

Syllabus.

must abide by the legality of the tax. When it follows the statute its officers have the protection of the statute, and parties must comply with the requirements thereof before they can prosecute as plaintiffs.

The JUDGMENT REVERSED, and

A VENIRE DE NOVO AWARDED.

Mr. Justice CLIFFORD, with whom concurred Justices SWAYNE, DAVIS, and STRONG, dissenting:

I dissent from the opinion and judgment of the court in this case because the evidence offered by the distiller to show that the assessment in question covered eight days in which his distillery could not be operated was not an answer to the whole declaration; nor could it be, as the assessment was for a deficiency and covered the regular tax for a whole month.

Suppose the evidence was admissible, still if it had been admitted it would only have shown that the assessment was excessive in amount, in which state of the case all will agree, I suppose, that the defence must have failed, as the case showed that no appeal had ever been taken to the Secretary of the Treasury, as required by the act of Congress.

Such must be the rule, else it will follow that nothing can be collected of the taxpayer in any case where the assessment is for an amount greater than that authorized by law, which is a proposition at war with the whole system of Federal taxation.

MAXWELL *v.* STEWART.

1. Where there is no assignment of error, the defendant in error may either move to dismiss the writ, or he may open the record and pray for an affirmance.
2. In a suit upon a judgment of a sister State, objections to the form and sufficiency of the evidence offered to prove the record on which the action is brought cannot be sustained; the document offered being properly certified to be "a true and faithful copy of the record of the proceedings had in the cause."

Statement of the case.

8. Nor is it a valid objection against the jurisdiction of the court rendering the judgment that the record shows that the cause was tried without the intervention of a jury, and did not show that a jury had been waived as provided by statute.

ERROR to the Supreme Court of the Territory of New Mexico.

Stewart brought an action in a State court of Kansas against Maxwell. The writ was returned, "Not served." Thereupon an attachment was issued and levied on his property. A bond was then entered into by which the property was released.

The judgment entry recited that "the plaintiff appeared by his attorney, J. C. Henningray, and the defendant by his attorneys, John Martin and Isaac Sharp, and both parties announcing themselves ready," the trial proceeded.

On the record of this judgment Stewart subsequently sued Maxwell in the Territory of New Mexico, the clerk of the court in Kansas certifying that the record "was a true and faithful copy of the record of the proceedings had in the said court in the said cause;" the cause, namely, in Kansas. Three pleas were put in, alleging certain irregularities and deficiencies in the said record, and also a plea that the judgment was void as the record showed that the case had been tried without a jury. There was no plea alleging that the attorneys who were represented by the record of the judgment to have appeared for the defendant were not authorized to appear.

All the pleas were overruled, a judgment was rendered for the plaintiff, and on appeal to the Supreme Court of the Territory, where the overruling of the pleas was assigned for error, the judgment was affirmed. The defendant now brought the case here.

It may be well to state that by the statute of Kansas,* it is provided that in actions on contracts the trial by jury may be waived, by written consent, or "by oral consent in open court, entered on *the journal*."

* Acts of 1868, p. 684, § 289.

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There was no appearance in this court by the plaintiffs in error and no errors had been here assigned. The court accordingly, on the case being called, were about to dismiss the writ. *Mr. P. Phillips*, for the defendant in error, however, opened the record and prayed an affirmance of the judgment.

The CHIEF JUSTICE delivered the opinion of the court.

On examining the record we find that four errors were assigned in the court below. The first three relate to the form and sufficiency of the evidence offered to prove the record of the judgment in the District Court of the State of Kansas upon which the action was brought. We think the objections were not well taken and that there was no error in overruling them.

The fourth is to the effect that the judgment in the Kansas court was void because the cause was tried by the court without the waiver of a trial by jury entered upon the journal. Whatever might be the effect of this omission in a proceeding to obtain a reversal or vacation of the judgment, it is very certain that it does not render the judgment void. At most it is only error and cannot be taken advantage of collaterally.

JUDGMENT AFFIRMED.

NOTE.

A motion was afterwards made by *Mr. J. S. Watts*, for the plaintiff in error, to rehear the case; but the motion was denied.

HAMILTON v. DILLIN.

The government of the United States clearly has power to permit limited commercial intercourse with an enemy in time of war, and to impose such conditions thereon as it sees fit; this power is incident to the power to declare war and to carry it on to a successful termination.