## GREGORY v. PIKE.

(Circuit Court of Appeals, First Circuit. October 23, 1896.)

No. 195.

APPEAL—DECREE PURSUANT TO MANDATE.

An appeal from a decree entered in a circuit court pursuant to a mandate from the circuit court of appeals should not be entertained by the latter court when no errors are assigned as to any matters arising subsequent to the mandate, or when permission for appeal was not obtained or asked of the appellate court. In re Gamewell Fire-Alarm Tel. Co., 20 C. C. A. 111, 73 Fed. 908, followed.

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

This was a suit originally brought in the supreme judicial court of Massachusetts by Charles A. Gregory against Frederick A. Pike and others to compel the surrender of certain notes. The case was removed to the United States circuit court. In a supplemental bill filed by complainant, additional parties were made defendants, and, by amendment, after the decease of Charles A. Gregory his executrix, Mary H. Pike, was made defendant. The facts out of which the controversy arose are fully stated in 15 C. C. A. 33, and 67 Fed. 837. Appeals from the decree of the circuit court were taken to the circuit court of appeals, and that court made an order directing the form of the final decree. The case was remanded to the circuit court with a mandate requiring the entry of the decree in conformity with the order. From the decree entered by the circuit court, plaintiff appealed.

Francis A. Brooks, for appellant.

John Lowell and Thomas H. Talbot, for appellee.

Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

PER CURIAM. This is an appeal, allowed by the circuit court from a decree entered in that court pursuant to a mandate from this court; and we are now asked by the appellee, Mary H. Pike, to dismiss it. It is now said that the decree in the circuit court departs from the mandate in some particulars. The departures were not assigned as errors. No errors were assigned as to anything arising subsequent to the judgment of this court on which the mandate issued, nor was the permission of this court for the present appeal obtained or asked. Therefore the principles announced by us in Re Gamewell Fire-Alarm Tel. Co., 20 C. C. A. 111, 73 Fed. 908, and in Re Pike, where our opinion was passed down September 17, 1896 (76 Fed. 400), govern this case, and compel us to conclude that this appeal will not lie. The appeal is dismissed, with costs in this court for Mary H. Pike incidental to her motion to dismiss.

## NATIONAL CASH-REGISTER CO. v. LELAND et al. (four cases).

SAME v. WRIGHT et al.

(Circuit Court, D. Massachusetts. November 24, 1896.)

Nos. 473, 474, 475, and 476.

PRACTICE—DEPOSITIONS AND INTERROGATORIES—STATE STATUTES.

The act of March 9, 1892 (2 Supp. Rev. St. p. 4,) providing that, "in addition to the mode of taking depositions of witnesses in causes pending at law or in equity" in the federal courts, "it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held," merely provided an additional mode of taking depositions and obtaining answers on interrogatories in the cases already authorized, and did not confer additional rights to obtain proofs by interrogatories addressed to the adverse party in actions at law under the provisions of state statutes.

These were four actions at law, brought by the National Cash-Register Company; the first three being against Arthur S. Leland and others, and the fourth against James H. Wright and others. The case was heard upon a motion by plaintiff for default because of the failure of the defendants to answer certain interrogatories filed in accordance with the state statute. The right to proceed under the state statute was claimed under the act of congress of March 9, 1892, which reads as follows:

"Chapter 14. An act to provide an additional mode of taking depositions of witnesses in causes pending in the courts of the United States. Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that in addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held."

Russell & Russell, for plaintiff.
Fish, Richardson & Storrow, for defendants.

ALDRICH, District Judge. We will assume, for the purposes of these cases, that the statutory patent action on the case for damages for infringement of patent rights, under section 4919 of the Revised Statutes, is to be treated as the common-law action of case; and the question presented arises upon the plaintiff's motion for default, grounded upon the defendants' failure to answer interrogatories, filed by the plaintiff against the defendants in accordance with the provisions of section 49 of the practice act of Massachusetts. It is provided by section 861 of the Revised Statutes of the United States that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided"; and it is conceded in the case at bar that adverse parties living within 100 miles of the place of trial, not bound on a voyage to sea, or about to go out of the United States, or out of the district, and to a greater distance than 100 miles from the place of trial, and who are neither ancient nor infirm, are not witnesses within the provisos following section 861 of the Revised Statutes, and that the matter sought by the interrogatories would not be testimony within the meaning of section 861. Ex parte Fisk, 113 U. S.