

## Statement of the case.

## SPARROW v. STRONG.

1. This court will not take jurisdiction of a judgment shown by the context of the record to be but an order affirming a refusal of a court below to grant a new trial; even though the language of the record of affirmance brought here by the writ of error purports to affirm generally the judgment of a court inferior to the affirming court, and the only judgment, in strict language, in the record of such inferior court, is a general judgment.
2. An appeal from an order denying a motion for a new trial does not, under the legislation of Nevada, carry the original judgment and the whole cause before the appellate court, so that the decision upon the appeal operates as a judgment reversing or affirming the judgment below.

SPARROW brought ejectment against Strong in the District Court for the County of Storey, in Nevada, for an undivided interest in a mining claim, the proceeding being in the form prevailing in Nevada, of petition, answer, and replication.

On the 21st of May, 1862, a jury, after hearing the evidence and the charge of the court, rendered a general verdict for the defendants.

On the next day afterwards, to wit, on the 22d day of May, 1862, the court pronounced judgment on the verdict.

On the 13th of November, 1862, the District Court in which the cause had been tried heard a *motion for new trial*, and, after argument, overruled the motion and *refused the new trial*, to which the plaintiffs excepted.

Two days afterwards the plaintiffs gave notice to the defendants that they (the plaintiffs) appealed to the Supreme Court of the Territory from *the order* of the District Court, *made on the 13th of November, 1862, overruling the motion for a new trial*.

On the same day of this notice the defendants filed a bond—an undertaking—for the damages and costs. In this bond they recite that it is given on an appeal from *the order* of the District Court, *made on the 13th of November, overruling the motion for a new trial*.

On the 22d of November, 1862, the counsel of both parties agreed upon a *statement*; and it was declared in their agree-

## Statement of the case.

ment that the statement so settled was to be used on the hearing in the Supreme Court of the appeal from the *order* of the District Court refusing a *new trial*, which order is referred to in it as made on the 13th of November, 1862.

The statement comprised :

1. The motion of the plaintiffs for a new trial, and a specification of the grounds on which it was to be sustained; among which are insufficiency of the defendants' evidence, surprise at the trial, and newly-discovered evidence.

2. Certain evidence, oral and documentary, given on the trial. There were no *bills of exception* to evidence embodied in the statement; but in the specification of grounds it was alleged that the evidence was excepted to.

3. The prayers of both parties for instructions to the jury on questions of law, with the answers of the judge.

4. The general charge to the jury.

5. Affidavits of the parties, and of several other persons, taken after trial, to prove surprise and newly-discovered evidence. One of these undertook to detail what a certain witness, who had been rejected, would have sworn if he had been admitted.

On this statement, apparently, the case went into the Supreme Court of the Territory. No writ of error was taken out; nor did bills of exception accompany the evidence; nor was any assignment of error made in the Territorial Supreme Court.

On the 16th of March, 1863, the Supreme Court gave judgment in the case as follows :

"On appeal from the District Court of the first judicial district in and for Story County.

"Now, on this day, this cause being called, and having been argued and submitted and taken under advisement by the court, and all and singular the law and the premises being by the court here *seen* and *fully considered*, the opinion of the court herein is delivered by Turner, C. J. (Mott, J., concurring), to the effect that the *judgment* below be affirmed.

"Wherefore it is now *ordered*, *considered*, and *adjudged* by the court here that the *judgment* and *decree* of the District Court of

## Statement of the case.

the first judicial district in and for Story County, *be and the same is affirmed with costs.*"

From this judgment of the Supreme Court of Nevada a writ of error, on the 14th of August, 1863, was taken here.

On the same day the plaintiff in error filed with the clerk of the Supreme Court of the Territory the *assignment of errors* for this court; that is to say, a specification of the grounds on which they relied here for the reversal of the decision of the Territorial Supreme Court.

In those specifications they complained that the Supreme Court of the Territory *refused to reverse the judgment and order of the District Court refusing a new trial.* Then followed the specific objections to the *judgment and order*, some of which were *matters of fact.*

On the same day that the writ of error from this court was taken out and the errors assigned the plaintiffs petitioned for a *citation.* In that citation they described the cause or subject-matter which it was their object to have reviewed in this court. They set forth that, after trial and judgment in the District Court, they moved the same court for a *new trial*; that it was refused on the 13th of November, 1862; that *an appeal from that order* was taken to the Supreme Court of the Territory; that in the latter court, on the 16th of March, 1863, judgment was rendered "*affirming the order of said District Court;*" that the plaintiffs afterwards asked for a rehearing, which was denied them; hence the writ of error.

This court, two terms ago, on the record being brought before them, by a motion to dismiss the case on other grounds assigned, doubted, on looking at the judgment of affirmance above quoted, as given in the Supreme Court of Nevada, whether it was a final judgment or decision reviewable here within the meaning of the act of Congress organizing the Territory, and which gave this court jurisdiction to review "the final decisions" of the Supreme Court of the Territory, and ordered that point to be argued. It was accordingly argued; the argument turning chiefly on the language of the affirmance.

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Argument for the defendant in error.

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After the argument, this court refused to dismiss the case on the motion. It then said:\*

“It is insisted, on this point, that the judgment is merely an affirmance of the order of the District Court overruling the motion for new trial. *If* this be so, the judgment itself is, in substance and effect, nothing more; and it is settled that this court will not review such an order. The granting or refusing of new trials is a matter of discretion, with the exercise of which, by the court below, this court will not interfere. The circumstance that the discretion was exercised under a peculiar statute by an appellate court, and on appeal, cannot withdraw the case from the operation of the principles which control this court.

“But the majority of the court does not feel at liberty to disregard the plain import of the terms of the judgment rendered by the Supreme Court of the Territory. It does not purport to be an order or judgment affirming an order overruling a motion for new trial, but a judgment affirming the judgment or decree of the District Court, and the only judgment or decree, which we find in the record, is the judgment for the defendants in the action of ejectment.

“*If* this view be correct, the judgment of the Supreme Court is one to review which a writ of error may be prosecuted.”

The case was accordingly retained for a hearing in regular course. It was now reached, and was argued fully on its merits; the true nature of this judgment or decree of affirmance and of every part of the matter of the jurisdiction being, however, again very fully discussed on a minute examination of all parts of the record, with a presentation of the Code of Nevada.

*Messrs. W. M. Stewart, and J. S. Black, for the defendant in error*, after arguing the case on merits, contended that the discussion of these ought never to arise in this court; that it was manifest from the statement of the case that the counsel of the plaintiff in error expected this court to hear them on the motion for a new trial, and to reverse the de-

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\* *Sparrow v. Strong*, 3 Wallace, 105.

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Argument for the defendant in error.

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cision of the Territorial court on that point by granting, here, the new trial which, there, had been refused. The language of the decree of affirmance of itself might be doubtful if read by the distant lights of ancient technical formularies; but it was not doubtful if read by the lights which surrounded it, and which as modern ones are the true ones by which to read it. The clerk has written, the "judgment and decree" of the District Court affirmed. But what does he mean by "decree?" No one will pretend that there is any decree in the technical sense, in this case; that, by any proceeding here taken this court has acquired jurisdiction of a decree in chancery; yet this pretence would be no more unreasonable than the assertion that this court may entertain jurisdiction of a judgment which was not before the Territorial Supreme Court. The whole record shows that the decision of the Territorial Supreme Court was merely one of affirmance of whatever was before that court, to wit, the order overruling the motion for a new trial.

It makes no substantial difference as to the form of the decision, as long as its meaning is obvious. An order overruling a motion for a new trial is, in one sense, a judgment. It is true, it is not technically a common law judgment, but it is, nevertheless, a decision of a court, and in that sense it is a judgment, and the record shows that that was the sense in which the clerk used the words decree and judgment. For his use of the word decree shows that he had little knowledge of the technical use of legal terms. We submit, therefore, that the decision of the Territorial Supreme Court was nothing more nor less than an affirmance of an order overruling a motion for new trial, of which this court has no jurisdiction.

The mode of removing a cause, in Nevada, from an inferior court for review in a court of appellate jurisdiction was prescribed by statute and is exclusive. It may be done, the statute declares, "as presented in this title and not otherwise."\* It is worth while to look at these provisions a little.

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\* See Statute Book, 361.

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Argument for the plaintiff in error.

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They will make it plain that what was here affirmed, was the action of the inferior court about a *new trial*.

Section 274, provides for appeals generally.

Section 285, shows in what cases and how an appeal may be taken to the Supreme Court from the District Court in Chancery cases.

Section 302, prescribes the mode of removing "*every final judgment, order, or decision of a District Court, except in Chancery cases,*" to the Supreme Court, to be re-examined for error in law, and declares that it shall be done *by writ of error*.

Section 308, requires the errors to be specified.

Section 275, authorizes an appeal from an order of the District Court granting or refusing a new trial.

Section 284, prescribes how the cause shall be taken up *when the appeal is made from an order*.

Section 276, provides that a statement shall be made when an appeal is taken from an order, just as it was made in this case.

There was therefore no jurisdiction. If this court, when the case was last here, intimated anything else, it was on an imperfect view of the record; and now, that on such thorough view and full examination of every part of it, as the argument on the merits gives, it sees the true history of the case, it will dismiss the suit.

*Messrs. G. T. Curtis and C. O'Conner, contra:*

When this same cause was before the court at a former term, on a motion to dismiss, one of the grounds of the motion was that the judgment of the Territorial Supreme Court, now brought into this court for review and reversal, was an affirmance of an order of an inferior court overruling a motion for a new trial. This court, after hearing this point elaborately argued, held that the judgment of the Supreme Court was not an affirmance of an order of the inferior court overruling a motion for a new trial; that it did not purport at all to be an affirmance of an order overruling a motion for a new trial; but that the plain import of its terms is, that it affirmed a general judgment for the defend-

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Argument for the plaintiff in error.

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ants in the action. Hence, it was held by this court that the judgment of the Supreme Court is one which can be reviewed in this court by writ of error, and the motion to dismiss was denied.

The point, then, in relation to the plain import and effect of the judgment of the Territorial Supreme Court, is really *res adjudicata*, and ought not to be argued.

We submit, however,

1. That the proceeding under the Nevada code, called therein a motion for a new trial, is a special method of review, intended to reach the verdict and the judgment rendered in an action, and to bring the latter up for revision in the court in which it was rendered; and that the appeal from an order overruling such an application is intended to carry into the appellate court, for its revision, the merits of the judgment of the inferior court, and to enable the appellate court to act upon that judgment.

Our view of this proceeding is, that it is intended (as a mode of review of a general judgment) for an alternative method, with like efficacy and effect with an appeal from such general judgment or a writ of error, and more convenient and more likely to be embraced, because it unites in the same proceeding relief to be given in respect to the weight of evidence, or newly discovered evidence, and relief to be given, on account purely of erroneous rulings of law. That it unites these two grounds of relief, can constitute no solid objection to the re-examination, in this court, of the pure questions of law contained in a record made under such statute provisions, and brought here by writ of error. That such is the character of this proceeding is shown, we think, by the act of Congress\* organizing this Territory, which act committed to the regulation of the Territorial legislature the whole subject of "writs of error, bills of exceptions and *appeals*," from the Territorial District Courts to the Supreme Court of the Territory; and by the Code of Practice, adopted November 29th, 1861, by the Territorial

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\* Act of Congress, March 2d, 1861, § 9; 12 Stat. at Large, 212.

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Argument for the plaintiff in error.

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legislature,\* under authority conferred by the act of Congress aforesaid.

It was certainly competent to the Territorial legislature, under the broad authority conferred upon it, to provide any *form* of appeal from the District to the Supreme Court, and to give that form any scope and effect that it saw fit.

The Territorial Code of Practice, in civil cases, does not prescribe or recognize a common-law bill of exceptions; and it does prescribe and recognize a different mode of excepting to the rulings of a court at the trial of an action. It also provides three modes of bringing errors of law under review after a verdict and *judgment*; one of which is called a motion for a new trial. The code recognizes but one *form of civil action*, which it makes the same at law and in equity. It is instituted by complaint.† But the distinction between suits at law and suits in equity is not abolished.

Issues are either of law or of fact. If of fact in an action at law, there may be a trial by jury.

When there is a trial of issues to a jury, the court is required to state to them all matters of law necessary for their information in giving their verdict, and to furnish to the parties a statement in writing of the points of law contained in the charge, or to sign at the time a statement of such points prepared and submitted by the counsel of either party.‡

This is not a *bill* of exceptions according to the statute of Westminster; but something quite different, and obviously intended as a substitute therefor. That it is so intended is apparent from the definition of an exception given in § 188; namely, "an objection taken, at the trial, to a decision upon a matter of law."

It may be taken for the future purpose of a motion for a new trial, or for the future purpose of an appeal (§ 188). It may be delivered in writing to the judge, or written down by the clerk; or it may be noted on the judge's minutes, and

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\* Laws of Nevada Territory, 314-485

† Code of Practice, title i, p. 314.

‡ Id. § 165, p. 841.

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Argument for the plaintiff in error.

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afterwards *settled* in the "statement of the case," provided by the code (§ 189). "No particular *form* of exception shall be required" (§ 190).

After a verdict, "judgment" is to be entered by the clerk in conformity therewith, within twenty-four hours after the verdict (§ 197), and a "judgment is the final determination of the rights of the parties in the action" (§ 144).

"Final judgments" in the *District* Courts may be reviewed on appeal to the *Supreme* Court, by appealing from the "final judgment" rendered in an action commenced in the *District* Courts, or brought there from another court; and an "order" overruling a motion for a new trial may, also, be appealed from (§ 285). Both are intended to reach the final judgment of the *District* Court.

An appeal from the "final judgment" of course opens the whole merits of the judgment. An appeal from an "order" overruling a motion for a new trial may do this, and it also has a function beyond; it may open the whole merits of the judgment, and bring under review incidental errors not properly reviewable on direct appeal from the judgment alone. It may open only questions of fact, addressed to the discretion of the court; or it may open questions of law, addressed to the legal obligation of the court to decide rightly on the law, according as the "statement of the case" and the motion for a new trial did or did not include questions of law. This is apparent from various sections.\* Hence it appears that it was not true, in the courts of this Territory, that motions for new trials necessarily involve *only* questions addressed to the discretion of the court. They *may* involve matters of discretion—as the weight of evidence, or newly discovered evidence; or they *may* involve rulings of law, or they may involve *both*, according as the "statement" and the "exceptions" are made up.

An appeal, therefore, from an order overruling a motion for a new trial *may* bring into the appellate court a record

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\* See, on the points, §§ 188, 189, 190, 191; 193, 194, 195; 271, 275, 276, 277, 278, 279, 280, 281, 282, 283; 285; 291.

## Argument for the plaintiff in error.

which shows erroneous rulings of law; and if the order overruling the motion for a new trial is final in its nature, re-affirming, or leaving operative the general judgment previously rendered on the verdict, it is the proper subject of an appeal; and if it be founded, in whole or in part, on rulings of law at the trial, duly excepted to, the appeal from it necessarily opens the merits of the general judgment, in respect to the exceptions so taken.

2. The Supreme Court did act on the general judgment of the District Court, and did affirm that judgment, without authority, and when it only had authority to affirm or reverse an order overruling a motion for a new trial; and for this error, if it was one, we are entitled to a reversal of the judgment entered in the Territorial Supreme Court.

It is impossible to construe the judgment entered by the Supreme Court as a mere affirmance of the order of the District Court overruling the motion for a new trial. Either the Supreme Court rightly supposed—as we conceive—that the appeal from the order brought before it the general judgment of the District Court for reversal or affirmance, or else it committed an error; for it made no order or decree in direct reference to the order overruling the motion for a new trial, but proceeded directly to the general judgment of the District Court, which was the only judgment in the record before it, and *affirmed* it. If the Supreme Court had intended to act only on the order appealed from, it would simply have dismissed that appeal, or have affirmed in terms the order appealed from. It did not act on the mere order, but acted on the judgment brought before it in the record; and if the plaintiffs in error had never prosecuted this writ of error, the defendants must in all time have found their final evidence of title to this property in this record of the Supreme Court of the Territory, affirming the judgment of the District Court, by which the claim of the plaintiffs was negated.

3. It can constitute no valid objection to the examination by this court of any errors of law disclosed by this record, that it contains no sealed bill of exceptions, or that the pro-

## Opinion of the court.

ceeding by which the whole case was, after judgment entered, brought under review, first in the District Court and then in the Supreme Court, was denominated in the practice of those courts a motion for a new trial.

The Nevada code\* provides that "no particular *form* of exception shall be required;" just as that of New York does,† that an exception shall "not be sealed or signed." Both codes require the exception to be *taken* at the proper time, and point out how the evidence that it was taken shall be preserved; but under neither code can the judge, either before or after the judgment, be compelled to seal it. The decision in *Pomeroy v. The Bank of Indiana*,‡ cannot extend to writs of error to *all* courts, even though their statutory practice excludes the requirement of a sealed bill of exceptions. It applies only to the ruling of those where the Statute of Westminster is of binding force.

[The learned counsel, after arguing all these and some other points with great fulness and minute citations from the code, proceeded to argue the case on its merits.]

The CHIEF JUSTICE delivered the opinion of the court.

This case was before us at the last term, upon motion to dismiss the writ of error.

The suit, originally brought in the District Court for the Territory of Nevada, was an action of ejectment for an undivided interest in a mining claim.

Upon trial, there was a verdict and judgment for the plaintiff. Subsequently, and in accordance with the statute of Nevada, a motion for a new trial was made, which was denied. An appeal was then taken to the Supreme Court of the Territory, which gave judgment affirming the judgment or decree of the District Court.

We were asked to dismiss the writ, upon the ground that this judgment affirmed only the order of the District Court denying the motion for new trial, and was, therefore, not reviewable here.

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\* §§ 165, 188-91.

† § 264.

‡ 1 Wallace, 592.

## Opinion of the court.

On opening the record, however, it was apparent that the judgment of the appellate court was, in terms, an affirmance of the judgment or decree of the District Court, and that the only judgment of that court, properly so called, was the judgment for the defendants in the action of ejectment.

A majority of the court declined to look beyond the plain import of the judgment of affirmance, and examine the record farther, in order to ascertain whether there was anything in it which would limit its effect to an affirmance of the order denying the motion for a new trial.

The motion to dismiss was therefore overruled; but we then observed that, if the judgment of the Supreme Court was, in substance and effect, nothing more than such an affirmance, this court could not review it; and after stating the familiar rule, that this court will not revise the exercise of discretion by an inferior court, in granting or refusing new trials, we said further: "The circumstance that the discretion was exercised under a peculiar statute, by an appellate court, and upon appeal, cannot withdraw the case from the operation of the principles which control this court."

The cause has now been regularly heard, and fully argued, and the first question for our consideration is that which was left undecided at the last term: "What is the true nature and effect of the judgment of the Territorial Supreme Court?"

The record shows an action of ejectment by petition, answer, and replication—the form sanctioned by Territorial law—regularly prosecuted in a Territorial District Court, resulting in a verdict and judgment for the defendants.

The record shows, also, a motion for new trial overruled, and a notice by the plaintiffs to the defendants of an appeal, from the order overruling that motion, to the Supreme Court of the Territory, and a bond of the plaintiffs, on appeal, reciting the appeal as made from that order.

Under the laws of Nevada, appeals are allowed from orders granting or refusing new trials; but it was necessary, before an appeal could be perfected, that a statement of the case, showing the grounds of appeal, should be filed. ^

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Opinion of the court.

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statement which had been used on the motion for new trial was accordingly filed, under a stipulation signed by both parties, which recited the notice of appeal as an appeal from the overruling order.

There is no paper in the record which indicates that either party understood that anything was before the appellate court except that order. Nothing else, as it seems, was intended to be brought before it by the appellants, and nothing else was understood to be by the appellees.

If, then, the decision of that court is anything more than an affirmance of the order of the District Court, it is not what was expected by either party. It must not, therefore, be held to be more, unless the principles of legal construction clearly require it.

Its terms, indeed, import an affirmance of the original judgment; but are they incompatible with a more limited sense? The decision is loosely and inaccurately expressed. It purports to affirm a judgment and decree; but there was no decree, in any proper sense of the word, in the District Court. The words "judgment and decree" must, therefore, have been used as equivalents; and "judgment" in such a connection, may well have been regarded as the equivalent of "decision or order."

It is probable, we think, that the court intended that its judgment should be understood as a simple affirmance of the order below. And such seems to have been the understanding of the appellants; for, in their prayer for a citation, on appeal to this court, they describe their "appeal" to the Supreme Court of the Territory as "taken for the reversal of the order," in the District Court, and state that judgment was given "affirming the order." We impose, then, no impossible, or even unnatural sense on the terms of the judgment, especially when considered in connection with the whole record, when we hold it, as we do, to be nothing else than an affirmance of the order overruling the motion for new trial.

But, it was argued at bar, with ingenious ability, that this judgment, if admitted to be merely an affirmance of the

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Opinion of the court.

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order of the District Court, was, nevertheless, a final judgment, subject to review, on a writ of error, by this court. It was insisted, that under the peculiar legislation of Nevada, an appeal from an order denying a motion for a new trial, carried the original judgment and the whole cause before the appellate court, and that the decision, upon appeal, operated as a judgment, reversing or affirming the judgment below.

But we do not so understand that legislation. The statutes of Nevada directed the judgment to be entered within twenty-four hours after verdict, unless there was a stay of proceeding; and the direction of the statutes was observed in this case. But those statutes also provided for a motion for new trial after judgment; and the effect of granting the motion was to vacate the judgment and verdict, as in the ordinary practice it would vacate the verdict only, and so prevent the entry of judgment. With this exception, the proceeding, on motion for new trial, in the court of original jurisdiction, was not distinguishable, in any important respect, from the like proceeding in the District and Circuit Courts of the United States. There was, however, another peculiarity in respect to the finality of the proceeding. In the latter courts, the decision upon such a motion is without appeal. In the District Court of Nevada, an appeal might be taken to the Supreme Court; and, as we have seen, in case of such appeal, a statement, showing the grounds of it, must be filed, in order to perfect the proceeding.

But there is nothing in the statutes which gives, in terms, any other or different effect to the reversing or affirming order of the appellate court, than would attend the allowance or denial of the motion in the inferior court. Nor is there anything in the statutes which seems intended to give by implication any such other or different effect. On the contrary, the statutes provide for the ordinary mode of reversing the judgments of inferior courts, by appellate tribunals, upon writs of error; which would hardly have been done, if it was intended to give the same effect to appeals from decisions upon motions for new trials.

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Syllabus.

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Decisions on such motions, by the District Courts, were required to be made upon such grounds of law and facts as the case might furnish; and upon like grounds were the decisions of the Supreme Court, upon appeal, required to be made. We cannot doubt that the decision of the District Court, in such a case, was the exercise of a discretion not reviewable in the Territorial Supreme Court, except under an express statute of the Territory. And we are obliged to think that the decision of the appellate court was equally an exercise of discretion upon the law and the facts, and not reviewable here in the absence of any act of Congress authorizing appeals in such cases.

This view of the preliminary question makes it unnecessary to examine the other important points in the case, which have been so ably and exhaustively discussed by counsel. We think the judgment of the Supreme Territorial Court only an order affirming the order of the District Court denying a motion for new trial, and that it is therefore not reviewable here on error.

WRIT DISMISSED.

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BELL v. RAILROAD COMPANY.

1. Municipal corporations, such as the county boards of police usual in Mississippi, when authorized by statute to do acts which otherwise they would have no power to do—such, for example, as subscribe to a railroad incorporated and beginning in another State and passing through their own State—cannot modify or alter the subscription as authorized by the statute. A compromise by such board with a railroad company which does so modify or alter the subscription is, accordingly, void.
2. A sheriff, *ex officio* collector of taxes, who under the direction properly given of such county police board has collected a tax which such board was authorized by statute, upon certain conditions, to levy for the benefit of another body, a railroad company, has no right to decide whether such municipal body has laid the tax rightly or not, or to settle differences between the tax-payers, the county, and the third body. If the president of the board of police direct him to pay it to the third body his duty is to pay it.