Syllabus.

3d. That thenceforward the common law of all the States was restored to its original principles of liberty, justice, and right, in conformity with which some of the highest courts of the late Slave States, notably that of Louisiana, have decided, and all might, on the same principles, decide, slave contracts to be invalid, as inconsistent with their jurisprudence, and this court has properly refused to interfere with those decisions.

4th. That the clause in the fourteenth amendment of the Constitution which forbids compensation for slaves emancipated by the thirteenth, can be vindicated only on these principles.

5th. That clauses in State constitutions, acts of State legislatures, and decisions of State courts, warranted by the thirteenth and fourteenth amendments, cannot be held void as in violation of the original Constitution, which forbids the States to pass any law violating the obligation of contracts.

EX PARTE RUSSELL.

1. The words "final disposition" in the 2d section of the act of June 25th, 1868, allowing the Court of Claims "at any time while any suit or claim is pending before or on appeal from the said court, or within two years next after the *final disposition* of any such suit or claim, on motion on behalf of the United States, to grant a new trial in any such suit or claim," mean the final determination of the suit on appeal (if an appeal is taken), or if none is taken, then its final determination in the Court of Claims. The Court of Claims has accordingly power to grant a new trial, if the same be done within two years next after the final disposition, although the case may have been decided on appeal in this court, and its mandate have been issued.
2. When the Court of Claims on a motion for a new trial under the 2d section of the act of June 25th, 1868, above referred to, has not reached the consideration of the motion on its merits, but has dismissed it under an assumption that they had no jurisdiction to grant it, *mandamus* directing the court to proceed with the motion is the proper remedy. Appeal is not a proper one.
3. But if the Court of Claims have granted an appeal, mandamus will not lie to cause them simply to vacate the allowance of it.

Statement of the case.

4. *Semble*, however, that it might lie to do so, *and to proceed to the hearing of the motion for a new trial.*

5. The proper course in a case where the Court of Claims, improperly (from supposed want of jurisdiction) refused to grant to the United States a motion for a new trial, made under the act of 1868, above referred to, and the United States *appealed*, stated to be, for one or the other party to move to dismiss the appeal, and then for the United States to ask for a distinct mandamus on the Court of Claims to proceed; this court stating that the motion to dismiss might be made at any time when the court was in session, and that it was not necessary to await the arrival of the term to which the record ought to be returned.

MOTION, *by Mr. William Penn Clarke*, for a writ of mandamus; the case being thus:

The second section of an act of June 25th, 1868, relating to the Court of Claims, thus enacts:

"That the said Court of Claims, at any time while any suit or claim is pending before or on appeal from said court, or within two years next after the *final disposition* of any suit or claim, may, on motion on behalf of the United States, grant a new trial in any such suit or claim, and stay the payment of any judgment therein, upon such evidence (although the same may be cumulative or other) as shall reasonably satisfy said court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law."

It now appeared from the affidavit and exhibits on which this motion was based, that in October, 1867, Russell filed a petition in the Court of Claims to recover from the United States compensation for the use of certain steamboats, and that he obtained a judgment for $41,355 on the 6th of December, 1869, that afterwards an appeal was taken to this court on behalf of the United States, and the judgment of the Court of Claims was affirmed on the 20th of November, 1871,* that, pending the appeal, the counsel for the United States applied to the Court of Claims for a new trial, but the

* See the report of the case, *supra*, p. 623. The case was decided at the close of the last term.

motion was not argued until after the decision of the case here on the appeal, though it was argued before the mandate was issued; that the motion for a new trial failed by an equal division of the court; that the mandate from this court was filed in the Court of Claims on the 12th day of December, 1871, and on the next day that court ordered a rehearing of the motion for a new trial; and that, on the 29th of January, 1872, the Court of Claims dismissed the motion for a new trial as for want of jurisdiction, on the ground that, after it was made, the mandate of the Supreme Court had been filed affirming the judgment, and also on the ground that the motion had failed on the prior hearing by an equal division of the court. From this last decision the counsel for the United States appealed to this court, and the appeal was allowed by the Court of Claims. Thereupon the claimant moved that court to vacate the allowance of the appeal, but the court refused to do so. He now moves this court for a mandamus to compel the Court of Claims to vacate its order allowing the appeal. The grounds on which the application was made were:

First, that an appeal does not lie from an order refusing a new trial, because it is not a final judgment.

Secondly, that the granting of a new trial rests in the discretion of the court.

Thirdly, that the allowance of the appeal was a violation of the mandate of this court.

Mr. Clarke, in support of his motion, argued that the first and second reasons assigned needed no explanation. That the third one was well founded, and that the allowance of the appeal was a violation of the mandate of this court appeared on a right reading of the 2d section of the act of June 25th, 1868, under which the motion for the new trial was made. That section does but extend the time within which the government may exercise the right of appeal. The extension is:

1st. "While any suit or claim is pending before or on appeal from said Court" (of Claims); OR,

Argument against the motion.

2d. "Within two years next after the final disposition of any such suit or claim."

"Final disposition." Where? In the Court of Claims, of course. The act relates only to the Court of Claims, and the limitation is twofold. If the two limitations were united by the conjunction *and*, instead of the preposition "*or*," the section would then bear the construction contended for by the government. The case was *not* "pending on appeal from said court" when the motion for a new trial was argued, and the court properly overruled the motion. Its jurisdiction over the cause terminated when the mandate of this court, showing that the judgment had been affirmed, was filed in that court, except so far as its action was required to carry the judgment into execution. And the cause not being *pending* there, the court had no power to grant the allowance of an appeal. To have done so, would have been to have allowed an appeal to the Court of Claims from this court. Having erred in allowing the appeal, the order should have been vacated on the motion of the claimants.

Mr. W. McMichael, Assistant Attorney-General, and Mr. B. H. Bristow, Solicitor-General:

1. The appeal is not from an interlocutory order, but is the final judgment of the court below in the case.

2. The refusal to grant a new trial was a decision of the case against the United States; it involved not a matter of discretion but one of right. The words "final disposition" in the section under which this motion for a new trial was made do not relate alone to the action of the Court of Claims, but where cases are taken by appeal to the Supreme Court include the disposition of the case by the latter tribunal. A case which is thus taken to the Supreme Court cannot be regarded as finally disposed of until the court has expressed its judgment, and the two years recited in the statute are to be measured from that time. In the present case that limitation had not yet expired, and the motion for a new trial was not only made within it, but also within two years from the judgment of December 6th, 1869, in the Court of Claims.

Opinion of the court.

Mr. Justice BRADLEY delivered the opinion of the court.

We think that the Court of Claims erred in dismissing the motion for a new trial as for want of jurisdiction; that the counsel for the United States mistook their remedy in appealing from that decision; and that the claimant has equally mistaken his remedy in applying for a mandamus to vacate the allowance of the appeal.

The difficulty has arisen out of the anomalous provisions of the 2d section of the act of June 25th, 1868. The policy of this act was undoubtedly dictated by the fact that the government agents are at a great disadvantage in defending suits in the Court of Claims on account of their personal ignorance of the facts, and of the witnesses and evidence necessary to rebut the petitioner's case; for all which they have to depend on distant and uninterested parties, or parties whose sympathies and, perhaps, whose interests, are with the claimants, whilst the claimants have had years to prepare and get up their cases and to select the most favorable proofs to sustain them. From these causes, no doubt, the government is often greatly defrauded, and claims are proved and adjudged against it which have really no just grounds, or which have long since been settled and paid. But whatever reason Congress may have had for passing the act, of its right to pass it there is no question. The erection of the Court of Claims itself, and the giving to parties the privilege of suing the government therein, though dictated by a sense of justice and good faith, were purely voluntary on the part of Congress; and it has the right to impose such conditions and regulations in reference to the proceedings in that court as it sees fit.

The section in question was undoubtedly intended to give the government an advantage, which, in respect to its form, is quite unusual, if not unprecedented, but which Congress undoubtedly saw sufficient reason to confer. It authorizes the Court of Claims, on behalf of the United States, at any time while a suit is pending before, or on appeal from, said court, or within two years next after the final disposition of such suit, to grant a new trial upon such evidence as shall

satisfy the court that the government has been defrauded or wronged. The question is, what is meant by the final disposition of the suit from which the two years of limitation is to date. And it seems to us there is hardly room for a doubt. Looking at the words in their collocation with the previous words, it seems evident that the final determination of the suit has reference to its final determination on appeal (if an appeal is taken), or, if none is taken, then to its final determination in the Court of Claims. The natural meaning of the words leads to the same conclusion. The final determination of a suit is the end of litigation therein. This cannot be said to have arrived as long as an appeal is pending. Neither the existence nor the determination of the appeal interferes with the right, on the part of the government, to apply for a new trial; and, of course, the mandate from this court cannot affect it.

It has been objected that the granting of a new trial after a decision by this court is, in effect, an appeal from the decision of this court. This would be so if it were granted upon the same case presented to us. But it is not. A new case must be made; a case involving fraud or other wrong practiced upon the government. It is analogous to the case of a bill of review in chancery to set aside a former decree, or a bill impeaching a decree for fraud.

We are of opinion, therefore, that the Court of Claims had jurisdiction to grant a new trial, notwithstanding the filing of the mandate of this court.

The other ground on which the court dismissed the motion, namely, that on the first hearing the court was equally divided, was no valid reason for not proceeding after an order for a rehearing had been made.

The next question is as to the proper remedy of the counsel for the United States upon the dismissal of their motion. To us it seems clear that they should have applied to this court for a mandamus. An appeal was not the proper remedy. The Court of Claims did not reach the consideration of the motion for a new trial on its merits; but stopped

short of that point by reaching the conclusion that, under the circumstances, they had no jurisdiction to entertain the motion, and therefore they dismissed it. The only proper remedy, therefore, which was left to the United States was to move for a mandamus to direct the court to proceed with the motion. Where a court declines to hear a case or motion, alleging its own incompetency to do so, or that of the party to be heard, mandamus is the proper remedy. A writ of error or appeal does not lie; for what has the appellate court to review where the inferior court has not decided the case, but has refused to hear it? Where a final judgment or decree to which a writ of error or an appeal can be taken is based on a supposed want of jurisdiction, that question, as well as other questions, may be examined by the appellate court. But that, as we have shown, is not the case here.

If this view as to the proper course of proceeding is correct, it follows that the appeal taken by the counsel for the government was not well taken, and that this court would dismiss it upon proper application here.

But we cannot grant a mandamus to the Court of Claims to cause them to vacate their allowance of the appeal. That would be to use the writ for the purpose of compelling the inferior court to decide a case or question in a particular manner. If we should grant a mandamus in the case at all, it would be adverse to the claimants, namely, a mandamus to vacate the allowance of the appeal, and to proceed with the hearing of the motion for a new trial. Perhaps, on the principle of going back to the first error, we might do this; especially, as by their appeal, the defendants, though not in the proper mode, have asked us to do substantially the same thing by reversing the order dismissing their motion for new trial.

However, since the appeal has been actually allowed, and the court below has thus lost possession of the case, and as it is now within the control of this court, we think the more orderly and proper course would be for one or the other party to move to dismiss the appeal, and for the counsel of the United States, if they see fit, to move for a distinct

mandamus to require the Court of Claims to proceed. A motion to dismiss the appeal where it has been improperly allowed is an adequate remedy, and this is an additional reason why a mandamus commanding the court below to vacate the allowance thereof should not be granted.

It is suggested that a party wishing to move the dismissal of an appeal is obliged to await the arrival of the term to which the record ought to be returned, which occasions great delay. But as the case is virtually in the possession and subject to the control of this court as soon as the appeal is effectively taken, we see no reason why the appellee should not at any time when the court is in session, apply to have the appeal dismissed, provided the question can be properly presented to the court. Of course the court would not hear the motion without having the record before it; but that could be procured and presented by the appellee as is done where the appellant has failed to have the record filed in due time. In many cases the court might decline to hear the motion until the record were printed; but that could also be done by the appellee, if he desired to have a speedy hearing of the matter. Unless some unforeseen inconvenience should arise from the practice, we shall not refuse to hear a motion to dismiss before the term to which, in regular course, the record ought to be returned. It would be likely to prevent great delays and expense, and further the ends of justice.

The motion for mandamus must be

DENIED.

If the counsel for the United States desire to dismiss their appeal and ask for a mandamus to the Court of Claims to proceed with the motion for a new trial, it will be granted. But probably counsel will be able, in view of the suggestions now made, to come to some mutual arrangement by which further process or delay may be avoided.

The CHIEF JUSTICE, with whom concurred CLIFFORD, J., dissented from the opinion of the court because

they thought that the act of Congress did not warrant the granting of a new trial on a petition filed subsequent to an appeal and the return of the mandate from the court.

INSURANCE COMPANY *v.* THWING.

1. Merchandise, carried under bill of lading and paying freight is cargo and not dunnage, although stowed as dunnage would be stowed for the purpose of protecting the rest of the cargo from wet, and put on board by the shipper with knowledge that it would be so stowed.
2. A warranty in a ship's policy "not to load more than her registered tonnage," will be broken by carrying more cargo in weight than such tonnage, though the excess be used as dunnage; whilst, if such excess had been mere dunnage, and not cargo, the warranty would not have been broken.

IN error to the Circuit Court of the United States for the District of Massachusetts.

This was an action of assumpsit for money had and received, brought by The Great Western Insurance Company, of New York, against W. Thwing, a citizen of Massachusetts, to recover certain insurance money which the company had paid to him in ignorance (as they alleged) of a breach of warranty by him. They had made him a policy on his ship Alhambra, on a voyage from Liverpool to San Francisco, which policy was dated the 6th of October, 1863, and contained, amongst other things, this clause:

"Warranted not to load more than her registered tonnage with lead, marble, coal, slate, copper ore, salt, stone, bricks, grain, or iron, either or all, on any one passage."

The registered tonnage was 1285 tons, and the vessel took on board at Liverpool, among other things, 1064 tons of iron, 6 tons of brick, and 238 tons of cannel coal, being an excess over the registered tonnage of 23 tons. The ship having sustained a partial loss on the voyage, the insurance company paid the money in question in ignorance of the amount