

## Statement of the case.

The CHIEF JUSTICE delivered the opinion of the court.

Two questions are presented, both of which have been adjudicated. The first relates to the proceeding of the court of Louisiana, by which the original judgment was rendered. It is claimed that this was a proceeding in admiralty. It was, in fact, a proceeding against the persons of the defendants, instituted by attachment. Such a suit, we have held, is not a proceeding in admiralty.\*

The second question relates to the validity of the appointment of the judge who presided in the court of the Fourth District of New Orleans. His commission came from the military governor, who was appointed by the President during the late war. We have already decided that such appointments were within the power of such a governor.†

There can have been no good ground for the writ of error under the former adjudications of this court, and there is no attempt to question these adjudications. We are obliged, therefore, to regard this writ of error as prosecuted for delay.

The judgment of the Supreme Court of Arkansas must be

AFFIRMED, WITH TEN PER CENT. DAMAGES.

## EX PARTE ROBERTS.

The allowance of an appeal to this court by the Court of Claims, does not absolutely and of itself remove the cause from the jurisdiction of the latter court, so that no order revoking such allowance can be made.

ON petition of M. O. Roberts for a writ of mandamus to the Court of Claims to require that court to hear, entertain,

\* The Genesee Chief *v.* Fitzhugh, 12 Howard, 443; Jackson *v.* Steamboat Magnolia, 20 Id. 296; Taylor *v.* Carryl, Ib. 583; The Hine *v.* Trevor, 4 Wallace, 555; The Belfast, 7 Id. 624; Leon *v.* Galceran, 11 Id. 185.

† Handlin *v.* Wickliffe, 12 Id. 173; Leitensdorfer *v.* Webb, 20 Howard, 177; The Grapeshot, 9 Wallace, 133.

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Statement of the case in the opinion.

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and decide a certain motion made there by him for a new trial, and also to correct the records of the court in certain particulars set forth in the petition, the main question arising on the motion being whether the allowance of an appeal to this court by the Court of Claims, absolutely and of itself removes a cause from its jurisdiction, so that no order revoking such allowance can be made.

*Messrs. T. Wilson and E. N. Dickerson, in support of the motion; Mr. C. H. Hill, Assistant Attorney-General, contra.*

The CHIEF JUSTICE stated the case and delivered the opinion of the court.

The act of Congress, 3d March, 1863, authorizes appeals from the Court of Claims to this court under such regulations as this court may direct, provided such appeals be taken within ninety days after such judgment or decree.

By our third rule, regulating these appeals, we directed that this limitation of ninety days should "cease to run from the time of the application for the appeal." In other words, the appeal was taken, in the sense of the act, when the defeated party in the Court of Claims signified, by his motion for the allowance of an appeal, his desire to take one. But, by the same rule, we declared that an allowance by the court or the Chief Justice in vacation was essential to the perfecting of an appeal; so that there might be, between the motion for the appeal and its allowance, an interval of time, greater or less as might be determined by the convenience of counsel, subject to the discretion of the court.

The judgment in the case before us was rendered on the 27th of February, 1871. On the 16th of May, a motion for new trial was made, and, on the 22d of the same month, there was filed a motion for the allowance of an appeal. This motion was in time, and, unless there be some rule of the Court of Claims to the contrary, we perceive no objection to hearing the motion for new trial at any time after it was made, or, if that should be refused, to the subsequent allowance of the appeal. It appears, however, that the

## Opinion of the court.

attorney for the petitioners, apprehending some prejudice to his motion for new trial from the motion for an appeal, entered into a stipulation with the Assistant Attorney-General, representing the United States, which was filed with the motion for an appeal, that the latter motion should not injuriously affect the former, or prevent a full hearing and decision upon the merits. Both motions were thereupon continued. Subsequently, while both were pending, one of the counsel for the plaintiffs, not the attorney of record, and without the assent or knowledge of the attorneys of record, moved the court, on the 2d day of May, 1872, for the allowance of an appeal as prayed by the motion of the 22d of May, 1871, and the appeal was allowed. As soon thereafter as the motion could be made, the same counsel moved for and obtained an order, May 8th, 1872, revoking this allowance. Afterwards, the motion for new trial coming on to be heard, on the 22d November, the court refused to entertain it, on the ground that an appeal had been allowed on the 2d May, 1872, and that, the cause having been thus removed from its jurisdiction, the subsequent order, revoking that allowance, was a nullity. The attorney for the petitioners then moved the court to strike out the allowance of appeal, on the 2d of May, 1872, but the court refused to entertain that motion.

The question whether the court erred is now before us.

We are clearly of opinion that the Court of Claims had power to hear and ought to have heard and determined both motions, and that its order of revocation, made on the 8th of May, 1872, was within its jurisdiction.

That it ought to hear and decide the motion for new trial is obvious; for, when that motion was called up on the 22d of November, 1872, the order revoking the allowance of appeal stood itself unrevoked. A new order was necessary to get rid of its effect. As long as it remained on the record, no question could be made of its operation.

But was it a nullity in fact?

It cannot be denied that the order allowing the appeal

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Statement of the case.

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was improvidently made. It was moved for without authority, or, if with authority, under a total misapprehension of fact and in disregard of the stipulation entered into by the attorneys in the cause. Its effect was to destroy the previous motion for a new trial, contrary to the express terms of the agreement. It had hardly been made when the counsel who had inadvertently moved for it, moved for its revocation, and the motion was granted. We do not doubt the power or the propriety of that action. The whole record was still in the possession of the Court of Claims; and the stipulation, showing that the motion for an allowance of the appeal could not properly be disposed of before the motion for new trial had been heard and determined, was a part of that record.

We shall, therefore, award a mandamus, requiring the Court of Claims to hear, entertain, and decide the motion for new trial, and also the motion to correct the records of that court, as set forth in the motion to this court, made in behalf of the petitioners.

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AWARD ACCORDINGLY.

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MOSES *v.* THE MAYOR.

The rule redeclared, that a decree of the highest court of a State which, merely dissolving an injunction granted in an inferior court, leaves the whole case to be disposed of on its merits, is not a "final decree," and, therefore, does not come within the 25th section of the Judiciary Act of 1789 or the 2d section of the act of 1867, giving revisory powers to this court over final decrees or judgments rendered in certain cases in such highest court.

On motion of *Mr. P. Phillips*, to dismiss for want of jurisdiction; the case being thus:

Moses and another had filed their bill in a State court of Alabama, asserting that a law of that State authorized them, on payment of a certain sum, to establish a lottery; that they had paid the sum and established a lottery accordingly. They now complained that they had been several times ar-