355; Polleys v. Improvement Co., 113 U. S. 82, 5 Sup. Ct. 369. The various circuit court of appeals cases, with reference to the provisions of section 11 of the act creating this court, speak with no uncertain voice as to the practice. "The United States circuit court of appeals has no jurisdiction in a case where more than six months intervene between the entry of judgment and the day on which the writ of error is sued out." Coulliette v. Thomason, 50 Fed. 787, 1 C. C. A. 675; U. S. v. Baxter, 51 Fed. 624, 2 C. C. A. 410; Union Pac. Ry. Co. v. Colorado Eastern Ry. Co., 54 Fed. 22, 4 C. C. A. 161; Stevens v. Clark, 62 Fed. 321, 10 C. C. A. 379; White v. Bank, 71 Fed. 97, 17 C. C. A. 621. The motion to dismiss as to Botefuhr is well taken, and must be allowed.

The granting of this motion as to Botefuhr necessitates like action as to the motion of defendants Tynan and Stoldt, which is based upon the ground, among others, that a release as to one of the joint obligors upon the bond releases all. The failure of the plaintiff to sue out its writ of error within six months after the entry of the judgment against Botefuhr makes that judgment final, and operates as a release to Botefuhr from all liability upon the bond. If the plaintiff had brought all the defendants before the court, to correct the judgments which were adjudged in favor of defendants severally, within the time allowed by statute, the action of the court below could have been reviewed; but the writ of error seeks only to review the judgment as to two of the defendants. The action being joint as to all, the defendants before the court have the right to object to any review of the case on the merits, upon the ground that their co-defendant has not been brought before the court to share in the costs, if any were to be adjudged against them. The objection here made stands substantially upon the same plane, and is based upon the same reason, as if, though the action had been originally brought against the two defendants, or had been brought against all, and a judgment had thereafter been rendered against one of the joint obligors. In either event, objections based upon the ground that all the joint obligors must be proceeded against jointly would have to be sustained.

In Freem. Judgm. § 231, it is said:

"Whenever two or more persons are jointly liable, so that, if an action is commenced against any less than the whole number, the nonjoinder of the others will sustain a plea in abatement, and judgment against any of those so jointly bound merges the entire cause of action. The cause of action being joint, the plaintiff cannot be allowed to sever it against the objection of any of the defendants. By taking judgment against one, he merges the cause of action as to that one, and puts it out of his power to maintain any further suit, either against the others severally, or against all combined."

Numerous authorities are cited in support of this text.

In Sessions v. Johnson, 95 U. S. 347, and U. S. v. Ames, 99 U. S. 35–44, the court said:

"Even without satisfaction, a judgment against one of two joint contractors is a bar to an action against the other, within the maxim, 'Transit in rem judicatam'; the cause of action being changed into matter of record, which has the effect to merge the inferior remedy in the higher. King v. Hoare, 13 Mees. & W. 504. Judgment in such a case is a bar to a subsequent action against

the other joint contractor, because, the contract being merely joint, there can be but one recovery; and, consequently, the plaintiff, if he proceeds against one only of two joint promisors, loses his security against the other, the rule being that by the recovery of the judgment the contract is merged, and a higher security substituted for the debt."

In Suydam v. Barber, 18 N. Y. 468, the court said:

"According to the common law of this state, a judgment against one of several joint debtors, obtained in an action against him alone, is a bar to an action against the others. Robertson v. Smith, 18 Johns. 459; Pierce v. Kearney, 5 Hill, 82; Olmstead v. Webster, 8 N. Y. 413. It is held to be a bar upon the ground that, by the recovery of the judgment, the promise or cause of action as to the party sued has been merged and extinguished in the judgment, 'by operation of law, at the instance and by the act of the creditor.' This is plainly founded upon the nature and force of our law, and not upon the idea that the creditor is deprived of his right for any other reason than that, by the first suit and judgment, he has placed himself in a position where he is unable, legally, to assert or enforce his demand."

In the present case, the plaintiff, by its own act, has released one of the joint obligors of all liability, and is now seeking to enforce its rights against the others after the cause of action has been released as to one "by operation of law, and at the instance and by the act of the creditor." The general rule that a release of one of several joint obligors operates as a release of all is well settled. 20 Am. & Eng. Enc. Law, 751, and authorities there cited. There are several exceptions to this general rule, which need not be noticed, as this case does not come within any of the recognized exceptions of the adjudged cases.

The motion of Tynan and Stoldt is sustained. The writ of error is dismissed. The respective defendants are entitled to judgment for their costs.

SPIRO v. FELTON.

(Circuit Court, E. D. Tennessee. March 20, 1896.)

No. 995.

1. EVIDENCE—INJURY CAUSING DEATH—TENNESSEE STATUTE.
   In an action for damages for an injury causing death, brought, under the Tennessee statutes (Mill. & V. Code, §§ 3130, 3134), for the benefit of the widow or next of kin of the deceased, evidence of the number and ages of the children of the deceased is competent.
2. PRACTICE—SETTING ASIDE VERDICT—WEIGHT OF EVIDENCE.
   The federal courts have no power to set aside a verdict because against the weight of evidence, however decided that weight may be, if any evidence has been given which would have rendered it improper for the court to direct a verdict.

Ingersoll & Peyton, for plaintiff.
Chambers & Head, for defendant.

CLARK, District Judge. It is urged as ground for a new trial in this case that the court allowed plaintiff to prove the number of and ages of the children. It is certainly true that, as a general proposition of law, such evidence would not be relevant. As the right of action given in cases like this for death of a person is, under the statute (Mill. & V. Code, § 3130), "for the benefit of his widow or