

the verdict is clearly against the weight of evidence, or contrary to the law as given in its instructions, to set the verdict aside. But from the action of the court in granting or refusing a new trial (under our system and practice) there is no appeal. *Railroad Co. v. Charles*, 2 C. C. A. 380, 51 Fed. 562, and authorities there cited. As was said by the court in *Insurance Co. v. Ward*, 140 U. S. 77, 91, 11 Sup. Ct. 720:

"It may be that, if we were to usurp the functions of the jury, and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error. In such a case we are confined to the consideration of the exceptions, taken at the trial, to the admission or rejection of evidence, and to the charge of the court and its refusals to charge. We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted."

See, also, *Railroad Co. v. Winter's Adm'r*, 143 U. S. 61, 75, 12 Sup. Ct. 356; *Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. 387.

The judgment of the circuit court is affirmed.

WOODBRIDGE & TURNER ENGINEERING CO. v. RITTER.

(Circuit Court, E. D. Pennsylvania. September 16, 1895.)

No. 30.

1. ACTION ON JUDGMENT OF STATE COURT—TRANSCRIPT OF RECORD.

In an action on a judgment of a state court, an exemplification which is a transcript of the "complete record" of the proceedings, made up according to the practice in the courts of the state, is sufficient when it shows that the court had jurisdiction of the subject-matter and the parties, and that the judgment was in fact rendered.

2. SAME—PENDENCY OF APPEAL—SUPERSEDEAS.

An action on a judgment of a state court will lie notwithstanding the pendency of an appeal; and if, in such case, the affidavit of defense alleges that the appeal operates as a supersedeas, it must not merely aver this as a conclusion of law, but must show the facts upon which it is based, and must therefore state that the security required to suspend execution was given.

This was an action at law by the Woodbridge & Turner Engineering Company against J. Rush Ritter upon a judgment rendered by the supreme court of the state of New Jersey. Rule for judgment for want of a sufficient affidavit of defense.

Patterson & Carr, for plaintiff.

Wm. A. Manderson and Chas. H. Eimerman, for defendant.

DALLAS, Circuit Judge. This action is brought on a judgment of the supreme court of the state of New Jersey. The affidavit of defense sets forth:

"* * * That the said exemplification of record attached to the plaintiff's statement of claim in this case is not the full and complete record of the proceedings in said cause in said supreme court of the state of New Jersey as the same appeared of record and existed on the files of the said office of the clerk of said court at the time of the alleged attestation of said exemplifica-

tion at the time of the date thereof, namely, July 6, 1895, in this: That there are errors and defects existing in that portion of the exemplification of the record attached to plaintiff's statement of claim filed in this case from the record on file in said court; that said exemplification of record does not contain the report of the referee filed in said proceedings, which is material and important; that said record does not contain the oath of the referee, the notice of the filing of the referee's report, which is also important and material, and should have appeared upon the record; that no copy of the docket entries of the proceedings in said supreme court of New Jersey in said cause or of the entry in the judgment docket or index of any judgment having been entered or recovered, the said exemplification fails to show any bill of costs filed in the sum of three hundred and fifty dollars and sixty-four cents, or any taxation thereof, although suit is sought to be brought thereon, and judgment thereon is sought to be recovered in this action; the said exemplification fails to show the issuance of a writ of *fi. fa.* in said action, which, as a matter of fact, was issued out of said supreme court on the 27th day of June, 1895,—all of which facts are true, as will appear by a comparison of the exemplification filed in this case, and the record as it appears in the supreme court of New Jersey. That the judgment so rendered in the supreme court of New Jersey was appealed from, and a writ of error taken to the court of errors and appeals of the said state of New Jersey, notice of the taking of which was served upon the counsel of the said plaintiff in said action. That the said writ of error has been perfected, and the writ of error promptly brought into the office of the said supreme court, and entered upon the docket thereof in said cause on the 12th day of July, 1895. That the said writ of error, as deponent is advised, informed, and believes, was taken within the statutory period to enable the same to be a supersedeas, which is still pending and undetermined. That, there being no final judgment unappealed from, this court has no jurisdiction over the subject-matter of this controversy. The record, the exemplification of which is filed in this cause, and the basis of this action being imperfect, incomplete, and defective, this court has no jurisdiction."

The validity of the two defenses thus set up is challenged by the plaintiff's rule for judgment.

1. The exemplified copy which is said to be defective is not so. It is a transcript of the "complete record." The entries and documents referred to in the affidavit constitute no part of it. Revision N. J. 1709-1877, p. 877. The form of the record of a judgment is regulated by the practice of the court in which the action is prosecuted. The record sued upon in this case shows the existence of every essential fact. It appears from it that the court had jurisdiction of the subject-matter of the action and of the parties, and that a judgment had in fact been rendered. *Maxwell v. Stewart*, 22 Wall. 79.

2. It has been held in this circuit (*Union Trust Co. v. Rochester & P. R. Co.*, 29 Fed. 609) that "an action of debt will lie on a judgment of another state, notwithstanding the pendency of an appeal or writ of error." This affidavit asserts that the appeal from the New Jersey judgment operated as a supersedeas, but this averment is of a legal conclusion; and the facts upon which the correctness of that conclusion depends are not alleged. It is not stated that the security required to suspend execution was entered. Moreover, even if it appeared that the appeal superseded the judgment, it is, to say the least, extremely doubtful whether the rule which was unqualifiedly laid down in *Union Trust Co. v. Rochester & P. R. Co.*, *supra*, would not still be applicable. The rule for judgment is made absolute.

WOODBIDGE & TURNER ENGINEERING CO. v. RITTER.

(Circuit Court, E. D. Pennsylvania. October 2, 1895.)

APPEAL TO SUPREME COURT.

The jurisdiction of the court is not drawn in question by the denial of the right of the plaintiff to the judgment entered in its favor, nor is the authority of the court to enter the judgment put in question by the allegation that it is erroneous, so as to allow a writ of error from the circuit court direct to the supreme court, under the act establishing circuit courts of appeals.

Sur petition for allowance of a writ of error to the supreme court of the United States.

Patterson & Carr, for plaintiff.

William A. Manderson and Charles H. Erdman, for defendant.

DALLAS, Circuit Judge. The act "to establish circuit courts of appeals," etc., provides that writs of error may be taken from the circuit courts direct to the supreme court in any case in which the jurisdiction of the court is in issue, and that in such cases the question of jurisdiction alone shall be certified. In this case there is no such issue or question, and the assumption to the contrary, upon which this petition is founded, is, in my opinion, a mistaken one. The jurisdiction of the court was not drawn in question by the mere controversion of the right of the plaintiff to the judgment which has been entered in its favor, nor is the authority of the court to enter that judgment put in issue by the allegation that it is erroneous. *Cook Co. v. Calumet & C. Canal & Dock Co.*, 138 U. S. 653, 11 Sup. Ct. 435. It is true that the petitioner has asserted, in the affidavit of defense, which has been adjudged insufficient, that the facts therein set forth are jurisdictional facts, but this incorrect assertion does not impress that character upon them. I see no reason to doubt that this judgment is reviewable by the court of appeals for this circuit, and, should a petition for the allowance of a writ of error to that end be presented, it will be entertained. The prayer of this petition is denied.

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BERRY v. LAKE ERIE & W. R. CO.

(Circuit Court, D. Indiana. December 5, 1895.)

1. FEDERAL COURTS—GENERAL LAW—IMPUTED NEGLIGENCE.

The question whether or not the negligence of a parent should be imputed to a child of tender years is one of general law, upon which a federal court will be guided by its own views of that law, and is not bound by the decisions of state courts.

2. NEGLIGENCE—IMPUTED—PARENT AND CHILD.

The negligence of a parent, in permitting a child of tender years to wander from home alone, will not be imputed to the child if it is injured by another's negligence while so wandering alone.

3. SAME—CHILD OF SCHOOL AGE.

It seems that, even if negligence of a parent were to be imputed to a child, it is not negligence to permit a child of school age to go alone, through the streets of a city, to school.