missioners 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 preperty 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 on 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 responden said: His proposition in the cas 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 the higher Court alone. But while it belonged to such Court alone—and he never yet conceded that this Court had the right to decide it, 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 enter into the question as 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 have 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 the money that passed into us hands for his own use should fair value test. This was not in which another case might cided from estoppel, as in the a promissory note, referred but was a question of involved in this issue, it ing by this issue that the was demanded. It was a case of ejectment from a piece of land the rent of might not be worth more dollar a year—in that case would be the test of appeal value of rent or the value of the The judgment must be for the entitled to possession and always was the value of the Indirectly a party sued for say, a man walked on his ing him really no injury, claimed to be injured to the of six cents; he gets the judg and by that judgment the his land would be established perhaps, to him millions of It was directly within the cause it was directly within the and the value of the land would the test on appeal. Counsel then if it would be contended office had not been decided? understood when defeated case it was decided his client the Probate Judge of Weber ty; or was it, he asked, that other fellow should carry bond. If it was decided that ball was the Judge of Probate, the emoluments of that office involved in it. And what were emoluments, and how should be determined? It was argued it was not a salaried office, was mere guess-work as to would bring. It would be mined like any other fact the value of property, on the tion of competent witnesses. who should decide whether the estimate was well taken? body but the Supreme Court of United States.

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

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

Mr. Brown: Yes, sir.

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

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

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

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

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

Mr. Brown: Yes, but not of