that whatever might have been fairly within the scope of the pleadings in the former suit, must be held as concluded by the judgment.

In the case before us, the second plea clearly and distinctly avers that the bonds, which are the foundation of plaintiffs' action, were issued without any good or valuable consideration, and that this fact was known to the plaintiffs when they received them. I have examined in vain all the pleas filed by defendants in the former suit to discover any plea which set up this defence, or which raised such an issue that the want of consideration *must* have been passed upon in deciding the case. Nor can I discover any plea under which it *might* have been decided. Here, then, is a distinct, substantial defence to the bonds sued on, sufficient to defeat the action, which was never presented to the court in the former action, and therefore, never decided; and I am of opinion that the former suit did not conclude defendants' right to have this matter inquired into in this action.

DURANT v. ESSEX COMPANY.

1. A decree dismissing a bill in an equity suit in the Circuit Court of the United States, which is absolute in its terms, unless made upon some ground which does not go to the merits, is a final determination of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties.
2. Where words of qualification, such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits.
3. Where the judges of the Supreme Court of the United States are equally divided in opinion upon the questions of law or fact involved in a case before the court on appeal or writ of error, the judgment of affirmance, which is the judgment rendered in such a case, is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case.

APPEAL from the Circuit Court for the District of Massachusetts.

The Constitution vests appellate jurisdiction in the Su-

preme Court under such regulations as Congress shall make, and Congress, by the act of March 3, 1803, authorizing appeals, provides that "the said Supreme Court shall be, and hereby is, authorized and required to receive, hear, and *determine* such appeals."

With these provisions in force, Durant filed a bill, in October, 1847, against the Essex Company, seeking to hold it liable for certain real estate. The bill was finally "dismissed." An appeal was taken to this court, where, after hearing the case, the judges were equally divided in opinion; and in conformity with the practice of the court in such cases it ordered that the decree of the court "be affirmed with costs."

The complainant, conceiving that as the judgment in this court was by a bench equally divided, there had been no decision of his case by the court of last resort, filed another bill—the bill in the court below—for the same relief in the same matter as he had filed the one before.

The defendant pleaded that the former suit and decree in this court—which the plea averred were made after testimony was taken on both sides, and the case heard on its merits and argued by counsel—were a bar to the present bill. This was determined by the court below to be so; and the mandate of this court being filed, the complainant moved for leave to discontinue the suit, or that the bill be dismissed without prejudice. But the court refused leave, and dismissed the bill, no words being put in the decree that showed that the dismissal was other than an absolute one. Appeal here accordingly.

The questions which the appellant now sought to raise were:

1. Whether the decree of dismissal simply was a bar to a new suit?

2. What was the effect of an affirmance by an equally divided court?

Mr. Boyce, for the appellant, contended:

1. That the decree in the first suit being simply one of

dismissal, did not prevent the filing of a new bill in another court, or even in the same court.

2. That an affirmance by an equally divided court amounted to nothing; that this court, upon appeal, must "determine such appeal," and that a decree by a divided court was not a compliance with the act of Congress. It was an abdication of the appellate power, and, in effect, imparted the power to the Circuit Court.

Messrs. Merwin and Storrow, contra, considering the first point made plainly untenable, were proceeding to the second, when they were stopped by the court; Grier, J., referring them to a note of the late Horace Binney Wallace, Esq., of Philadelphia, appended to the case of *Krebs* v. *The Carlisle Bank*,* as to the effect of an affirmance of judgment by an equally divided court, which he said was "clear and satisfactory."

Mr. Justice FIELD delivered the opinion of the court.

The decree dismissing the bill in the former suit in the Circuit Court of the United States being absolute in its terms, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits.†

Accordingly, it is the general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, for the court to express in its decree

* 2 Wallace, Jr., 49. See it, *infra*, Appendix.

† Walden *v.* Bodley, 14 Peters, 156; Hughes *v.* United States, 4 Wallace, 237; Bigelow *v.* Winsor, 1 Gray, 301; Foote *v.* Gibbs, Ibid. 412.

that the dismissal is without prejudice. The omission of the qualification in a proper case will be corrected by this court on appeal.*

In the case in the Circuit Court we are not left to conjectures, or to presumptions, as to what was intended by the decree. The plea of the defendants avers, that testimony was taken on both sides, and that the case was heard on its merits, and argued by counsel. And when the mandate of this court was filed, the complainant moved for leave to discontinue the suit, or that the bill be dismissed without prejudice; but the motion was denied and the decree was affirmed.

There is nothing in the fact that the judges of this court were divided in opinion upon the question whether the decree should be reversed or not, and, therefore, ordered an affirmance of the decree of the court below. The judgment of affirmance was the judgment of the entire court. The division of opinion between the judges was the reason for the entry of that judgment; but the reason is no part of the judgment itself.

It has long been the doctrine in this country and in England, where courts consist of several members, that no affirmative action can be had in a cause where the judges are equally divided in opinion as to the judgment to be rendered or order to be made. If affirmative action is necessary for the further progress of the cause, the division operates as a stay of proceedings. If the affirmative action sought is to set aside or modify an existing judgment or order, the division operates as a denial of the application, and the judgment, or order, stands in full force, to be carried into effect by the ordinary means.

Thus, in *Iveson* v. *Moore*,† a verdict was rendered for the

* Lindsay *v.* Lynch, 2 Schoales & Lefroy, 10; Woollam *v.* Hearn, 7 Vesey, 222; Stevens *v.* Guppy, 3 Russell, 185; Sewall *v.* Eastern R. R. Co., 9 Cushing, 13; Miles *v.* Caldwell, 2 Wallace, 45; Carneal *v.* Banks, 10 Wheaton, 192; Dandridge *v.* Washington, 2 Peters, 378; Piersoll *v.* Elliott, 6 Id. 100; Gaylords *v.* Kelshaw, 1 Wallace, 83; Barney *v.* Baltimore, 6 Id. 289; Hobson *v.* McArthur, 16 Peters, 195.

† 1 Salkeld, 15; S. C., 1 Lord Raymond, 495.

plaintiff, and according to the practice prevailing in the English courts, a rule was entered for judgment *nisi*. Afterwards a rule was obtained that the judgment should be arrested *nisi*—that is, unless cause be shown against the arrest. On motion to discharge this latter rule the judges were equally divided, and no order could be made. But the court said, if "it had been divided on the first motion [that is, the motion against the judgment under the general rule], the plaintiff might have entered judgment; but now this rule [in arrest] must stand or be discharged, and discharged it cannot be, for the court is equally divided." The inability of the court, from the division, to take affirmative action, would have allowed the plaintiff to enter his judgment under the general rule if no order in arrest has been made; but that being made, the position of the parties was changed.

In *Chapman* v. *Lamphire*,* the plaintiff obtained a verdict, upon which the usual rule was entered for judgment *nisi*, in accordance with the established practice. A motion was then made for the arrest of the judgment, and it is reported that "the judges were divided in opinion, two against two, and so the plaintiff had his judgment, there being no rule made to stay it, so that he had his judgment upon his general rule for judgment; but if it had been upon a demurrer or special verdict, then it would have been adjourned to the Exchequer Chamber."

By a law of England, passed as long ago as 14 Edward III, if the judges of the King's Bench, or Common Pleas, are equally divided, the case is to be adjourned to the Exchequer Chamber, and be there argued before all the justices of England. If these are equally divided, it is to be determined at the next Parliament by a prelate, two earls, and two barons, with the advice of the lords chancellor, and treasurer, the judges, and other of the king's council.†

In the case of the special verdict, affirmative action would be required to enter judgment, which would be impossible

* 3 Modern, 155.

† Comyn's Digest, title Court, D. 5; Coke Litt. 71, 2.

from the division of the judges. But in the case of the demurrer, the effect of a division would depend, we think, upon the rules of practice established in such cases, for in the absence of a settled practice or general rule of court upon the subject, the judges disagreeing as to the demurrer might disagree also as to the effect of their inability to decide it, as was the fact in this court in the case between the commonwealth of Virginia and West Virginia, argued upon demurrer to the bill at the last term.

In cases of appeal or writ of error in this court, the appellant or plaintiff in error is always the moving party. It is affirmative action which he asks. The question presented is, shall the judgment, or decree, be reversed? If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed.

The Antelope,* and *Etting* v. *The Bank of the United States*,† are cases where the decisions of the court below, or some part of them, were affirmed upon a division of the judges, and a term seldom passes in which there are not several cases disposed of in this way. In *Brown* v. *Aspden*,‡ Chief Justice Taney observed that there was no difference between a decree in chancery and a judgment at law as to its affirmance on a division of the court. "In both cases," he said, "the motion is to reverse, and if that fails, the judgment, or decree, necessarily stands."

It is also the practice of the Exchequer Chamber in England to affirm the judgment of the court below, brought before it on a writ of error, when the judges are equally divided. Where a case is adjourned to that court, under the

* 10 Wheaton, 66. † 11 Id. 59. ‡ 14 Howard, 28.

statute of 14 Edward III, upon a division of the judges of the court below, the practice, as we have stated, is different. But on writs of error it is similar to that followed by this court. Such, also, is the practice of the House of Lords when sitting as a court of appeals. It is said that this practice depends upon the manner in which the Lords put the question, which is always in this form: Shall this judgment, or decree, be reversed? But that is the question in all appellate courts, and the particular manner in which the question is stated, cannot change the rule of law on the subject.*

The statement which always accompanies a judgment in such case, that it is rendered by a divided court, is only intended to show that there was a division among the judges upon the questions of law or fact involved, not that there was any disagreement as to the judgment to be entered upon such division. It serves to explain the absence of any opinion in the cause, and prevents the decision from becoming an authority for other cases of like character. But the judgment is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case.

JUDGMENT AFFIRMED.

KENDALL *v.* UNITED STATES.

A claim which has never received the assent of the person against whom it is asserted, and which remains to be settled by negotiation or suit at law, cannot be so assigned as to give the assignee an equitable right to prevent the original parties from compromising or adjusting the claim on any terms that may suit them.

APPEAL from the Court of Claims.

A. and J. Kendall made an agreement, in the year 1843, with persons representing a branch of the Cherokee tribe of Indians, called the Western Cherokees, to prosecute a claim

* See Bridge *v.* Johnson, 5 Wendell, 372.