

Opinion of the Court.

EX PARTE HUGHES.

ORIGINAL.

Argued March 31, 1885.—Decided April 6, 1885.

On a petition for a writ of mandamus to a circuit judge directing him to pay over to the petitioner a sum of money alleged to have been paid into court for the petitioner, and to be absolutely and unconditionally his property, and also alleged to be held in court because the judge refused to sign an order for its payment to petitioner, a rule to show cause was issued; and a return thereto being made, showing that it had not been adjudged that the money belonged to petitioner but that the litigation was still pending; *Held*, That the petitioner was not entitled to the writ.

Application for a writ of mandamus. The facts which make the case are stated in the opinion of the court.

Mr. John H. Mitchell for petitioner.

Mr. J. N. Dolph opposing.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is an application for a writ of mandamus requiring Matthew P. Deady, judge of the District Court of the United States for the District of Oregon, to “forthwith sign and execute, by signing or countersigning any and all such orders, matters and things as may be requisite or necessary to enable your petitioner (Ellis G. Hughes, an attorney-at-law practising in the Circuit and District Courts of the United States for such district) to withdraw from the depositary of said court the sum of five hundred dollars belonging to him.” The petition for the writ, which is sworn to by the petitioner, states that on and prior to May 3, 1882, there was pending in the Circuit Court of the United States for the District of Oregon a suit in equity for the foreclosure of a mortgage in which William Reid, manager, was plaintiff, and H. McCallister and W. B. McCallister, defendants, and that the plaintiff therein “recovered in said suit a certain decree as against the defendants . . . and a certain order of sale, wherein and whereby it

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was ordered, adjudged, and decreed that the defendants . . . should pay to the plaintiff a certain sum of money, and interest as therein specified, and also the costs and disbursements in the suit to be taxed, 'including ten per cent. on the full amount due from the defendants . . . to the complainant, as an attorney's fee to the attorney of the complainant,' and that in default of such payment being made certain lands in said decree and order of sale set out and described be sold."

The petition further states, "that your petitioner, as the attorney of the plaintiff, by express agreement and by the express terms and conditions of said decree and order of sale, was the absolute and unconditional owner of the attorney's fee recovered therein and thereby as costs of the suit." It is then stated that a sale of the mortgaged property was made under the decree, and "the amount due your petitioner under said decree and order of sale, as and for his attorney's fee, . . . having been regularly ascertained and determined, the said purchaser at said sale paid to the clerk of the Circuit Court . . . as and for and in payment of the claim of your petitioner for his attorney's fee, . . . the full amount so as aforesaid ascertained and determined to be due to your petitioner therefor." The petition then states that, upon the collection of the money, it was deposited in the registry of the court, and that, although demanded, the district judge holding the Circuit Court had refused to sign an order for its payment in full to him, but that the sum of \$500, part thereof, was retained, although it was then in the depositary of the court and "absolutely and unconditionally the property of your petitioner."

No copies of the various orders and decrees on which the rights of the petitioner depend were attached to the petition; but upon the positive sworn statements of the petitioner as to their nature and effect, a rule was entered on the district judge to show cause why the writ asked for should not be issued. To this rule a return has been made from which it appears unmistakably that it has never been adjudged that the petitioner was the owner of the money in court. On the contrary, it does appear that, on the 4th of December, 1884, the petitioner asked

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that the money in court, being \$1,039.42, be "paid to him by the clerk," and thereupon it was ordered "that there be paid to said Hughes (the petitioner) out of said funds the sum of \$519.04," but the court declined to make any disposition of the rest of the fund until the plaintiff had notice of the application and could be heard thereon. The amount so ordered to be paid was afterwards received from the registry of the court by the petitioner. The application for the rest of the fund was subsequently heard, the plaintiff in the suit appearing to resist, and upon full consideration it was expressly adjudged by the court that the litigation in the case was not ended, and that "neither by the terms of the decree nor the right and justice of the case was he [petitioner] entitled to the same [the money] until he had earned it by prosecuting said suit to a final decree as to all the defendants therein." The application for the remainder of the money was consequently denied, and the fund was left "in the registry of the court to be disposed of or applied hereafter as the rights of the parties and justice of the case may require." Certainly upon this return the petitioner is not entitled to the writ he asks.

The rule heretofore granted is discharged with costs.

STEPHENSON v. BROOKLYN CROSS-TOWN RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

Argued March 11, 1885.—Decided March 23, 1885.

None of the separate elements of the devices described in the patent granted September 16, 1873, to John A. O'Haire and W. A. Jones, as assignees of John A. O'Haire for an improvement in operating car doors, were new; nor was the combination new; nor was there any patentable invention in the contrivance described in the patent.

The device described in the patent granted March 30, 1875, to appellant for an