UNDERWOOD *v.* McVEIGH.

ERROR TO THE CORPORATION COURT OF ALEXANDRIA COUNTY, STATE OF VIRGINIA.

No. 504. October Term, 1873. — Decided March 23, 1874.

The writ of error is dismissed, because it should have been directed to the Court of Appeals of the State of Virginia.

Motion to dismiss. The case is stated in the opinion.

Mr. Chief Justice Waite delivered the opinion of the court:

The writ of error taken in this cause is dismissed, because it should have been directed to the Court of Appeals instead of the judge of the Corporation Court of Alexandria. *Dismissed.*

Mr. Justice Clifford dissenting:

Jurisdiction is vested in the Supreme Court, in certain cases, to re-examine and reverse or affirm upon a writ of error, the final judgment or decree rendered in the highest court of law or equity of a State, in which a decision in the suit could be had in the courts of the State.

Cases of the kind consist of several classes, all of which are plainly described in the 25th section of the Judiciary Act, which also points out, in terms equally plain, the respective conditions annexed to the exercise of the right; as, for example, the decision of the state court, in one class of the cases, must be against the validity of a treaty or statute of, or an authority exercised under, the United States; and in another class the decision of the state court must be in favor of the validity of a statute of, or an authority exercised under, a State in the respect therein specified; and in a third class the decision of the state court must be against the title, right, privilege, or exemption specially set up or claimed, as therein described, by the parties suing out the writ of error.

Congress undoubtedly intended by that provision to give the party aggrieved, in such a case, a right to remove the cause into this court for a re-examination, but whatever the grievance may be, the remedy, if any, must in every case be pursued by a writ of error as the act of Congress gives no other; nor does the power to re-examine and reverse or affirm extend to any proceeding, except a final judgment or decree, of the highest court of law or equity of a State in which a decision of the suit could be had. 1 Stat. 85.

No other process can be employed except that given by the act of Congress, but the act of Congress does not prescribe the tribunal to which the writ of error shall be directed, from which the clear inference is that Congress intended that it should be directed to the tribunal, or, if more than one, to some one of the tribunals, which can execute the commands of the writ, as it would be an idle ceremony to direct it to a tribunal which could not execute its commands.

Common law writers define a writ of error as a commission by which the judges of one court are authorized to examine a record upon which a judgment is given in another court, and on such examination to affirm or reverse the same according to law. "Under the Judiciary Act," says Marshall, C. J., "the effect of a writ of error is simply to bring the record into the appellate court, and submit the judgment of the inferior tribunal to re-examination," as it acts only on the record, and does not, in any manner, act upon the parties. *Cohens* v. *Virginia*, 6 Wheat. 264, 410; *Suydam* v. *Williamson*, 20 How. 437.

Such jurisdiction arises only in the cases specified in the 25th section of the Judiciary Act; but it is a great mistake to suppose that it is limited in its scope to final judgments or decrees rendered in such a case by the highest court of law or equity of the State, as it plainly extends to every final judgment or decree rendered in such a case by the highest court of law or equity of the State, having *jurisdiction* to render the decision, which is the subject of complaint, however subordinate that tribunal may be, as compared with the other judicial tribunals of the State.

Courts of various grades existed in the several States at the time the Judiciary Act was passed, and their power and jurisdiction at that time, as well as at the present time, were and are regulated by statute and, of course, were, as they now are, subject to constant change. Many changes, doubtless, have since been made, but all experience has proved that it would have been unwise to have prescribed to what tribunal the writ of error in such a case should be directed, as that is a matter which can best be determined by the court empowered to issue the writ, the object being that it should be directed to such a tribunal as can execute its commands.

Appellate power, in some form, is exercised by courts in all the States, but the forms and modes of proceeding vary from time to time, and it is not probable that they are at the present time precisely alike in any two States.

Where the appellate court requires the *whole* record to be sent up and executes its own judgments, it may well be held that the writ of error should be directed to that tribunal, as no other can obey the commands of the writ, and send the record, which is the subject of complaint, into the appellate court for re-examination. But where only a part of the record is sent to the appellate court, or where, whatever is sent up, whether the whole or a part, the transcript is immediately returned to the subordinate court, together with the judgment of the appellate court, for record, it is equally plain that the writ of error from this court should be directed to the subordinate court, as the only tribunal which can execute the commands of the writ.

Cases arise also where the law of the State requires a full transcript to be sent up to the appellate court, and makes it the duty of that court, not only to record its own judgment, but also that it shall send down the same to the subordinate court to be there recorded, in which case there is a complete record in both courts, and in such cases the practice is well settled that the writ of error may be directed to either court, as it is clear that either court is competent to execute the commands of the writ of error.

Since the law requires a thing to be done, says Story, J., and gives the writ of error as the means by which it is to be done, without prescribing, in that particular, the manner in which the writ is to be used, it appears to the court to be perfectly clear that the writ must be so used as to effect the object. It may then be directed, as the learned judge said, to either court in which the record and judgment on which it is to act may be found.

Unquestionably the judgment to be examined must be that of the highest court of the State having cognizance of the case; but the record of that judgment may be brought from *any court* in which it may be legally deposited, and in which it may be found by the writ. *Gelston* v. *Hoyt*, 3 Wheat. 246, 304.

In that case it was directed to the Court of Errors, which, having parted with the record by remitting it, could not execute it. Without the direction having been changed, it was then presented to the Supreme Court of the State, but being directed to the Court of Errors, it could not be regularly executed by the Supreme Court.

Beyond doubt a new writ of error would have been required, had not the parties consented to waive all objection and to consider the record as properly here, if, in the opinion of this court, the record

could be properly brought up by writ of error directed to the Supreme Court of the State, which, in that case, was a court subordinate to the Court of Errors; and this court having decided that question in the affirmative, the case was heard here under that arrangement.

Exactly the same rule was promulgated by this court in the case of *Webster* v. *Reid*, 11 How. 457, the unanimous opinion of this court being given by *Mr. Justice McLean*, in which he says, the writ of error in such a case may be directed to any court in which the record and judgment on which it is to act may be found, and if the record has been remitted by the highest court to another court of the State, it may be brought up by the writ of error from the subordinate court.

Examples where the writ of error has been directed to the subordinate court to which the record has been remitted are very numerous, and are sufficient to show that the rule laid down by *Mr. Justice Story* in the leading case of *Gelston* v. *Hoyt*, has always been regarded as the true rule of practice in such cases. *State of New York* v. *Dibble*, 21 How. 366; *Almy* v. *State of California*, 24 How. 169; *Farney* v. *Towle*, 1 Black, 350; *Hoyt* v. *Sheldon*, 1 Black, 518; *Sherman* v. *Smith*, 1 Black, 587; *Cohens* v. *Virginia*, 6 Wheat. 265; *Buell* v. *Van Ness*, 8 Wheat. 312; *Hunt* v. *Palao*, 4 How. 589; *United States* v. *Booth*, 18 How. 476.

Nor is it necessary to rely *merely* upon examples, as the point has been directly adjudicated by this court in a more recent case, where it was decided that a writ of error from this court is properly directed to the court in which the final judgment is rendered, and by whose process it must be executed, and in which the record remains, although such court may not be the highest court of the State, and although such highest court may have exercised a revisory jurisdiction over points in the case, and may have certified its decision to the court below. *McGuire* v. *Commonwealth*, 3 Wall. 382.

Direct adjudication to the same effect was also made by this court in the case of *Green* v. *Van Buskirk*, 3 Wall. 448, 450, in which also, as well as the preceding case, the opinion was given by the late Chief Justice, with the concurrence of all the associate justices of the court. By that case it is expressly determined that, when the highest court of a State renders a final judgment in such a case, and sends the judgment with the record to the court below for execution, the writ of error may be directed to the subordinate court, and the Chief Justice went farther in that case, and decided that a judg-

ment cannot be regarded as final, in the sense of the act of Congress, until it is entered in a court from which execution can issue.

Since those decisions were made and have become known to the legal profession, the examples where the writ of error has been directed to the subordinate court have very much increased in number, as will appear from the following citations, to which many more might be added: *Butler* v. *Horwitz*, 7 Wall. 258; *Aldrich* v. *Ætna Co.*, 8 Wall. 491, 493; *Downham* v. *Alexandria*, 9 Wall. 659; *Downham* v. *Alexandria Council*, 10 Wall. 173; *Insurance Co.* v. *Treasurer*, 11 Wall. 204; *Northern Railroad* v. *The People*, 12 Wall. 384; *Miller* v. *State*, 15 Wall. 478, 491; *Commercial Bank* v. *Rochester*, 15 Wall. 639; *Crapo* v. *Kelly*, 16 Wall. 610; *Miltenberger* v. *Cooke*, 18 Wall. 421; and *Insurance Co.* v. *Dunn*, 19 Wall. 214, both decided at the present Term.

Three grades of courts are established by the laws of Virginia, of which the Court of Appeals is the highest, and from which writs of error may issue to the next highest grade, which are denominated Circuit and Corporation Courts, and from which writs of error may issue to the lower grade, called County Courts. Writs of error may issue from the Court of Appeals to the Corporation Courts, upon the application of an aggrieved party.

Regularly, such a party should apply to the court which rendered the judgment, that the execution of the same may be suspended, as in that event it is the duty of the court to grant such a suspension for a reasonable time, in order that the applicant may apply to the Court of Appeals for a writ of error. He then presents to the latter court a transcript of the record, or of such portion of it as may be necessary to present fully to the appellate court the point or points involved in his complaint, accompanied by a petition for the writ, and an assignment of errors. If the writ of error is allowed, the judgment is suspended until the questions involved are decided in the Court of Appeals. Due hearing is had and the Court of Appeals, if the proceedings are regular, decides the question involved, and affirms or reverses the judgment below, and certifies their decision to the subordinate court, and by the law of the State, the decision of the Court of Appeals is then required to be entered by the subordinate court *as its own*, and the provision is that "execution may issue thereon accordingly." No execution can issue from the Court of Appeals, as their duty is fully performed when they have made their decision and certified the same down to the subordinate court.

Viewed in the light of the authorities cited and of these suggestions, it is quite clear, in my judgment, that the writ of error in this case was properly directed to the subordinate court, as fully appears from the transcript which that court has sent up to this court, and which is in all respects complete. Suppose it be conceded, however, that the full record also exists in the Court of Appeals as well as in the Corporation Court, which is not admitted, still it is clear that the case should not be dismissed, as in that case the law of this court is well settled by repeated decisions, that the writ of error "*may then be directed to either court in which the record and judgment on which it is to act may be found.*" *Gelston* v. *Hoyt*, 3 Wheat. 245, 304; *Webster* v. *Reid*, 11 How. 436, 457; *McGuire* v. *Commonwealth*, 3 Wall. 382; *Green* v. *Van Buskirk*, 3 Wall. 448, 450.

Nothing need be said in respect to the other grounds of the motion, as the order of this court is based entirely upon the ground that the writ of error is directed to the Corporation Court instead of the Court of Appeals. Such a motion, as it seems to me, is entitled to no favor, as the full record is here and has been printed, and is now in the hands of every justice of this court. All doubt upon that subject is foreclosed, as no one suggests any diminution. On the contrary, the principal argument in support of the motion is, that it will enable the defendant in error to get rid of the *supersedeas*, and to get his execution earlier than he will if he has to wait the decision upon the merits. Injury in that behalf will certainly result to the plaintiffs in error, as they will be obliged to pay the expense of another transcript, and the United States will be compelled to pay the public printer for furnishing the justices of this court with copies of the same, though the full record is already in print and in our hands.

Much difficulty, it is apprehended, will result from the rule established in the case, from the fact that the appellate courts of the State have no power to supersede their own judgments in such a case, after the judgment has been remitted to the court below for record and execution; and it is quite clear, that a writ of error from this court to an appellate court of the State will not operate to supersede a judgment recorded in a subordinate court of a State, whose duty it is to issue the final process.

Whether this court can issue a writ of *supersedeas* in such a case to such subordinate court, it is not necessary now to decide, as it is

clear that it cannot be done in this case, more than sixty days having elapsed since the judgment was remitted to and recorded in the Corporation Court.

Doubtless the dismissal of the suit will be satisfactory to the present defendant, as he will be immediately entitled to a writ of *habere facias possessionem*, and the plaintiff will never be able, by any subsequent writ of error or other proceeding, to supersede the judgment pending the litigation.

For these reasons I am of the opinion that the motion to dismiss should be denied.

Mr. S. Ferguson Beach for plaintiffs in error. *Mr. P. Phillips*, *Mr. C. Cushing* and *Mr. C. W. Wattles* for defendant in error.

BOISE COUNTY COMMISSIONERS *v.* GORMAN.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF IDAHO.

No. 717. October Term, 1873. — Decided March 16, 1874.

Supersedeas will not issue without notice to the other party, when the object is to avoid an alleged improper execution of the judgment below.

Motion for *supersedeas*. The case is stated in the opinion.

Mr. Chief Justice Waite delivered the opinion of the court.

The plaintiffs in error moved in this cause, 1, for the allowance of a *supersedeas;* and 2, for a writ which shall command the marshal of the Territory to restore Ben. T. Davis to the office of assessor and tax-collector of Boise County, from which he has been removed by the execution of the judgment in the court below.

They claim that before the judgment had been enforced by the execution it had been stayed by *supersedeas*. If this claim is supported by the facts, no new *supersedeas* is now necessary. That already obtained will operate to stay any further proceedings which may be had under the judgment.

The real object of this motion is to avoid the effect of the alleged improper execution of the judgment, and restore Davis to his office. Such a motion cannot be entertained, except after reasonable notice to the opposing party. No such notice has been given in this case. This motion is, therefore, overruled, but without prejudice to its renewal after reasonable notice to the defendant in error.

In the event of its renewal, the plaintiffs in error in order to