the measure of damages is the price of the goods.* The court below, therefore, erred in charging the jury that the right to sue was in abeyance until the time limited by the award for the payment of the money had expired.

Inasmuch as this case is to be remanded, it is proper to say, that in the opinion of the court, the award of the 26th of January is inoperative and void. Arbitrators exhaust their power when they make a final determination on the matters submitted to them. They have no power after having made an award to alter it; the authority conferred on them is then at an end.†

Bayne can, if so advised, amend his pleadings and test the correctness of the first award; which not being properly in the case has not been considered by the court, and no opinion is therefore given on the question of its validity.

JUDGMENT REVERSED AND VENIRE AWARDED.

BURR v. THE DES MOINES RAILROAD AND NAVIGATION COMPANY.

1. Although this court will give judgment, on error, upon an agreed statement of facts or case stated, if it be signed by counsel and spread upon the record at large, as part thereof, yet it will not do so, except upon that which is professionally and properly known as a case stated; that is to say, upon a case which states facts simply; not one which presents, instead of facts, evidence from which facts may or may not be inferred.
2. Legal presumption being in favor of a judgment regularly rendered, the court, where it does not reverse, nor dismiss for want of jurisdiction, might, in regard to a case which it refused to consider on evidence adduced, affirm simply. However, a case being before it, and having been argued on its merits, where counsel on both sides erroneously supposed that they had brought up a case stated, when *in fact* they brought up nothing but a mass of evidence, and where they erroneously supposed, also, that they would obtain an opinion and judgment of this

* 2 Parsons on Contracts, 485–6; Cort et al. *v.* The Ambergate Railway Company, 6 English Law and Equity Reports, 237; Hanna *v.* Mills, 21 Wendell, 90; Rinehart *v.* Olwine, 5 Watts & Sergeant, 157; Mussen *v.* Price, 4 East, 147; Dutton *v.* Solomonson, 3 Bosanquet & Puller, 582.

† Russell on Arbitration, 135.

Statement of the case.

court on the case as, by common consent, they presented it,—the court benignantly "dismissed" it only; so leaving the parties at liberty to put the case, if they could, by agreement below, in a shape where it could be here reviewed. But the dismission was with costs.

THIS was a writ of error, in an action of ejectment, to the Circuit Court for the District of Iowa; the plaintiff in error having been also plaintiff below.

The record (or document so called), which was brought before the Supreme Court, after reciting the pleadings, and that the parties had appeared and waived a jury, showed that the following judgment had been rendered by the court

"The evidence having been seen and examined by the court, and the arguments of counsel heard, it is now considered and adjudged that the court do find the issue in favor of the defendant, and that the plaintiff take nothing by his petition. Whereupon it is ordered that the defendant recover of the plaintiff his costs in this behalf expended, taxed, &c., and that he have execution therefor."

Then came a certificate of the clerk to the record, certifying that what preceded the certificate contained "a true, full, and perfect copy of the plaintiff's petition and replication, of the defendant's answer, *and of all the proceedings of the court in the above-named cause.*"

After this followed thirty-six pages of printed matter, annexed to which was another certificate of the clerk, certifying, "that the foregoing twenty pages of print and writing are a true copy of *the agreed statement of facts* filed in the foregoing cause, as the same remains on file, *it being all the evidence upon which the cause was submitted.*"

This "agreed statement of facts" consisted of acts of Congress and statutes of Iowa; of opinions of Attorneys-General of the United States; of decisions of the Secretaries of the Treasury and Interior Departments, and numerous letters between those officers and members of Congress, and other persons interested in the several land grants made by Congress to the State of Iowa for purposes of internal improvement; of various matters admitted by the one party and the

other; the whole constituting a perplexing mass of law and evidence. At the close of "the record" was the following statement:

"If, upon the whole case, the title of the plaintiff to said lands has not failed, but, under the defendants' deed to him, and the subsequent legislation by Congress, he has acquired a good title to said lands, the defendants are entitled to judgment and to costs of suit.

"This cause is submitted, without a jury, upon the foregoing agreed statement of facts; but it is expressly agreed that the matters and things herein stated are only to be taken for what they are legally worth; and that all objections on account of immateriality or irrelevancy are reserved by the parties respectively; and may be urged and considered by the parties, and by the court, upon the argument and in the decision."

Notwithstanding the reservation of the right to do so, it appeared that no objection had been taken on the trial to the materiality or relevancy of any of the mass of testimony above described, nor to any ruling of the court on the law arising on the facts. The paper just quoted was not signed by counsel, nor entered on the record of the court, nor made a part of the record of the case by bill of exceptions, or in any other manner. In fact, no bill of exceptions was taken in the suit.

The case was argued here, on the large mass of testimony brought up, on its merits and as if the record had been in form, by *Mr. Gilbert for the plaintiff in error, and by Messrs. Mason and Tracy on the other side.*

Mr. Justice MILLER, after stating the case, delivered the opinion of the court:

It is very clear that a paper not signed by counsel, nor entered on the record of the court, nor made part of the record of the case by bill of exceptions, or in any other manner, cannot be considered by this court as the foundation on which it is to affirm or reverse the case. It is probable, from the language of the closing paragraph, that the parties considered it as an agreed statement of facts, on which the court

below might decide the law, and on which this court would review that decision. And it is quite true that this court has decided, in the case of *The United States* v. *Eliason*,* and in several cases since that one, that this may be done.

But in order to bring such a case properly before this court, two things are essential, which are wanting in the present case.

1. The agreed statement of facts must, in some manner in the court below, be made a part of the record of the case. The case of *The United States* v. *Eliason* shows, that it was strongly urged upon this court that it had been laid down by Sir Wm. Blackstone in his Commentaries, and by Stephen in his Treatise on Pleadings, that error did not lie on such a statement. The court, however, said that the reason for this was, that in the English practice, the agreed statement was not like a special verdict entered on the record, and the appellate court could not therefore notice it. But that in the practice of our courts such agreements are signed by "the counsel, and spread upon the record at large as part thereof." And thus they become technically a part of the record, into which the appellate court look, with the other parts of it, to ascertain if there be error.†

2. The statement of facts on which this court will inquire, if there is or is not error in the application of the law to them, is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by this court, but must have all the sufficiency, fulness, and perspicuity of a special verdict. If it requires of the court to weigh conflicting testimony, or to balance admitted facts, and deduce from these the propositions of fact on which alone a legal conclusion can rest, then

* 16 Peters, 291. † See also Graham *v.* Bayne, 18 Howard, 60.

it is not such a statement as this court can act upon. The paper before us "is evidence of facts, and not the facts themselves as agreed or found."* It is obvious that if the whole of this paper were presented by a jury as a special verdict, it would be objectionable, as presenting the evidence of facts, and not the facts themselves, which must determine the issue.

Cases of a character nearly allied to this have been frequently before this court, and although the opinions delivered are not always reconcilable in every respect, it is believed that they speak but one language as to the two propositions here laid down.†

The paper which we have been considering being rejected, there is nothing before the court by which it can determine whether the judgment of the court below is right or wrong.

The legal presumption is in favor of the correctness of that judgment, but as the parties here have all considered the case as turning on the evidence which we have refused to consider, and have so argued it, and as it was, no doubt, prepared with a view to obtaining the opinion of this court on the case there stated, we have determined to dismiss the writ of error, thus leaving the parties at liberty, if they can do so by a proper agreement in the court below, to remove the difficulties which now prevent this court from reviewing the case.

CASE DISMISSED WITH COSTS.

* Graham *v.* Bayne, 18 Howard, 62.

† Pennock *v.* Dialogue, 2 Peters, 1; The United States *v.* Eliason, 16 Id., 300; The United States *v.* King et al., 7 Howard, 844; Bond *v.* Brown, 12 Id., 256; Weems *v.* George, 13 Id., 190; Arthurs *v.* Hart, 17 Id., 7; Graham *v.* Bayne, 18 Id., 60.