EVENING NEWS.

Published Daily, Sundays Excepted,
AT FOUR O'CLOCK.

PRINTED AND PUBLISHED BY THE
DESERET NEWS COMPANY.

CHARLES W. PENROSE, EDITOR.

Monday, - Feb. 26, 1883.

THE MANDAMUS CASE.

THE Supreme Court of the Territory of Utah, in accordance with agreement made at the last sitting, met on Saturday last for the purpose of hearing arguments on the right of appeal to the Supreme Court of the United States, in the case of Kimball *vs.* Richards, in which is involved the title to and possession of the office of Probate Judge of Weber County.

It will be remembered, from what has already been published in reference to this case, that the Supreme Court, (Chief Justice Hunter, dissenting) decided that Mr. Kimball was entitled to the office. When this desision was rendered, notice was given of an appeal to the Supreme Court of the United States, and this Court was asked to state what would be a sufficient bond in the premises. Thereupon, an informal discussion arose as to the right of the Court either to grant the appeal or fix the amount of the bond. There being considerable diversity of opinion upon the subject, the Court then decided to adjourn the case until to-day, when it would hear arguments on the points in question.

Accordingly on Saturday morning at 10 o'clock, Chief Justice Hunter and Associate Judges Emerson and Twiss on the bench, a large representation of the bar of Utah were present, and it was evident that considerable interest was being taken in the case. Prior to the opening of the court, it was currently reported that the case would assume a new aspect, that, in fact, it was going to be argued by Mr. Kimball and his counsel that this was not an appealable case.

After the court had been declared open, the Clerk (Mr. Sprague) read the minutes of the last sitting of the court, and was about to hand the book to the Judges for signature, when

Mr. Kimball arose to make an amendment to the minutes' to the effect that a motion which had been made at the last session of the court by the respondent—a motion for a remittitur in the case—did not appear on the minutes.

Mr. Arthur Brown: Did'nt you withdraw it?

Mr. Kimball: No, there was to be a hearing on that question at this session.

Judge R. K. Williams: There was some talk about such a motion, but—

Chief Justice Hunter: There was a verbal motion made, and the argument upon that motion was deferred until to-day.

Mr. Kimball: We so understand, but the record does not show the making of the motion, though it was made in open court.

The Clerk: I have added to the minutes: "A motion for a remittitur forthwith was made by the respondent, and hearing thereon fixed for the same time."

The Court: We will now hear the motion, allowing three hours for the argument—one hour and a half to each side.

Mr. Brown: Your Honor says there was a motion here; but there were so many motions that I would like to enquire what that motion is. We asked the Court to fix the amount of supersedeas bond, which we supposed it was the Court's duty to do. So on the strength of that Judge Sutherland moved for a remittitur, but I ultimately understood that he backed out of it. Still I don't care. Gentlemen say they made this motion. Now is it a motion for the remittitur that is to be discussed, or whether the Court will fix a bond? What is it that we are to argue? That is what I want to know beforehand.

The Court: There was a motion made for the Court to fix the amount of supersedeas bond. A conversation took place among the various members of the bar, during which Judge Sutherland moved for a remittitur, and the understanding was that everything was to stand over until to day, and we meet to-day, as I understand it, for the purpose of discussing whether or not the supersedeas bond is to be granted.

Judge McBride contended that the only motion involved in the argument was whether the Court would send down a remittitur to this court below. That of course lay at the foundation of the proceedings. It was not a question as to the amount of bond. They did not dispute the right of the Court to fix the bond, nor the amount.

Mr. Brown: Do you think $2,000 would be enough?

Judge McBride: The Court can determine that.

Mr. Brown: That is the only question we have asked this Court. We do not leave it to this Court to say whether we shall appeal or not.

Mr. McBride: So we understand, and that is the reason why we made our motion, so that the question which was necessary to be determined should come legitimately before the Court. The Court has a right to determine whether it will carry its own process into effect; in other words the remittitur is the process of this Court.

Judge Williams: After the judgment was affirmed, the question came up about fixing the amount of bond. That was the first motion made. We announced we wanted to take an appeal, and we asked the court to grant the appeal. While we were discussing that, Judge Sutherland moved for a remittitur, but the other motion comes first in order.

Mr. Kimball claimed the right to a remittitur in this case whatever bond might be filed, and he took it that as remittitur was the process of that court, they had a right to ask for it. They asked that the process of the court be issued so that they might have the benefit of the judgment. So far as fixing the bond was concerned or approving it he took it that they were not particularly interested in that matter. He supposed the Court would follow the rule in the matter.

Judge Emerson: At the last session of the Court the question came up as to fixing the supersedeas bond, and upon that the Court said they would hear arguments of counsel. Then counsel made a motion for a remittitur.

Mr. Brown: Notwithstanding we file this bond, what is the effect of it?

Judge Twiss: Suppose you file a supersedeas bond, what effect will that have on the remittitur?

Mr. Brown: Not the slightest, unless it is a case that the law provides for. In that case it will have every effect; but that is a question for the Supreme Court to decide.

Mr. Kimball claimed that they had a right to the first hearing on the motion for a remititur, as a decision on that point would decide the whole thing.

Mr. Brown: We want first of all the bond fixed, although we do not claim anything from that.

The Court: So far as the amount of the bond is concerned, if a bond is to be given, the Court has a right to fix the amount of that bond.

Mr. Brown: Your Honors are not asked to give the bond. We simply ask you to fix the amount. We ask you to say what will be a sufficient sum for a supersedeas bond. We ask no other determination.

The Court: Gentlemen, we will hear your arguments on the general proposition and reserve what we have to say.

Mr. Brown: We want to be heard on our motion if your Honors are not prepared to decide. We think our motion is first in order.

Judge Emerson: The Court is satisfied with the amount.

Mr. Brown: We have a bond here endorsed by Mr. Wm. Rossiter and Mr. John Sharp. We ask your Honors to decide as to the sufficiency of the amount and upon the two sureties.

Judge McBride objected to it being allowed 'as supersedeas bond. They were satisfied as to the amount, but did not wish the Court to place itself on the record as granting it as a supersedeas bond.

Mr. Brown: We ask your Honors to say whether these are good and sufficient sureties for $2,500, and whether $2,500 is sufficient if a supersedeas bond is proper.

Judge McBride suggested that the Court withhold its judgment on the question of the bond until it heard the whole discussion. Their position was that it was not an appealable case; and there was no doubt as to that Court having the right to control its own process.

Mr. Brown: I have no objection to you taking all the processes you want. I do not ask any Court for an appeal. That is a question which the Supreme Court of the United States alone can determine. I simply ask whether Mr. Sharp and Mr. Rossiter are sufficient sureties, and whether the amount is sufficient.

The Court: I understand the object is, on all these matters, where a bond is offered, that it is simply for the purpose of satisfying the Supreme Court of the United States that the amount is satisfactory to this Court, and that the sureties are good.

Mr. Brown: That is my position exactly.

The Court: We decide that $2,500 is an amount sufficient for bond in this case, and that the sureties of the bond are good if a supersedeas bond is granted.

Mr. Brown: That will satisfy us.

Mr. Kimball: If the Court please—

Judge Williams (interrupting): Which motion is now to be discussed?

Mr. Kimball: There is a motion for a remittitur, and—

Judge Williams: Does the Court approve of the bond?

The Court: We have stated that the amount of $2,500 is sufficient and that the sureties named in the bond are good if supersedeas lies.

Mr. Kimball contended that his motion had precedence. He asked the Court to issue its process, and there was no question as to its having the right to control its own process, and it seemed to be the only one the Court had a right to act upon.

The Court: We will hear both your motions together. It is immaterial to us which you argue.

Judge Williams claimed their side had precedence, and he insisted upon having the opening and closing argument.

The Court ultimately decided that the parties moving for supersedeas had the affirmative in the discussion.

The arguments in the case then proceeded.

JUDGE R. K. WILLIAMS,

In opening the argument on the motion for the appellant, said: The question to be decided by the Court was the approval of the bond tendered to operate as a supersedeas. The Court had already decided that the penalty was sufficiently large and the sureties amply good, hence, the only remaining question was to determine whether appellant was entitled to a supersedeas. If the value of the thing in dispute was over $1,000, the right to appeal to the United States Supreme Court and have a superdeas was secured by Section 702, Revised Statutes of the United States.

The first question to be decided is as to what was in controversy; the second question is as to whether it was of money value, and if so, was its value over $1,000.

Then how is it to be ascertained what was in controversy? As early as 1793, in Wilson vs. Daniel, 3 Dallas, Reports, the United States Supreme Court decided that the Court will "not regard the verdict or judgment as the rule for ascertaining the value of the matter in dispute between the parties. * * *

To ascertain, then, the matter in dispute, we must recur to the foundation of the original controversy—to the matter in dispute when the action was instituted." And the Court adjudged that the penalty of the bond being over the necessary amount, although the judgment was under it, gave jurisdiction. And where the value does not appear in the pleadings, its value may be subsequently proved by the affidavit of the party or other competent evidence, and these rules have been followed in numerous subsequent cases, 4 Dallas, 20; Williamson vs. Kincaid; 5 Cranch, 216; the U. S. vs. Brig. Union, etc. Now to recur to the pleading, the thing in controversy or dispute will be ascertained.

On the 4th day of October, 1882, the respondent, Kimball, filed before the Judge of the First District Court, an affidavit called a complaint in mandamus, setting out that the appellant had been elected Probate Judge, at the August election in 1880, and that his successor should have been elected in August, 1882, but that there was no such election held, and that September 28, 1882, the Governor of Utah had commissioned him, Kimball, as such Probate Judge, and that he had given bond, taken the oath of office, but that he could not find the County Treasurer and had left the bond at his office, and on Oct. 2, '82, had presented his commission to Judge Richards, and demanded that he deliver to him (Kimball) the papers, books, etc., appertaining to said office, but "notwithstanding plaintiff's appointment aforesaid, he (Richards) refused to deliver all or any of said books, papers, records or property to said plaintiff, and still does so refuse, and claims that he is entitled to retain the custody of the same until a successor to him is elected by the people." Thus showing in his own affidavit or complaint, that the very foundation for his claim to the books was whether he or Judge Richards was the legal Probate Judge of Weber County.

But the defendant afiled a demurrer and answer at the same time, and in his answer he sets out that by virtue of an election to said office in August, 1880, the same Governor of Utah had commissioned him to fill said office "for the term prescribed by law, and until his successor shall be elected and qualified," dated September 1st, 1880, and alleges: "That his official term has not expired and said office has not become vacant by reason of a failure to elect his successor on the first Monday in August, 1882, or otherwise;" and "that by virtue of said office, and in accordance with his duties, the defendant holds and retains the custody of the books, records and all property pertaining thereto, and not otherwise."

Could a more direct and square issue be made as to the right to the office? By what authority could any Court take from the legal incumbent, or one holding the office and claiming to be the legal incumbent, the papers and records pertaining to the office, and giving them to any one not legally the Probate Judge? And could any Court take from such an incumbent the papers, books, etc., without first determining that the claimant was the legal Probate Judge, and entitled to the custody of the papers? Was it not essential for Kimball to set out by what right and title he claimed the right to have possession of the books, etc.?

Had he filed an affidavit or complaint simply claiming the right to have the custody, without showing his claim to the office, would any Court have failed to dismiss it on demurrer? His right to the custody of the papers depended solely on his right to the office. If he had no right to the office it would be a legal outrage and a high-handed usurpation in any Court, to take from the *de facto* officer claiming the right to hold the office and custody of the books, papers, etc., and giving them up to one without right, or claim of right.

Not only the pleadings of both parties show that the right to the office was involved, but his own printed brief, filed in this case and now part of the record in this Court, written by himself, with his name as a member of the firm of Kimball & Heywood attached to it, shows that he claimed the right to the office in this Court. I quote from page 5, section 5: "In this case there is no question of fact to be determined. The title of respondent, as well as that of appellant, depends on a question of law, to-wit: The construction to be given to section 8 of an Act to amend Section 5,352 of the Revised Statutes of the United States, commonly called the Edmunds bill, and the act of the United States Congress empowering the Governor to appoint officers to fill vacancies, commonly called the Hoar Amendment."

The Chief Justice dissented from a majority of the court mainly because he did not believe there was any vacancy for the Governor to fill by his commission to the respondent. The community therefore know that the right to this office was in controversy and determined, the Court that originally decided knows it was in dispute, and this Court knows it was in dispute, and now to permit the respondent to change his ground and to deny that it was in dispute or has been decided, in order to prevent an appeal to the United States Supreme Court, would be a stupendous fraud recognized and sanctioned by the Court; besides respondent is precluded by his own pleading and brief and conduct from setting up any such objection. The right to the office having been in dispute and having been determined, the next inquiry is, was it of money value? The law and Governor's commission gave to Judge Richards "the rights and emoluments thereunto legally appertaining." Not only does the law prescribe fees but allows the County Court to attach salary thereto. Ever since the celebrated case of Marbery *vs.* Madison, decided by the United States Supreme Court in 1803, adjudging that to withhold a commission from one entitled thereto was an illegal act and "violative of a vested legal right," it has been universally conceded in the American States that an incumbent of an office has a property in it. Since then there have been before the Supreme Court three cases of public offices, one as to Supreme Judge of Nebraska Territory, one as to the mayoralty of Georgetown, and one as Assessor and Collector of Boise City, Idaho, and no suggestion in either that such was not the case. 6 Wallace, 296 U. S. vs. Addison.

19 Wallace 663, Board of Commissioners vs. Gorman. This last was not a certain salaried office but the compensation was uncertain, depending on the number of days' service. See revised Laws of Idaho, p. 487, section 21.

That the incumbent has a property in the office and its emoluments is now a legally ascertained fact, then is it susceptible of valuation in money?

And this immediate and direct question came before the United States Supreme Court in 1822, in the case of the Columbia Insurance Company vs. Wheelwright et al., 7 Wheaton's Reports 534, which was a peremptory mandamus to admit the defendant in error to the offices of directors of the insurance company, the Court held that it had jurisdiction if the matter in controversy was of sufficient value, and directed Jones, the appellant's counsel, to produce affidavits of value, and he having failed to show by affidavits that the matter in controversy was of the value of one thousand dollars, the writ of error was dismissed. Now, what was in controversy? It was the office of director in said company. If he could have shown that the office was of the value of one thousand dollars his writ would not have been dismissed. This case does decide that the value of the office could be shown. In the case of Sparrow vs. Strong, 3 Wallace 103, the Supreme Court of the United States allowed affidavits to show the value of a mere possessory right to a mining claim in Nevada, before the land had been brought in market and before either party had title thereto, because it was a species of property recognized by miners. It is true the Court said it could not say that the appellant had not a Mexican claim, but the Court did not put its decision on that but on the value if the possessory right under miners' customs. The only difference between salaried offices and fee offices is in the proof of value. Fee offices are as much property as salaried offices, and as much entitled to the protection of the law and the courts. Where a salary is fixed by law that is decisive of itself of the value. If no salary be fixed then the fees and emoluments become a matter of proof. But the one has a money value as much as the other, but may not be worth as much, hence the proof must show its value, or that it is over the requisite sum. It is as susceptible of proof, however, as land or any other property. A tract of land situated in a populous county, or near a large city may be more valuable than a tract of greater fertility and more area situated in a sparsely populated region, and the Supreme Court might have jurisdiction of the one on account of its proven value, but not of the other, if in dispute; so of offices. The same office is much more valuable in some places than in others. In all such cases the value depends on the proof.

To say that a fee office has no money value is to ignore the every day observation of the Courts. Every Court knows that the offices of clerk, sheriff, marshal, etc., have a large money value, but what that value is, when in dispute, must, like all other property in dispute, appear either in the pleadings or in the proof. In this case it appears in the record and in the only proof in the case, the affidavit of Judge Richards, and both show its value to exceed $1,000, and about this there is no conflicting evidence.

Hence there is no escape from the legal conclusion that this appellant is entitled to have the bond tendered approved to operate as a supersedeas.

M. KIRKPATRICK, ESQ.,

Continued the argument in favor of Mr. Richards. He did not wish to argue this matter at any great length. He simply desired, in addition to what had been said by Judge Williams, to cite several authorities. He first of all referred to section 702 of the Revised Statutes of the United States, which designates the amount to be involved in a case appealable to the Supreme Court of the United States. He also referred to the case of Callin vs. May in 2nd Black, page 541, which went to show that the allowance of an appeal was always provisional and was not binding on the Court or the judge who made the order. It was the duty of courts even in a case of doubt, even although the judges might be inclined to think that no appeal would lie, to grant an appeal and fix a bond in order that the question shall be decided by the higher tribunal. This Court in passing upon this question did not decide whether or not an appeal would lie; it simply granted the appeal provisionally. This same principle was laid down in Phillip's Practice, page 49. And counsel took it that there was sufficient in this case to at least move their Honors—whatever their impressions might be, to grant this appeal and to refrain from issuing a writ to execute the judgment which this court had pronounced, so as not to render of non-effect, perhaps, the final decision of the Supreme Court of the United States. The case itself was admitted on all hands to be of public importance. It had a general and permanent interest attached to it. It involved a great many important questions which had been discussed at the bar before their Honors in the different cases which had been brought, with great deliberation and with all the ability and learning which the able bar of Utah could bring upon the subject. Their Honor knew it was a case of great importance and involved many deep questions, extending, even, to the constitutional laws of Congress and to the powers which had been granted to the Governor of this Territory. A case of this kind, therefore, involving so many questions, was really deserving to be considered and passed upon by the highest authority of the United States. It seemed to him that whatever might be the impressions of this tribunal, it would grant this appeal and refrain from issuing a writ which might render the consideration of the subject by the Supreme Court of the United States of no value. Counsel then proceeded to cite authorities to show that the right of mandamus was an important right and reviewable by the higher Court. Mandamus was an action in which many great rights might be determined. In this case, for instance, they were called upon to decide the right to an office and incidentally consider and construe laws of Congress and many important and various questions as this proceeding by mandamus. But suppose a case. Suppose that the court below should by a proceeding in mandamus grant a peremptory writ or order against some public functionary—say the Treasurer of a County or of a Territory—compelling him to pay out a large amount of money to the relator in some case, and suppose that there was an appeal taken from that decision; was it possible that that decision in the first place was not appealable? and if appealable could the court below issue its peremptory writ for the paying out of a large amount of public funds which might never be recoverable? and yet the decision of the court below might be reversed after it was too late to do any good. Having supposed this case, counsel asked if the same consideration would not apply to this Court in its relation to the Supreme Court of the United States, because the Supreme Court of the United States was the appellate tribunal, the tribunal which rendered the final adjudication. Counsel cited several authorities to sustain his proposition, all of which went to show that all such questions were to be finally determined in the Supreme Court of the United States.

JUDGE R. HARKNESS

Endorsed the line of argument pursued by the gentleman who had preceded him, and simply desired now to state the conclusion he had arrived at. The simple question before the court was this: Would an appeal lie in any mandamus case? It was not a question as to whether it would lie in the specific case of Kimball vs. Richards, but the question was, is a mandamus case appealable? There were many cases which sustained this position, and the Court being satisfied of this, it was its duty to allow the appeal, and leave it to the Supreme Court of the United States to decide whether there were any special circumstances in the case that an appeal would not lie. The allowance of an appeal by this Court did not determine at all whether this special case was appealable. That was a question for the Supreme Court of the United States to decide. All this Court had to do was to inquire if there was a *prima facia* case here. If there was, then the whole thing must be remitted to the higher tribunal, which was the proper Court to decide as to the value of the office and everything else pertaining to the question.

J. N. KIMBALL, ESQ.

In his own behalf, as respondent said: His proposition in the case was, that there was nothing upon the record to show that the amount involved in the suit was sufficient to appeal it to the jurisdiction of the Supreme Court of the United States. That if this cause were appealed, the appeal should be taken regardless of the action of this Court; claiming, under the laws of the Territory, that he was entitled to a remittitur to the Court below. And if appealed, while the Supreme Court would decide whether or not the case was appealable, at the same time in resisting the issue of the process of this Court, counsel for appelant must show to the satisfaction of the Court what the jurisdiction of the Supreme Court of the United States is. The question in this action was the right to certain books and papers appertaining to the Probate Judgeship of Weber County, but for the time being he would say that the question was not involved in that transaction; and if that were true, there was no estimated value shown so that the Court might judge whether it was appealable, and if the case were not appealable, then they were entitled to the remittitur. Another point to which Mr. Kimball called the notice of the Court was, that the compensation of the Probate Judge was not fixed by stipulated salary; the value of the office depended upon the work to be done in the future, thereby rendering it impossible to tell what the office was worth pecuniarily. He held that it was not a proper case in which to introduce affidavits setting forth the value of the office, to support which he cited authorities.

JUDGE J. R. McBRIDE,

In behalf of Mr. Kimball, referred the Court to the judgment of the Court below, which judgment had been affirmed by this court. The result of that judgment would be, he contended, that Mr. Richards should deliver over to Mr. Kimball all the books, papers and property pertaining to the office of Probate Judge of Weber County. Of course they proposed to proceed upon the idea that Mr. Kimball was the Probate Judge of that county by reason of that judgment. But what was there in that judgment that implied that the office was worth anything? Take the affidavit which had been presented by the other side, and it showed, what? Simply that the fees and emoluments of said office amounted to more than $1,000. But the judgment did not profess to pass upon the question as to the right of Mr. Kimball to the office; it simply passed upon the question of the possession of certain records. But in order to show that the case came within the meaning of the Act of Congress, and that there was the right of appeal, the other side must show that the matter adjudicated upon was worth $1,000. This, Mr. McBride contended, they did not attempt to show. As a matter of fact, the value of the office was not capable of being estimated, inasmuch as the fees and emoluments were uncertain. The Court would not allow a man to lump things together and guess at what an office was worth. No Probate Judge of this or any other county could tell what the fees of his office would be worth. He might as well attempt to assume the damage in some contingent case, or assume that the loss would be so much if certain payments were not made that were expected to be made. Before a case could be appealed the compensation of the office must be a fixed thing and it must be $1,000. Counsel contended that in this case there was no pecuniary value involved; that there was nothing involved but the right to certain books and papers, which were of no pecuniary value. It would not answer to say that the fees and emoluments of the office were more than $1,000. The fees and emoluments to be derived from the office, referred to services to be rendered in the future, which might never be rendered. The office might be worth that sum, and it might not; in this case it was mere guess-work. That would not do. When a party was permitted to come in and show money value, it must be property or money. Therefore, upon these grounds they contended there was no pecuniary value involved in this controversy; the record did not show that there was a dollar involved except the right to certain fees and emoluments. Counsel asked that the Court execute its own judgment and grant the motion for remittitur; and referred, in conclusion, to a recent decision in Montana, which, it was contended had a direct bearing on this case.

ARTHUR BROWN, ESQ.

Said his view of the case was, that the power to appeal did not rest with the Court from which the appeal was taken; that an act of Congress gave the right of appeal not to the Court but to the party conceiving himself to be injured; and whether he was right in conceiving himself injured or not, was for the Court above to determine. The right of appeal vested in the individual; and all that remained for the Court below to do in the premises was, to determine as to what would be an appropriate bond for the person appealing to give. That in the teeth and notice of appeal, for the Court below to execute its judgment would be a violation of justice, and those executing the judgment would be acting in their own wrong without authority, as though no judgment had been given. Referring to the argument of opposing counsel, who held that appeal would not lie in this particular case of mandamus, on the ground that the amount or value of the office involved was not shown to be a thousand dollars or more, he replied that that was not a competent question for the lower Court to decide, but for the Supreme Court of the United States, when that question should be brought before it; and he repeated unhesitatingly that that Court, and that Court alone, was competent to decide that question. Affidavits had been filed setting forth that the value of the Probate Judgeship of Weber County was over one thousand dollars.

By the Court: "Should it not appear that the sum in controversy is a thousand dollars or more?"

Answer—"No, sir, not necessarily; that would be a question for the Supreme Court." For instance, he said, here was the affidavit of the party, with 29 others added to it, setting forth that the value of the office was $1,000, and counsel for the other side produced affidavit to the same number, claiming that the office was only worth nine hundred dollars; that, he said, would involve a question of fact to be determined, by whom?—by your Honors, or by the higher Court? By the higher Court, as that Court alone could determine the limit of its own jurisdiction, comparatively on the same principle that the District Court could not limit the jurisdiction of this Court. Therefore, whether this office was worth a thousand dollars or not was, so far as this Court was concerned, immaterial. All that counsel for respondent asked by this was, that this Court stay its hand until the higher Court determined that question, whether it be a question of law or fact. It was not remitted to them; it was a jurisdictional question belonging to that Court alone. But while it belonged to such Court alone—and he never yet conceded that this Court had the right to decide, or that its mandate would be worth the paper it was written on—he could not agree with the counsel on the other side, as he thought he could convince their Honors, were they the Supreme Court of the United States, that this was one of the cases in which appeal would lie, because of the fact that the amount in controversy was over one thousand dollars. They argue that there could not be any question of value on the proof of a mere bond turned over by the clerk of a county court, that it was apparent that the value was not a thousand dollars. In taking this ground they reversed the argument made in their behalf a few weeks ago; it was argued there that there was no question involved but the question of turning over simply a county clerk's bond, and that that could not be turned over as against an office *de facto*. Now they argue that we were an officer *de facto*, and it was a mere turning over of a county clerk's bond which does not entered into not the question to who was Probate Judge. Their honors could not have held that we were Probate Judge, and some one else has the right to that bond. If your Honors have decided that Kimball is not the rightful Probate Judge and that Ricards is, then indeed there would be no money value in discussion, but the other side claim Kimball is decided Judge to be Probate. If so, then there is a money value, viz: that which the Judge of Probate receives. If the Court has decided Kimball is Judge of Probate we have the right of appeal. We had not asked that the value of Weber County be estimated here. This man (Richards) was to be the Judge of Weber County and its estates; but because of that, we did not ask that that should be the estimate; but we did ask that the money that passed into his hands for his own use should be a fair value test. This was not a case in which another case might be decided from estopple, as in the case of a promissory note, referred to, but was a question of amount involved in this issue, it being by this issue that the office was demanded. It was like a case of ejectment from a barren piece of land the rent of which might not be worth more than a dollar a year—in that case what would be the test of appeal, the value of rent or the value of land? The judgment must be for the party entitled to possession, and the best always was the value of the land. Indirectly a party sued for trespass, say, a man walked on his grass doing him really no injury, but he claimed to be injured to the amount of six cents; he gets the judgment, and by that judgment the title to his land would be established worth perhaps, to him millions of dollars. It was directly within the suit, because it was directly within the issue, and value of land would be the test on appeal. Counsel then asked if it would be contended that this office had not been decided? He understood when defeated in the case it was decided his client was not the Probate Judge of Weber County, or was it, he asked, that some other fellow should carry around a bond. If it was decided that Kimball was the Judge of Probate, then the emoluments of that office were involved in it. And what were the emoluments, and how should they be determined? It was argued that it was not a salaried office, that it was mere guess-work as to what it would bring. It would be determined like any other fact involving the value of property, on the estimation of competent witnesses. And who should decide whether or not the estimate was well taken? Nobody but the Supreme Court of the United States.

Cases having a fixed salary had been submitted to the Court in which the Supreme Court of the United States had decided that appeals could lie, and was it consistent to say that cases worth twice as much by fees were barred appeal? Counsel claimed that this Court had done all within its power to do in the case at bar; that whether or not a supersedeas was the proper thing remained with the Court above. Believing the ruling of this Court to be an error, counsel for respondent asked to be allowed to appeal, filing a bond to protect the relator during the time the case should be determined by the higher Court, and that no action be taken by this Court.

By the Court: Your position is that you have the right of appeal independent of any action of this Court, or any refusal of this Court to grant it?

Mr. Brown. Yes, sir.

The Court: Does not that leave this Court in the sole jurisdiction and authority of the matter as it stands at this time?

Mr. Brown: I think not. But if your Honors will bear with me I will illustrate my position. The law says the Justice of the Peace may appeal; but whether he perfects his appeal or not is a question that must always be left to the appellate Court. And when an appeal is taken, the court below is stripped of any jurisdiction to enforce its own order. I concede, of course, that the Court might do it; but it would be the order of a man, not a Tudge.

The Court: Then your argument is, that this Court has nothing more to do with this case from the time the judgment or decision was made? Is it not the fact that the order of the Judge rests entirely with this court without reference to any action that may be made?

Mr. Brown: So far as the judgment is concerned it rests with this Court; but when a party has appealed from this court, then he has put an end, as he has a right to do, to the jurisdiction of this Court, and that ending of the jurisdiction is an absolute right given to the suitor—a right to shut off the jurisdiction by a simple notice of appeal or by writ of error or other remedy of review. Our ground is not to ask this court to allow us to appeal, the suitor is the judge whether we shall appeal or not; but we ask this court to determine how much shall be deemed an appropriate bond, and to accept that bond.

Judge McBride: Is not every Court the judge of its own jurisdiction?

Mr. Brown: Yes, but not of the jurisdiction of the higher. If one thousand dollars is involved, the Supreme Court of the United States takes jurisdiction, and their jurisdiction must be decided by themselves; the attempt to have this Court determine value is an attempt to determine the jurisdiction of another Court. There is no question but this Court has had jurisdiction; that is agreed on all sides. The present question is—Does the Supreme Court of the United States get a jurisdiction by this appeal? And can that appeal be defeated by the actions of this Court?

After a few minutes conversation, the Court announced that it would take the matter under advisement, and adjourned until Thursday, March 1, at 4 p. m. when judgment will be rendered.