their mortgage on that property failed, without considering whether they had done anything in fraud of the Bankrupt Law or not. And so that question was left intentionally by the court, as fairly deducible also from the words of the decree, to be an open one if raised by anybody when the claim should be presented for allowance.

We see no occasion to change a word in our decree or mandate, to give effect to the intent of the court, and the motion is, therefore,

*Denied.*

*Mr. J. H. Ashton* for the motion. *Mr. F. N. Bangs* opposing.

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## MEVS *v.* CONOVER.

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

No. 169. October Term, 1876. — Decided March 13, 1877.

Upon a bill in equity by the owner against an infringer of a patent, the plaintiff is entitled to recover the amount of gains and profits that the defendant made by the use of the invention.

The surrender of his patent by a patentee, in order to obtain a reissue, made after obtaining final judgment against an infringer, does not affect his rights which have passed into the judgment.

THE opinion of the court in this case is reported in full in 125 U. S. 144, 145, in the marginal note. *Mr. A. J. Todd* and *Mr. Edward Patterson* for appellant. *Mr. Rodney Mason* for appellee.

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## FOREE *v.* McVEIGH.

ERROR TO THE SUPREME COURT OF THE STATE OF VIRGINIA.

No. 478. October Term, 1876. — Decided April 16, 1877.

It appearing that the only Federal question involved in this case has been decided in another case at the present term, the court postpones the hearing of a motion to dismiss, in order to allow it to be amended, under the rules, by adding a motion to affirm.

THE case is stated in the opinion.

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

This case comes before us upon a motion to dismiss for want of jurisdiction. A similar motion was made and overruled at the last term, and we are satisfied with that decision.

Rule 6 provides "that there may be united with a motion to dis-

miss a writ of error to a state court a motion to affirm, on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument." So far as we can discover from the record, the only Federal question involved in this case was decided at the present term in *Windsor* v. *McVeigh*, [93 U. S. 274,] and if there had been united with the motion to dismiss a motion to affirm, we should, as at present advised, have been inclined to enter a judgment of affirmance. The only motion made, however, is one to dismiss, and that is the only motion of which the plaintiff in error has had notice. He has never been called upon to meet a motion to affirm.

If a party desires to obtain an affirmance under the operation of this rule, his motion must be to affirm as well as to dismiss. Of this the plaintiff in error must have the requisite notice, so that he may resist if he chooses.

The further hearing of the motion as it now stands is, therefore, postponed, with leave to the defendant in error to amend by adding a motion to affirm because the question involved has been already decided and no further argument is necessary.

*So ordered.*

*Mr. P. Phillips* for the motion. *Mr. S. F. Beach* and *Mr. B. F. Butler* opposing.

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## RUCKMAN *v.* BERGHOLZ.

ERROR TO THE COURT OF ERROR AND APPEALS OF THE STATE OF NEW JERSEY.

No. 704. October Term, 1876. — Decided March 13, 1877.

In an action in a state court by a real estate broker to recover commissions on sales of land, the exclusion of evidence that he had not paid the tax or received the license required by the statutes of the United States, when properly excepted to, raises a Federal question; but in this case the question was frivolous, and manifestly taken for delay.

Motion to dismiss or affirm.

*Assumpsit* in the Supreme Court of New Jersey by a real estate broker to recover of the defendant commissions on the sales of real estate. Plea *non assumpsit*. Verdict for the plaintiff for $13,903.65, and judgment on the verdict, which was affirmed on appeal. At the trial, the defendant's counsel offered to prove that the plaintiff