme court of Missouri,—Logan v. Barton Co. Court (1876) 63 Mo. 349,—wherein the supreme court expressed a doubt whether the general statute of limitations would begin to run against a county warrant until funds had been provided for its payment in the hands of the treasurer; and wherein it further held, conceding that statute would apply even though no funds were set apart, yet the collector and treasurer, being authorized to receive such warrants in payment of state dues, being the agents of the county, might waive the operation of the statute of limitation. It was to meet the difficulties suggested by this decision that the amendment we have before referred to was doubtless formulated. Section 3195 thus fixes a definite and just period, conditioned upon the necessities, frequently arising, in which county funds are found for a limitation of the life of county warrants, and withdraws the power of the collector or treasurer to waive this limitation. When warrants should be presented for payment, and the treasury be barren of money with which to make the payment, it would be a manifest injustice, the debt in no wise being disputed, to require the owner of the warrant, in order to maintain its life, to bring suit against the county, and thus not only perplex him, and dishonor the credit of the county, but also to involve it in needless expense and litigation. Upon the other hand, if there were money in the treasury with which to pay the warrant, five years is thought to be ample time within which the creditor ought to be allowed to present his warrant and procure its payment. If this construction does not prevail, then there is an entire want of mutuality in the operation of the 10-year statute of limitation. If the owner of the warrant should not call for it until the expiration of 4 years after it had been author-

ized by the county court and in the hands of its clerk, and were to allow it to run for 5 years thereafter without presentation to the county treasurer, he would be barred by the very language of this section, and could not plead, as the only period of limitation of action, the general statute of 10 years. This want of reciprocal operation would be so manifestly unjust as to require us to search for some invincible reason apparent upon the face of the statute before we could give it judicial sanction. It would be unjust to say that it does not operate as a limitation when the county is sued, but does when it may be invoked to defeat the holder of the warrant. To that extent it is beyond doubt a substitution of a different period of limitation. But why indulge in this sort of argument when the statute upon its face, in unequivocal terms, affixes the limitation which it names as a bar to the warrant? The language of the statute is, "such warrant shall be barred and shall not be paid." What does this mean, unless it is a legal bar to the maintenance of an action upon it? It will not do to say that this language is a limitation upon the authority of an officer to receive it in payment of county taxes, for this phrase is followed immediately by an independent clause, in disjunctive form, prohibiting its receipt in payment of any taxes or other dues. We must give force, according to the usual canon of construction, to every phrase of a statute, if it be at all sensible or practical to do so. Nor are we authorized, in interpreting a statute, to say that phrases following each other are simply cumulative of the same thought, where their literal signification expresses different meanings and different ideas. It is true, section 3195 is lodged under an article entitled "County Treasurers and County Warrants," but it comprehends many other subjects than those which, for the purpose of collation, are supposed to be more appropriately arranged under that title. Among other things, that article provides for the authority of the county court to audit claims against the county, settlements with collectors, duty of the county court in relation to sixteenth sections of land, and so a variety of subjects are embraced. Limitations, except of a general character, are not usually found in the general provision relating to that title. They may be expressed in many different forms, and may be as a condition, or an elemental part of a new right or remedy, or even in imposing and defining the duties of public officers in the administration of official business. This precise question was before this court in the case of U. S. v. Brown, 41 Fed. 481, and my distinguished predecessor, Judge Thayer, there held that section 3195, and not section 6774, was the limitation that applied to county warrants.

But there is another reason why this defense cannot avail upon the petition and the admitted facts in the answer. This warrant was annually presented, from the time it was issued, to the county treasurer for payment. On each occasion its payment was refused solely for the want of funds, and such refusal stamped or written upon the back of the warrant. The general statute of limitations (section 6793) contains a provision in effect that a written acknowledgment of a debt shall take it out of the operation of the statute of limita-

tions. The indorsement made by the county treasurer upon this warrant is one he is authorized to make by the statute, and is, in effect, an acknowledgment in writing of the debt. The statute above quoted does not require a promise to pay, in addition to the acknowledgment, in order that the running of the statute may be checked; a simple acknowledgment of the obligation in any writing is sufficient for that purpose. In Logan v. Barton Co. Court, supra, the supreme court held that the treasurer and collector of the county were authorized to waive the running of the statute of limitation. That power is not withdrawn, but limited to a given period, by section 3195; hence the acknowledgment of the debt, having been made in a form authorized by law, by a person empowered by statute to make it, will take the warrant without the operation of the statute of limitation. This rule is abundantly sustained. Chidsey v. Powell, 91 Mo. 622, 4 S. W. 446. With respect to the plea of five years' limitation predicated upon the provisions of section 3195, it is sufficient to say that there is no allegation in the answer sufficient to meet the provisos contained in that section. The demurrer to the fourth and sixth defenses will be sustained.

KLEVER et al. v. SEAWALL et al.

(Circuit Court of Appeals, Sixth Circuit. May 14, 1894.)

No. 150.

1. PRACTICE — FINAL JUDGMENT UPON ONE OF SEVERAL CAUSES OF ACTION — WRIT OF ERROR.
   It does not affect the finality of a judgment that the cause of action upon which it was rendered was united, in the same petition, with other causes of action, which have not yet been finally adjudicated; and the time for suing out a writ of error upon such final judgment runs from its entry, without reference to the disposition of such other causes of action.
2. SAME—VACATING JUDGMENT AFTER THE TERM.
   The circuit courts of the United States are without power to set aside a final judgment, for error of law, after the term at which it was entered, and when no motion for the purpose had been filed before the close of the term.
3. SAME—OCCUPYING CLAIMANT'S LAW OF OHIO.
   Under the occupying claimant's law of Ohio (St. Ohio, §§ 5786–5795), providing that a person in possession of lands under a certain specified color of title shall not be evicted under an adverse title until compensated for improvements, and that the court rendering judgment against such an occupying claimant shall make an entry of the claim, provide for a trial of the questions of fact by a jury, and enter judgment in certain forms, according to the facts found, a claimant, in order to avail himself of the benefit of the act, must give notice of his claim before or at the time of entering judgment for the plaintiff, and is barred therefrom by the entry of a judgment for the recovery of the real estate before the interposition of his claim.

In Error to the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

This was an action by J. Hairston Seawall and others against J. M. Klever and Edmund Klever for the recovery of an undivided interest in certain lands, for mesne profits, and for partition. Judg-

ment was entered for the plaintiffs, by default, for the recovery of the land and the mesne profits, and for partition to be made by commission. After the term at which such judgment was entered, defendants moved to set it aside, and also made an application for the allowance of the value of improvements under the occupying claimant's law of Ohio. The court denied both motions. Defendants bring error.

The defendants in error, and plaintiffs below, filed their petition in the circuit court for the Southern district of Ohio, Eastern division, seeking to recover from J. M. Klever and Edmund Klever an undivided one-third of a tract of 100 acres in Fayette county, Ohio, in the said district and division. The petition was filed October 7, 1889. It made the necessary allegations of diverse citizenship of the plaintiffs and defendants, averred that the value of the one-third of the tract sued for exceeded $2,000, and asked judgment for $800, as damages for the unlawful detention. The defendants were duly served with summons. J. M. Klever filed an answer August 5, 1890, in which he averred that the one-third of the land described in the petition was of a less value than $2,000, and that the court had no jurisdiction. He denied the title of the plaintiffs. He averred that the tract in question was not owned or possessed in common by himself and his codefendant, but that he himself owned 61 acres in severalty, and his brother and codefendant owned the remainder in severalty; and he therefore pleaded a misjoinder of causes of action. On January 10, 1891, the plaintiffs below, by leave of court, filed an amended petition, in which they repeated the averments of the original petition, increasing the amount claimed for damages and rents and profits to $8,000; and, in addition to a prayer for possession of the land and a judgment for $8,000, they added the following: "They also pray for the partition of said real estate, and that their undivided estate therein may be set off to them in severalty."

On February 10, 1891, the defendants filed the following motion: "And now come the defendants, and move the court to strike the amended petition of plaintiffs from the files: (1) Because said amended petition states and sets forth other and different causes of action than are set forth in the petition, and is not an amendment to the cause of action in the petition. (2) Said amended petition pretends to set forth a cause of action in equity, while said original petition is an action at law. (3) The amended petition sets forth several different causes of action not contained in the petition." This motion the court overruled February 21, 1891, by the following entry: "This cause came on to be heard on the motion of the defendants to strike the amended petition of the plaintiffs from the files on the grounds therein stated, was argued by counsel, and submitted to the court, on consideration whereof the court finds said motion not well taken, and doth overrule the same, to which defendants except. The defendants are hereby given 30 days in which to answer the amended petition." The defendants filed no answer, nor did they ask leave to refile the answer to the original petition as an answer to the amended petition within the 30 days allowed by the foregoing entry. Nothing whatever was done in the case by either party until December 16, 1891, when, upon the application of the plaintiffs, the court gave judgment by default against the defendants, James M. Klever and Edmund Klever. The court found that the said defendants had been duly served with process, and that they were in default for answer or demurrer to the amended petition, and that, from the evidence and exhibits, the allegations of the amended petition were true, and ordered and adjudged that the plaintiffs recover from the said defendants, and each of them, an equal undivided one-third part and interest in the real estate described in the amended petition, and the costs therein expended. The court then proceeded to order partition of the interest adjudged to the plaintiffs and the several interests found to belong to the defendants. In the event of its being impossible to divide the parts of the tract without manifest injury, the commissioners were ordered to value the same in money. It was further considered by the court that plaintiffs recover one-third of the rents and profits of the land from January 10, 1885, to be determined by a special master commissioner. The term of court at which this judgment was entered closed on

the day before the 1st Tuesday in June, 1892. A writ of partition issued on this judgment June 16, 1892, and was returned not served. On June 17, 1892, the time for executing the writ was extended from March 15, 1892, the date fixed in the judgment, until October 1, 1892. On June 19, 1892, an alias writ of partition issued. On August 27th, and before this writ was executed, defendants filed a motion to set aside the judgment rendered December 16, 1891. The motion was as follows: "Now come the defendants, and move the court to vacate and set aside the judgment and decree heretofore rendered and entered in this cause on the 16th day of December, 1891, for the following reason, to wit: Said judgment and decree was irregularly obtained, in this: (1) Said defendants were represented in said cause by counsel who had appeared and assisted in the hearing of a motion and demurrer, and had filed the answers of these defendants to the petition, which said answers were still pending and on file at the time said judgment and decree was taken, and the defenses therein set up unadjudicated by the court; and said judgment and decree was taken and entered without any notice to defendants or their said counsel, although counsel for plaintiffs were well aware and understood that these defendants were represented by counsel, and desired to and were making a defense herein. (2) Said judgment and decree was entered as on default while there were issues made up by the said answers of these defendants to the petition, which these defendants had the right to have tried by a jury. (3) Said judgment and decree was taken and entered as on default for answer while these defendants' said answers were on file and undisposed of. (4) Said judgment and decree was taken as on default for answer to the amended petition filed herein, while said amended petition contained no new matter except a prayer for the partition of said premises in case the title of plaintiffs should be found and established to the one-third part thereof, and the original petition had been and was then fully pleaded to by said answers of defendants, and the issues as to said title of plaintiffs fully made up. These defendants were wholly unaware of the rendition of said judgment and decree until on or about the ——— day of July, 1892." This motion was overruled, and the following bill of exceptions was taken, to show the evidence upon which the action of the court was based:

"Be it remembered that on the hearing of the motion to set aside the default and the said judgment of the court rendered thereon on the 16th day of December, 1891, the defendants tendered to the court answers putting in issue all the facts alleged in the amended petition, and offered evidence to show that said judgment was taken without having said cause noted for trial, and without notice to defendants, and that the defendants had no actual notice of said judgment having been taken until a few days prior to the 21st day of July, 1892, when the special master wrote to defendants' attorney of his intention to take testimony on the 21st day of July, 1892, as to rents and profits, which was done on said date. Also, Mills Gardner, attorney for the defendants, stated to the court, professionally, in explanation of the fact that no answer to the amended petition had been filed, that he, as attorney for the defendants, relied on the original answer of the defendants to the petition as putting in issue all the statements and allegations of the amended petition, and deemed no further answer on behalf of the defendants necessary for the putting in issue of the question of the ownership and right of possession of plaintiffs in and to the real estate described in the petition, and for those reasons he, on behalf of the defendants, filed no further answer, nothing of which so stated, however, he had communicated to the plaintiffs or their attorneys. That he, as attorney for said defendants, had no actual notice, knowledge, or information that said judgment was to be or had been taken till a few days prior to the 21st day of July, as aforesaid. It appeared to and was further found by the court that, by the rules of practice in the circuit court of the United States for the Southern district of Ohio, no cases can be or should be noted for trial except when at issue, and that no notice of any kind to the adverse party is required in taking default judgment. And this was all the evidence offered by either party. And the court having overruled said motion of the defendants, and refused to set aside default judgment, and permit defendants to plead further to said amended petition, the defendants duly excepted to said ruling and decision of the court at the time, and tender

this, their bill of exceptions, which is allowed, signed, sealed, and ordered to be made part of the record.

"[Seal.] George R. Sage, U. S. District Judge,
"Sitting in and Holding the Circuit Court in the Above-Entitled Cause."

The commissioners made return of their doings on October 27, 1892. In their report they say, among other things: "As there had been no recent survey of the lands, we employed a competent surveyor, as by said decree we were authorized to do; and our partition is based on the amount of land in each of said tracts, as shown by said resurvey, the report of which is filed herewith. In respect of improvements, the buildings on the several tracts hereinafter partitioned and allotted are all set off to the respective defendants, but their value is taken into account in making partition." They then reported that, of the 67-acre tract in possession of James M. Klever, they set off to him 44.74 acres, and the remainder, or 22.37 acres, to the plaintiffs, and that the 25-acre tract in possession of Edmund Klever could not be subdivided without injury thereto, and they returned the value thereof. The special master reported October 31, 1892, that there was due the plaintiffs, as rents and profits from the 61-acre tract, $536.85, and, from the 25-acre tract, $291.76. On November 2, 1892, plaintiffs moved to confirm the reports of the commissioners in partition and the special master. On December 6, 1892, the defendants filed the following application. "And now come defendants, and still protesting against the former judgments and orders heretofore, and waiving and admitting nothing, say that for more than 60 years defendants and their grantors have been, by connected chain of title of record, in the belief that they were the owners thereof in fee simple, in undisturbed possession of said premises, and have made many lasting and valuable improvements thereon, and paid the taxes and kept up repairs, all of which defendants are justly entitled to have allowed and accounted for, and that the former order of said court as to rents and profits should be modified so as to take account of all of said improvements, taxes, repairs, etc., which these defendants pray may be made accordingly." On May 16, 1893, Judge Sage overruled the motion of the defendants to set aside the judgment (as already stated); denied the foregoing "application" (Seawell v. Crawford, 55 Fed. 729), and entered a judgment confirming the report of the commissioners in partition and of the special master, and ordering the 25-acre tract sold. Exceptions were taken to the action of the court, and a writ of error was sued out from this court to reverse the same.

The following errors were assigned: (1) The court erred in rendering and permitting to be entered the judgment and decree herein on the 1st day of December, 1891, as upon default. (2) The court erred in overruling the motion of defendants to set aside said alleged and pretended judgment entered on said 1st day of December, 1891, and in refusing to permit defendants to further answer and defend against said action. (3) The court erred in refusing to open up and set aside default judgment, if the same was properly entered, and in refusing to permit defendants to file their answer to the amended petition, if any further answer were necessary to put in issue the matters thereof. (4) The court erred in overruling the motion of the defendants to set aside the report of the commissioners in partition. (5) The court erred in overruling the motion of the defendants to set aside the report of the special master commissioner appointed herein to take account of rents and profits.

Mills Gardner and Humphrey Jones, for plaintiffs in error.

Matthews & Cleveland, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and BARR, District Judge.

TAFT, Circuit Judge (after stating the facts). Paragraph 6 of section 5019 of the Revised Statutes of Ohio provides that there may be united in one cause of action "claims to recover real property, with or without damages for the withholding thereof, the rents and

profits of the same, and the partition thereof." "The action for damages for withholding real property and for rents and profits," under the Ohio Code, is the same as the action of trespass for mesne profits at common law. McKinney v. McKinney, 8 Ohio St. 423, 428. The amended petition united three causes of action—First, a suit for recovery of the possession of land; second, an action for trespass for mesne profits; and, third, an action for partition. The judgment entered December 16, 1891, found for the plaintiffs on the first cause of action, and adjudged that they were entitled to the possession of the undivided one-third interest sued for, and awarded the costs on that issue. This was, so far as the first cause of action was concerned, a final judgment. Had the plaintiffs then chosen to ask for it, they might have had execution on the judgment, and the issuance of a writ of possession. A judgment is final when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined. St. Louis, I. M. & S. R. Co. v. Southern Exp. Co., 108 U. S. 24, 28, 2 Sup. Ct. 6. It cannot affect the finality of a judgment that the cause of action upon which it was rendered was united in the same petition with other causes of action which have not yet been finally adjudicated. As the judgment of December 16, 1891, adjudging title and right of possession in plaintiffs, was a final judgment, the time within which a writ of error could be brought to review it began to run from that date, and expired six months thereafter. The writ of error in this case was not sued out until August 28, 1893. We have no power, therefore, to review the correctness of that judgment, and the first assignment, which seeks to have us do so, cannot be sustained.

The second and third assignments of error are directed to the action of the circuit court in refusing to set aside the judgment of December 16, 1891. The entry denying the motion for this purpose was made May 16, 1893, so that, if that action of the circuit court was a final order to which error lies, the writ was sued out in due time. Defendants, by their motion, sought to have the judgment set aside, on the ground that the court had erred in holding the defendants in default for answer to the amended petition, when there was on file an answer of one of the defendants to the original petition, which was broad enough fully to make an issue with the averments under the first cause of action on which judgment was rendered. The motion was made nine months after the rendition of the judgment, and three months after the close of the term at which it was entered. The court is conceded to have had jurisdiction of the parties and the subject-matter. No fraud in procuring the judgment is alleged, but only irregularity, and that consists solely in the court's finding a default to exist when, as the defendants claim, it was not in law a default. It is true there is an averment that the judgment was entered without notice to counsel for defendant, but, if they were in default, they were not entitled to notice.

Before we can consider whether the court was in error in holding defendants to be in default, we are, therefore, confronted with the question whether a circuit court of the United States has the power

to set aside a final judgment for error of law after the term at which the judgment was entered, and when no motion for the purpose had been filed before the close of the term. In Bronson v. Schulten, 104 U. S. 410, it was sought, long after the term at which it had been rendered, to correct a judgment for the recovery of duties erroneously assessed and collected, in which the amount of the recovery was much less than it should have been, through an error of a master to whom the determination of the amount had been referred by agreement of parties. The circuit court granted the motion, but this action was reversed by the supreme court. Mr. Justice Miller, in speaking for the court, said (page 415):

"It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them, during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court. But it is a rule equally well established that, after the term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and, if errors exist, they can only be corrected by such proceedings, by a writ of error or appeal, as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court that, while realizing that there is no court which can review its decision, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court."

The learned justice then referred to the common-law writ of error coram vobis by which a court, having rendered judgment, was enabled to set it aside after the term, for some error in fact which had escaped attention and was material in the proceeding,—as that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared or been appointed, or was a feme covert, or for some misprision of the clerk,—and pointed out that, in practice, this writ had been supplanted by a motion for the same purpose. Pickett's Heirs v. Legerwood, 7 Pet. 144. But the conclusion was reached that the writ coram vobis did not "reach the facts submitted to a jury, or found by a referee or by the court sitting to try the issues," and therefore that it did not reach the case then before the court. If that be true, a fortiori does it not reach alleged errors of law upon which the judgment was based. And this is expressly held in the case of Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. 901. See, also, Hickman v. Ft. Scott, 141 U. S. 415, 12 Sup. Ct. 9; Bank v. Moss, 6 How. 31; Noonan v. Bradley, 12 Wall. 121; Sibald v. U. S., 12 Pet. 488. Nor can the plaintiffs in error derive any aid from the remedies for correcting judgments after the term provided by the statutes of Ohio. In the case of Bronson v. Schulten, where the judgment sought to be set aside was rendered in the circuit court of the United States, sitting in New York, a statute of that state was relied on as furnishing ground for the action of the lower court in modifying the judgment after the term. To this Justice Miller made reply:

"The question relates to the power of the courts, and not to the mode of procedure. It is whether there exists in the court the authority to set aside,

vacate, or modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state or the practice of its courts."

We are therefore of opinion that the motion to set aside the judgment of December 16, 1891, upon the first cause of action,—i. e. the recovery of the land,—was rightly overruled, for want of power in the court to grant it. There is no hardship in this result. The defendants below, being in court as parties, were charged with notice of everything done in the case (White v. Crow, 110 U. S. 183, 4 Sup. Ct. 71), and, at any time within six months after the judgment, could have brought a writ of error to review the holding of the court in respect to the existence of a default. If any equitable reason exists for setting aside the judgment or enjoining its execution, that should be taken advantage of by bill in equity. The writ coram vobis (or the motion which is its substitute in practice) does not afford a remedy on such a ground.

The next assignments of error are to the action of the court in overruling the motions of the defendants to set aside the report of the commissioners in partition and the report of the special master. The only reason brought to the attention of this court by the brief or argument of counsel for plaintiffs in error why these motions should have been granted is that the plaintiffs in error (the defendants below), after the reports had been made, filed an application to have accounted to them all the improvements made by them and their grantors in bona fide reliance upon a title of record since 1823. It is said that they were entitled to an allowance for improvements under the occupying claimant's law of Ohio. Section 5786, Rev. St. Ohio, provides that a person in quiet possession of lands or tenements, and claiming to own the same, who has obtained a certain specified color of title to, and is in possession of, the same, without fraud or collusion on his part, shall not be evicted or turned out of possession by any person who sets up and proves an adverse and better title, until the occupying claimant or his heirs are fully paid the value of all lasting and valuable improvements made on the land by him, or by the person under whom he holds, previous to receiving actual notice by commencement of suit on such adverse claim of title. Section 5788, as amended by act of April 21, 1890 (87 Ohio Laws, 237), provides that the "court rendering judgment against the occupying claimant, in any case provided for by this sub-division, shall at the request of either party cause a journal entry to be made; and the cause shall then proceed as in other civil cases." Section 5789 (as amended) provides that, "for the trial of the question of fact remaining undisposed of, a jury shall be impaneled and sworn as in other civil cases and shall at once proceed," etc. Sections 5792, 5793, 5794, and 5795 provide the forms of judgment to meet the possible verdicts of the jury and judgments of the court as to the improvements, their value, and the good faith with which they had been made, together with the proper offsets against the same, arising from rents and profits withheld from the successful claimant. It is obvious to us that, in order that a defendant in an

action for the recovery of real estate may avail himself of the benefit of the occupying claimant law, he must give notice of his claim to the court before or at the time judgment for plaintiff on the main action is entered, or at least before the term has passed in which such judgment is entered. Otherwise the successful plaintiff can never know when he has a clear title to the land adjudged to be his. Such seems to be the opinion of the supreme court of Ohio; for in Raymond v. Ross, 40 Ohio St. 343, it was held that a claim for improvements under the occupying claimant law was barred by a judgment for the recovery of the real estate, because, if valid, the claim for improvements should have been set up in the main action. We think, therefore, that the default judgment of December 16, 1891, was a bar to any claim by the defendants below under the occupying claimant's law.

Secondly, it is urged that, in the partition of the land, the defendants are entitled to compensation for the value of permanent improvements made by them in good faith, and especially that they may use this as a set-off to the claim for rents and profits. Such relief is frequently accorded in equity, but the difficulty in doing so in the present case is that the action below was on the law side of the court, where no equitable remedy can be administered. The court below treated the action for partition as an action for partition at law, and held that such an action lay in Ohio, and could be united with an action for the recovery of the real estate and mesne profits. We do not understand that, under the writ of partition at common law, there was any power to order a partition sale and division of the proceeds, and yet this is what the court did in regard to the 25-acre tract of Edmund Klever. From this course, we must infer that the circuit court was proceeding under the partition statute of Ohio. The question, therefore, arises whether a partition under the Ohio statute is cognizable by a federal court of law, or should be properly sought by bill in equity. The question has not been argued or assigned for error, but it is so fundamental in the partition proceedings, which are attacked, that we cannot overlook it. It is too important to decide it without argument. We shall therefore affirm the default judgment and the judgment for mesne profits, and set the case down for reargument on the point above stated.

DAVIS v. DAVIS et al.

(Circuit Court, N. D. Georgia. December 10, 1894.)

1. PLEADING—DECREE.
   A petition, stating a decree entered in a former proceeding, either as matter of inducement or as the basis of plaintiff's action, need not set out the petition on which such decree was rendered.

2. SAME—CONTRACT MADE UNDER DIRECTION OF COURT.
   D. had an agreement with the executors of her husband's estate as to what should be allowed her from such estate, in settlement of her claim for dower, as against the provisions of her husband's will, to which agreement the executors desired to obtain the assent of the court. They accordingly filed a petition in a state court, and obtained a decree ratifying