

Statement of Facts.

Mr. Leander Holmes and *Mr. John H. Mitchell* for the motion.

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

This motion is denied. According to the petition, the court entertained jurisdiction of the cause, but dismissed it for want of due prosecution; that is to say, because errors had not been assigned in accordance with the rules of practice applicable to the form of the action. This is a judgment which can only be reviewed by writ of error or appeal, as the case may be. Mandamus lies to compel a court to take jurisdiction in a proper case, but not to control its discretion while acting within its jurisdiction. This rule is elementary. *Ex parte Morgan*, 114 U. S. 174, and cases cited.

Motion denied.

UNION PACIFIC RAILWAY COMPANY *v.* UNITED STATES.

ORIGINAL MOTION IN A CASE ON APPEAL FROM THE COURT OF CLAIMS.

Submitted January 11, 1886.—Decided January 18, 1886.

When a judgment of the Court of Claims is reversed and the case is remanded for new trial, the findings of fact on the first trial form no part of the record on appeal from the judgment in the second trial, unless embodied by that court in the second findings.

When a claimant in the Court of Claims amends his petition by filing a new one in the place of it, and the case is heard on the amended petition only, and on appeal that court sends up only the amended petition, this court will not issue a writ of certiorari to bring up the original petition.

This was a motion for a writ of *certiorari* to the Court of Claims. The motion set forth the following facts:

This cause was originally commenced in the Court of Claims

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by three petitions. In one, numbered 12,515, judgment was given against the company. On appeal this court reversed that judgment. 104 U. S. 662. The three cases were then consolidated in the Court of Claims and an amended petition filed as a substitute for the previous petitions. The original petition in 12,515 set forth as exhibit B a certain letter to the Postmaster-General; and the findings of fact found that letter by referring to the petition. The letter was not attached as an exhibit to, or contained in the amended petition, and was not found as a fact by the Court of Claims. This motion set forth the importance of the letter to the issues in this case, and prayed as follows: "That the said findings of fact in No. 12,515, and, particularly, the said letter of September 1, 1876, be ordered to be made and considered a part of the record on this appeal; and to that end, if necessary, prays, under Rule 14 of this court, that a writ of *certiorari* issue to the Court of Claims requiring it to transmit to this court the record and the said findings of fact in No. 12,515, and the said letter of September 1, 1876, to which end it prays, under the 30th rule of this court, that the appellant's motion, heretofore filed at this term for a further finding of facts by the Court of Claims, and the order of this court entered thereon, may be reheard, if such rehearing shall be necessary, in order to get said letter of September 1, 1876, before this court as part of the record on this appeal."

Mr. J. F. Wilson and Mr. John F. Dillon for the motion.

Mr. Solicitor-General opposing.

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

This motion is denied. The findings of fact on the first trial in the Court of Claims have not under our rules any place in this record. Those findings were set aside when the judgment thereon was reversed, and the cause remanded for a new trial. On this appeal we consider only the findings at the second trial.

The original petition filed in the Court of Claims contained

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by reference the letter of September 1, 1876. In the amended petition, on which the last trial was had, this letter was omitted. It is not, therefore, any part of the record on this appeal. We decided on the former motion to send the case back for further findings, that it could not now be brought here as part of the evidence, and that it was not the proper subject of a special finding. We see no reason to reconsider that decision.

Motion denied.

GIBBONS *v.* DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Submitted December 21, 1885.—Decided January 18, 1886.

If a church building is taken down, and a new church, with a sufficient space around it for air and light, is built on other land within the same enclosure, in order to enable a revenue to be derived from the sale or lease of the land on which the old church stood, and it is unnecessary for the enjoyment of the new church that this land should remain vacant, this land is not exempt from taxation for the support of the government of the District of Columbia under § 8 of the acts of March 3, 1875, ch. 162; July 12, 1876, ch. 180; and March 3, 1877, ch. 117.

It is within the constitutional power of Congress, acting as the local legislature of the District of Columbia, to tax different classes of property within the District at different rates.

This is an appeal from a decree dismissing a bill in equity by the Roman Catholic Archbishop of the Diocese of Baltimore, of which the District of Columbia is a part, to clear the title of lots numbered 36 to 46 inclusive (being the lots formerly numbered 5, 6 and 7), in square 376 in the City of Washington, from a cloud created by the assessment and sale thereof for taxes amounting, with interest, to more than \$5000.

The case was heard upon the bill, answer, a general replication, and the deposition of the pastor of St. Patrick's Church, from which the facts appeared to be as follows:

The lots in question front south on F Street about 170 feet,