THE PROTECTOR.

An *appeal* dismissed because taken in the name of William A. Freeborn & *Co.*; the court holding that no difference existed between writs of error and appeals as to the manner in which the names of the parties should be set forth.

ON motion to dismiss an *appeal;* the case being this:

By the 22d section of the Judiciary Act it is enacted that decrees in civil actions may be brought here by *writ of error.* By the 32d section of the act it is enacted:

"That no summons, writ, declaration, return, process, judgment, or *other proceeding* in civil causes in any of the courts of the United States, shall be *abated, arrested, quashed,* or reversed, for any defect or want of form, but the said courts respectively shall proceed and give judgment according as the right of the cause and matter in law shall appear unto them, without regarding any imperfections, defects, or want of form in such writ, declaration, or other pleadings, return, process, judgment, or course of proceeding whatsoever, except those only in cases of demurrer which the party demurring shall specially set down. . . . And the said courts respectively shall and may . . . from time to time amend all and every such imperfection, defect, and want of form, except, &c., and may at any time *permit either of the parties to amend any defect in the process or pleadings,* upon such conditions as the said courts respectively shall in their discretion and by their rules prescribe."

An act of March 3, 1803, enacts that decrees in admiralty must, if brought here, be brought by *appeal,* and enacts:

"Such appeals shall be subject to the *same* rules, regulations, and *restrictions,* as are presented in law in cases of *writs of error,* and that the said Supreme Court shall be and hereby is authorized and required to receive, hear, and determine such appeals."

In this state of statutory law William A. Freeborn, James F. Freeborn, and Henry P. Gardner, of the city of New

York, merchants, filed a libel in the District Court for the Southern District of Alabama against the ship Protector. That court dismissed the libel "at the costs of the libellants, and ordered execution therefor to issue against the libellants." This decree was confirmed by the Circuit Court. An appeal was then taken to this court. The petition for appeal was entitled William A. Freeborn *& Co.*, and prayed for an appeal in the name of William A. Freeborn *& Co.* The allowance of the appeal was in the same name and style. The bond recited the appeal in the name of William A. Freeborn *& Company.* The citation also directed the party to appear in the cause wherein William A. Freeborn *& Company* were appellants.

Who constituted the Co. or Company, nowhere appeared in the proceedings *on appeal.*

Mr. Phillips, *for the appellees*, now moved to dismiss the case for want of jurisdiction.

In support of his motion: There is no doubt that if this were a writ of error, the writ would have to be dismissed as vicious.* Is the rule different when applied to appeals? When a decree is joint against several all must appeal, without there is a summons and severance, and, as a consequence of this, whether the cause is to be removed by writ of error or appeal, all the parties must be named in the process by which the removal is effected.† By searching the record in the case we could doubtless gather the fact, that the three named libellants did compose the firm of William A. Freeborn & Co., and a like result might have been obtained in all the cases in which the court has dismissed writs of error.

Mr. Blount, *contra*, *opposed the motion*, and moved on his side:

1st. To amend the proceedings on appeal by the libel in the cause; and 2d, to amend the libel so as that a decree

* Deneale *v.* Stump, 8 Peters, 526; Smith *v.* Clark, 12 Howard, 21.

† Owings *v.* Kincannon, 7 Peters, 403.

might be rendered for interest and damages above the demand.

1st. It has been frequently decided that on an appeal to the Supreme Court in an *admiralty* cause, the cause is before that court as if in the inferior court. The libel here setting forth the names of all the parties who compose the firm of William A. Freeborn & Co., the *whole record* and proceedings being before this court, and the trial being *de novo*, the case is one for amendment under the thirty-second section—a section most remedial in its intent and broad in its language. It is the settled practice in admiralty proceedings *where merits appear upon the record*, but the libel is defective to allow the party to assert his rights in a new allegation.*

2d. In *Weaver* v. *Thompson*,† an appellee in admiralty was allowed to amend his libel in the appellate court so as to make a claim there for damages above costs, caused by a vexatious appeal.

The court having taken the matter into advisement, GRANTED THE MOTION TO DISMISS; an opinion, as given further on, being read from the bench, and holding that there was no difference in respect of the manner in which the names of the parties should be set forth between writs of error and appeals.

Mr. Carlisle hereupon submitted a motion for reargument, with a brief, thus:

1. In granting the motion to dismiss, it has been assumed that the same rule is applicable as in cases of writs of error. But it is respectfully submitted that this is not so.

The act of 1803 provides, "*That such appeals shall be subject to the same rules, regulations, and restrictions* as are prescribed in law *in case of writs of error*, and that the said Supreme Court shall be, and hereby is, authorized and required *to receive*, hear, and determine such *appeals*."

Now it would render the act nugatory if there were to be *no* difference, after its passage, between writs of error and

* The Adeline, 9 Cranch, 244. † 1 Wallace, Jr., 843.

appeals. The very object of the act was to recognize and establish these as two distinct modes by which the appellate jurisdiction might be acquired; and the inherent distinctions between the one proceeding and the other were to be observed, notwithstanding the general language above quoted, which general language was intended to apply only as to the substantial conditions on which *the right* to appeal should attach. The appeal must be always prayed and allowed in the court below or by a justice of the Supreme Court; and in either case these proceedings form *part of the record in the court below*, and are not, as in cases of writs of error, process out of *this* court. *Copies* only come here with the transcript, and this court is required to receive them only as parts of that transcript, and as "proceedings in that cause."

It would seem, therefore, that the reason of the rule, in cases of writs of error (viz., that it is an original writ and a new suit) does not apply. The whole record—appeal, allowance, and all—comes together as the same old suit; and it would be strange indeed if the appellate court, which is required to receive, hear, and determine the suit, should have any difficulty in ascertaining who are appellants and who appellees.

In the case of a writ of error there is nothing to amend by. In the case of an appeal there is everything. Here is simply an abbreviated description, not repugnant to the record, but plainly pointing to it, and is made certain by being filed in the cause below, and being sent up as part of the proceedings in that cause.

2. The order dismissing this appeal proceeds on the ground that the defect is a jurisdictional one. But it is submitted that a distinction is to be observed between jurisdiction of the subject-matter shown by the record [*the case*] and jurisdiction of the parties. No consent, stipulation, or waiver can confer jurisdiction of the first kind; nor can it confer jurisdiction of the parties, unless it appears that the court *may* take jurisdiction between such parties. But it is submitted that all mere informalities and irregularities may be

cured by the voluntary appearance of parties of whom the court may take jurisdiction in a proper case. If it were otherwise, then it is hazarding nothing to say that an examination of the records of this court would show hundreds of decrees and judgments, in most important causes, to have been and to be mere nullities for want of jurisdiction. To avoid the waiver of such an objection to the jurisdiction, it is the common practice and understanding of the bar that the appearance must be expressed and limited to be "*special;*" and, to avoid questions of fact in this respect, not many terms ago, the clerk, by direction of the court, caused the precipe to be used in such cases to be printed, using the word "*special.*"

The opinion originally read, and which had been retained until the motion to reargue was disposed of, was now delivered to be reported.

Mr. Justice NELSON had thus delivered it:

The motion made by the appellees to dismiss the case from the docket for want of jurisdiction, is grounded upon a defect of the title of the parties in the appeal as allowed. The title is, "*William A. Freeborn & Co.* v. *The Ship Protector and owners.*" This defect in a writ of error has been held fatal to the jurisdiction of the court since the case of *Deneale et al.* v. *Stump's Executors*,* down to the present time.† Nor can the writ be amended, according to repeated decisions of this court.‡ The only question before us is, whether the same rule applies to appeals in admiralty. Originally, decrees in equity and admiralty were brought here for re-examination by a writ of error, under the twenty-second section of the Judiciary Act. This was changed by the act of March 3, 1803, by which appeals were substituted in place of the writs of error in cases of equity, admiralty, and prize; but the act

* 8 Peters, 526.

† The Heirs of Wilson *v.* The Life and Fire Insurance Company of New York, 12 Id. 140; Smyth *v.* Pevine & Co., 12 Howard, 327; Davenport *v.* Fletcher, 16 Id. 142.

‡ Porter *v.* Foley, 21 Howard, 393; Hodge et al. *v.* Williams, 22 Id. 87.

provides "that the appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in law in cases of writs of error."

In *Owings et al.* v. *Andrew Kincannon*,* the appeal was dismissed because all the parties to the decree below had not joined in it. Chief Justice Marshall, in delivering the opinion of the court, referred to the case of *Williams* v. *The Bank of the United States*,† which was a writ of error, where it was held that all the defendants must join, and applied the same rule to the case of an appeal. He cited the act of 1803, and observed that "the language of the act which gives the appeal appears to us to require that it should be prosecuted by the same parties who would have been necessary in a writ of error." But the case of *Francis O. J. Smith, appellant*, v. *Joseph W. Clark et al.*,‡ is more direct to the point before us. It was a motion to docket and dismiss in the case of an appeal, under the 43d rule of the court. The certificate of the clerk, upon which it was founded, described the parties as in the title above. Chief Justice Taney, in giving the opinion of the court, stated that the certificate conformed to the rule in all respects but one, and that was in the statement of the parties. The respondents were stated to be Joseph W. Clarke *and others*, from which it appeared that there were other respondents, parties to the suit, who were not named in the certificate. He then referred to the case of a writ of error,§ where it was held that all the parties must be named in the writ, and the name of one or more of them, *and others*, were not a sufficient description; and, also, to the case of *Holliday et al.* v. *Baston et al.*,‖ where the same principle was applied to a writ of error docketed under the 43d rule, and observed the same reason for requiring all the parties whose interests were to be affected by the judgment, to be named in the writ of error, applied with equal force to the case of an appeal from a decree. And the motion to docket and dismiss for the above defect was overruled. The opinion of the court in the present case is, that no distinction in respect

* 7 Peters, 403. † 11 Wheaton, 414. ‡ 12 Howard, 21.
§ Deneale *v.* Stump, 8 Peters, 526. ‖ 4 Howard, 645.

to the question before us can be made between the case of an appeal under the act of 1803, and of a writ of error; and that the decisions referred to directing the dismissal of the latter from the docket for want of jurisdiction, apply with equal force to the former. This result disposes of the motions on the part of the appellant to amend the petition of appeal, citation, and bond, and also the motion to amend the libel.

MOTION TO DISMISS GRANTED.

Mr. Justice SWAYNE (with whom concurred Mr. Justice BRADLEY) dissenting:

I dissent from the conclusions announced by the court in this case. The defect objected to is, in my judgment, amendable under the 32d section of the Judiciary Act of 1789, and I think an amendment should be permitted to be made.

UNITED STATES v. TYNEN.

1. When there are two acts of Congress on the same subject, and the latter act embraces all the provisions of the first, and also new provisions, and imposes different or additional penalties, the latter act operates, without any repealing clause, as a repeal of the first.

   Accordingly, the thirteenth section of the act of Congress of 1813 "for the regulation of seamen on board the public and private vessels of the United States," which defined certain offences against the naturalization laws, and prescribed their punishment, was held to be repealed by the act of Congress of 1870, "to amend the naturalization laws, and to punish crimes against the same, and for other purposes," which declared not only that the commission of the several acts mentioned in the thirteenth section of the law of 1813 should constitute a felony, but that also a great number of other acts of a fraudulent character, in connection with the naturalization of aliens, should constitute a similar offence, and made the infliction of a larger punishment for each offence discretionary with the court.

2. By the repeal of an act, without any reservation of its penalties, all criminal proceedings taken under it fall. There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence.