

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?

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.

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 (2 Wallace, Jr., 49) 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, deciding that 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 constituted a bar to any further litigation of the same subject between the same parties.—*American Law Times*.

CORRESPONDENCE.

The Division Court Amending Act of 1869 and the special rules just made.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

GENTLEMEN,—Sometime since you inserted a letter of mine (see March No. of *Gazette*), signed "Lex," in which some remarks (in extenso), were made on the Garnishee clauses of this new Act, and in which I ventured to express an opinion that, under the second section of the Act, clerks should not and had not legal power to sign judgment in cases coming within the meaning of that section, until the return day of the summons; that is, the *Court-day*, or within one month after. In your remarks

at the end of the article, you were pleased to mention that you did not agree with what I said in all respects, by which I supposed you dissented from this view of the case. In your following number, however, (see April No.), you seemed to think the construction of this second section would, or might bear my construction, and you further remarked, that the Board of County Judges would set this doubt at rest by the way in which they would frame special rules or forms, in May last. I had an opportunity of conversing with the legal gentleman, who, was in fact the author of the whole Act framed under the directions of the Government, and asked him what was in his mind the meaning of the word "*return-day*" and what was the intention of the Legislature in his opinion; and he agreed with my view of the law—that is, that the *return-day* meant the *court-day*. But as that matter may be, for the time, supposed to be set at rest by the new rules, without any further remarks on it, I will just for a moment refer to them. Supposing my original view correct, that a clerk could not legally sign a final judgment in a cause under section two of this Act, until upon or after the court day; I will next enquire, does the Act give the Board of County Judges any power to alter the meaning of the Act in this respect?

The two sections of the new Act (Sections 21 & 22), relating to the powers of "the Board of County Judges" are in these words:

"21. The Division Courts Act and this Act shall be read as one Act; and the powers conferred on judges under the sixty-third section of the said Act as amended by this Act, shall extend to the making and framing from time to time, of rules and forms for the said Division Courts under the new Act, and to altering and amending the same."

It will be seen that this clause does not alter the law (if it be as I say), requiring clerks to sign judgment on the *return-day*. The Board is not by this section vested with that power, nor by the *original Act* referred to therein. "The power of making and framing rules and forms" would not extend to altering the intention of the law-makers. For instance, the Judges could not make a rule saying, a summons should be served only five days before its return, or do away with personal service—where personal service is required, nor can they authorise clerks to sign judgments sooner than the law originally meant they should,