Holcombe vs. McKusick and the U. S. Supreme Court's Reaction to the Codification Movement in the 1850s

BY

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A. Justice Nelson's lecture.

Holcombe v. McKusick was argued before the United States Supreme Court on May 7, 1858, and decided eleven days later. It was not difficult. McKusick appealed from an order of the Supreme Court of Minnesota Territory that was not a final judgment and because the U. S. Supreme Court does not accept interlocutory appeals, it lacked jurisdiction. Appeal dismissed. The court's opinion might have been one paragraph. Instead it occupies several pages of Benjamin Howard's *Reports*.[1]

Justice Samuel Nelson wrote for a unanimous court. His thinking seems to have evolved from curiosity to exasperation to fury. He may have started with the object of writing a typically "terse" opinion and, in that spirit, begins with a one sentence summary of Holcombe's claim: his house in the town of Stillwater was damaged by the defendants.[2] He went on to summarize the defendants' answer quoting the legislation that created Stillwater. Because "new matter" was contained in the answer, Holcombe served a reply which, in the venerable and time-honored tradition of that

[1] *Holcombe v. McKusick* , 60 U. S. (20 How.) 552 (1858). The complete text is posted in the Appendix on pages 23-7 below .

[2] About Nelson, Professor Frank Gatell writes, "The evaluation of a turn of the century biographer accords with the contemporary record: 'Nature intended him for a judge. All of his leading mental characteristics were of the judicial type. His fund of 'common sense' was inexhaustible. . . . His opinions are pervaded by a humane and liberal spirit. They were read and admired for their terseness, directness, lucidity and practical comprehension of the cases under consideration, by the members of the bench and bar throughout the country.'" Frank Otto Gatell, "Samuel Nelson" in Leon Friedman & Fred L. Israel, II, eds., III *The Justices of the United States Supreme Court, 1789-1978: Their Lives and Major Opinions* 817, 819 (Chelsea House Pub., 1980)(citing sources).

particular pleading, denied every allegation in the answer and also, to Nelson's amazement, contained "a long statement respecting the title to the land embraced within the corporate limits of Stillwater." The defendants demurred to parts of the reply, which the trial court sustained. Appalled by now, Nelson devotes three paragraphs identifying allegations in Holcombe's reply that were not demurred to, and thus remain factual issues for trial. He concludes by scolding the bar of Minnesota Territory:

> We have rarely in our experience examined a case, which in its principles is common and readily understood, so complicated and confused by the mode of pleading which has been pursued, and which it is understood is in conformity with the system adopted in this Territory. The pleadings raise many immaterial and even trivial questions of fact and law, which have nothing to do with the substantial merits of the case, and seem, in practical operation, whatever may be the system in theory, to turn the attention of courts and counsel to small matters as of serious import, which are undeserving a moment's consideration, overlooking or disregarding the most material and controlling questions involved.
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> The demurrers are put in to detached statements in the answer, the statements thus demurred to loosely made, and often incongruous in themselves, and upon which no principle of law can be raised or applied to govern the decision.
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> The system is anomalous, and involves the absurd and impracticable experiment of attempting to administer common law remedies under civil-law modes of pleading, and these very much perplexed and complicated by emendations and additions.

Surely, only one conclusion is to be drawn from Justice Nelson's lecture: the bar of Minnesota had slovenly pleading habits which the territorial courts tolerated.

But this would be premature. Experienced lawyers know that when an appellate judge begins a paragraph, "We have rarely in our experience examined a case which….," he usually means that he and his colleagues have seen too many similar cases and they are tired of them. It is not

surprising, therefore, to find that in a series of cases in the 1850s, the Supreme Court leveled high decibel critiques of pleading practices in other jurisdictions that resembled Samuel Nelson's indignant description of the practices of the bar of Minnesota Territory. Significantly, each was an appeal from a jurisdiction that had modified or replaced common law actions with codified rules of pleading.

B. The Court Reacts to the Codification Movement

Most of the justices who served on the Supreme Court in the decade before the war are unknown today. Only a few are the subject of biographies. To refresh our memories, here they are with their years of service:

John McLean (1785-1861)……1830-1861.
James Moore Wayne (1790-1864)……1835-1867.
Roger B. Taney (1777-1864)……1836-1864.
John Catron (1786-1865)……..1837-1865.
John McKinley (1780-1852)……....1838-1852.
Peter V. Daniel (1784-1860)…….1842-1860.
Samuel Nelson (1792-1873)…….....1845-1872.
Levi Woodbury (1789-1851)……1845-1851.
Robert C. Grier (1794-1870)……..…….....1846-1870.
Benjamin R. Curtis (1809-1874)……...1851-1857.
John Archibald Campbell (1811-1889)…....1853-1861.
Nathaniel Clifford (1803-1881)…….1858-1881.

These men were not law reformers. Most were seated before the codification movement in the states began in earnest. They were wary of it, as can be seen from the following letter Chief Justice Roger Taney wrote in June 1854, to Samuel Tyler, a lawyer who had sent him a copy of a report of a commission recommending that the Maryland legislature "simplify" rather than abolish common law pleading:

> DEAR SIR: — I have received your letter and certainly take much interest in the law reforms proposed in Maryland; and, as you desire it, would be glad to examine the report on pleading, if it was in my power, and give you my opinion of it. But at my time of life, the labors of a long session of the Supreme Court are sensibly felt when the Court is over, and I require repose and relaxation from business to regain my strength. Now, if I

undertook to examine the report on pleading in all its bearings, and to give you my opinion of it, it would occupy nearly the whole summer, in order to make up an opinion upon which I would myself be disposed to rely. The task of reforming—in other words, of radically changing—the system of pleading, which is interwoven with the common law itself, is one of extreme difficulty and delicacy. I am by no means satisfied that the experiments made in other States and in England have been successful. For I observe there are quite as many cases upon pleading now—if not more—than before the change was made. Far more disputes arise as to the meaning of words in new combinations and new modes of averment; while in common law pleading as it now stands, the ordinary counts in a declaration and ordinary pleas have a certain definite form which conveys a certain definite meaning, about which lawyers can never doubt or dispute. I am sensible, indeed, that there are many more forms and technicalities in common law proceedings which the Courts ought to have reformed long ago. The power has been given to them by the Legislature to give judgment according to the right of the matter, without regard to matters of form; and yet they have *obstinately* (I must say) continued to treat as a matter of substance what evidently was nothing but form, merely because it was called substance in some of the old law books. I fear they will continue to do so, without some direction from the Legislature. But when that direction is given, it will require the greatest care and consideration to preserve all that is really essential to the common law and trial by jury, and dispense with everything else. For certainly the proceedings ought to be so moulded that the party having right on his side, should not be defeated by technicality or nicety in pleading. But to do this by legislation, and yet preserve in full vigor and usefulness the great principles of the common law and trial by jury (without which, in my judgment, no free government can long exist), will require much reflection and care in matters of detail, and great perspicuity in language. [3]

[3] Roger B. Taney to Samuel Tyler, June 12, 1854, in Tyler, *Memoir of Roger Brooke Taney, LL.D.* 322-24 (John Murphy & Co., 1872)(italics in original).

The Chief Justice's claim that "many cases" under the "experiments"—his euphemism for the codes—had digressed into sparing over the "meaning of words in new combinations and new modes of averment" is steeped in irony. In fact, it was the codifiers who argued that common law pleading had become so technical that it was a trap for the unwary, leading to delay, confusion and injustice. Their solution was to condense the common law into codes, written in language that could be understood by the people. Simplified code pleading would replace antiquated, esoteric common law forms of action. And law and equity would no longer be separated.

But the Chief Justice was right: states that adopted codes were conducting "experiments" which were watched by other states and territories. Indeed, the progression of codification among the states is an early example of Justice Brandeis' view of the states as "laboratories" for "experiments" that did not endanger and might benefit the rest of the country. [4] Minnesota Territory was one of the earliest experimenters. In 1851, it became the sixth jurisdiction to enact a code of procedures for civil lawsuits.[5] Its code was modeled after but did not duplicate the "Field Code" passed by the New York Assembly in 1848. Unlike other code jurisdictions, Minnesota retained a Court of Chancery until 1853, when it was abolished and law and equity fused.[6]

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[4] New State Ice Co. v. Liebemann, 285 U. S. 262, 311 (1932) (Brandeis, J. dissenting)("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[5] Stat. ch. 70, §1 (1851) ("The distinction between the forms of action at law, heretofore existing, are abolished; and there shall be in this territory hereafter, but one form of action at law, to be called a civil action, for the enforcement or protection of private rights, and the redress of private wrongs; except as otherwise provided by statute."). For a discussion of the power of territories to adopt their own practices than follow the federal model, see William Wirt Blume & Elizabeth Gaspar Brown. "Territorial Courts and the Law," 61 Mich. L. Rev. 39, 84-9 (1962).

Preceding Minnesota were New York, Missouri, California, Iowa, and Kentucky. Charles M. Hepburn, *The Historical Development of Code Pleading in England and America.* 88, 98-9 (Lawbook Exchange, 2002)(published first in 1897).

[6] Stat 1851, ch. 94, governed the Court of Chancery, which was abolished on March 5, 1853. See Stat. 1849-1858, ch. 57, §§19-33, at 480-2 (§19 provided: "That all equity and chancery jurisdiction, authorized by the organic act of the territory, shall be exercised, and all suits or proceedings to be instituted for that purpose are to be commenced, prosecuted, and conducted to a final decision and judgment, by the like process, pleadings, trial, and proceedings as in civil actions, and shall be called civil actions." And §32 provided: "The court of chancery and the right to commence or

The codification movement was resisted by lawyers and judges who were trained in common law pleading. "[T]he stronger the argument for the Code, the more violent was the opposition," the biographer of David Dudley Field, the most prominent American codifier, wrote, adding, "It was a case of an irresistible force striking against an immovable body." [7] The Supreme Court was one of those "immovable bodies."

Carl Brent Swisher wrote that the Supreme Court was "peripherally involved" in the codification movement before and after the Taney period. [8] He noted that "[b]ecause, at first, state codification and simplification of procedure had little effect on the operations of the federal courts, Supreme Court attitudes are to be discovered from a relatively small number of cases." [9] In at least five cases, the first decided in 1851 and the last in 1860, it derided the codes while deifying the common law. *Holcombe v. McKusick*, probably the easiest case on the 1857-1858 calendar, was one of them.

i. *Randon v. Toby*
52 U. S. (11 How.) 493 (1851)

Texas was admitted to the union in 1845. Because of its Spanish heritage, it did not adopt common law pleading and did not distinguish law from equity. Charles M. Hepburn, an early historian of the codification movement, described the result:

> The system of pleading which prevails in Texas, although distinct from that of the codes, is in remarkably close accord with it. Civil pleading in Texas has never been encumbered with the technical distinctions and obsolete forms of a scholastic age. The common law of England was, indeed, adopted generally by the Republic in 1840, but the common law system of pleading was expressly excluded form (sic) the

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institute chancery suits and proceedings, and all statutes and statutory provisions inconsistent with this act, shall be and are hereby abrogated and abolished...").

[7] Henry M. Field, *The Life of David Dudley Field* 74 (Fred B. Rothman & Co., 1995)(published first in 1898).

[8] Carl Brent Swisher, *History of the Supreme court of the United States: The Taney Period, 1836-64* 339 (Macmillan Pub. Co., 1974).

[9] Id. at 351

> scope of the statute; and it was then enacted that the proceedings "shall, as heretofore, be conducted by petition and answer.' [10]

This is the background of two appeals from Texas which the Supreme Court decided in 1851. In both it expressed hostility to the federal district court's adoption of Texas's simplified procedures.

Randon v. Toby was the first. Toby sued Randon on two notes. In response, Randon argued that the notes were given for the "purchase of negroes [illegally] imported from Africa or Cuba" after 1833, which rendered them free and, consequently, he received no consideration. Justice Robert Greir had no trouble disposing of this defense: "The buying and selling of negroes, in a state where slavery is tolerated and where color is prima facie evidence that such is the status of the person, cannot be said to be an illegal contract, and void on that account. The crime committed by those who introduced the negroes into the country does not attach to all those who may afterwards purchase them." Toby was entitled to a directed verdict. But before he reached the merits, Grier unleashed his fury at the two-year procedural battle preceding the trial:

> Had this case been conducted on the principles of pleading and practice known and established by the common law, a short declaration in assumpsit, a plea of nonassumpsit, and nonassumpsit infra sex annos would have been sufficient to prepare the case for trial on its true merits.[11] But unfortunately the district court has adopted the system of pleading and code of practice of the state courts, and the record before us exhibits a most astonishing congeries of petitions and answers, amendments, demurrers, and exceptions—a wrangle in writing extending over more than twenty pages and continued nearly two years—in which the true merits of the case are

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[10] Charles M. Hepburn, supra note 5, at 151 (citing sources).

[11] The definitions of these common law pleadings are:

1. In an action of *assumpsit*, a party claims damages for breach of a simple contract, express or implied, not under seal.
2. A plea of *nonassumpsit* is a general denial to an action of *assumpsit*.
3. A plea of *nonassumpsit infra sex annos* is a statute of limitations defense to an action of *assumpsit*.

> overwhelmed and concealed under a mass of worthless pleadings and exceptions presenting some fifty points, the most of which are wholly irrelevant and serve only to perplex the court and impede the due administration of justice. The merits of the case, when extricated from the chaos of demurrers and exceptions in which it is enveloped, depend on two or three questions, simple and easily decided. We do not deem it necessary, therefore, to inquire whether the court below may have erred in their decision of numerous points submitted to them, which have no bearing on the merits of the case and are of no importance to the just decision of it. It will be unnecessary to decide whether the judge erred in his construction of the laws of Africa and other questions of a similar character, provided it shall appear that, on the admitted facts of the case, he should have instructed the jury that the defendant had established no just defense to the plaintiff's action.

Randon was cited in several subsequent cases, including *Bennett v. Butterworth* a few weeks later. This time, the Chief Justice spoke for the Court.

ii. *Bennett v. Butterworth*
52 U. S. (11 How.) 669 (1851)

Butterworth, a New Yorker, owned four slaves which came into the possession of Bennett, a Texan. Butterworth demanded their return but Bennett refused, claiming that he had bought them from a man who was awarded them in an arbitration which Butterworth lost. After the jury awarded Butterworth $1200 and damages of $.0625, the trial judge entered judgment in his favor for the four slaves, damages and costs. On appeal, the Supreme Court reversed because the judgment did not conform to the verdict.[12] While reaching this conclusion, Chief Justice Taney commented on the Texas code of pleading:

[12] The case was "hereby, remanded to the said District Court, with directions to award a *venire facias de novo*." This directed Judge John C. Watrous, the trial judge, to issue a writ summoning a new jury panel because of the irregularities in the original verdict. In other words, the Court ordered a new trial.

The common law has been adopted in Texas, but the forms and rules of pleading in common law cases have been abolished, and the parties are at liberty to set out their respective claims and defenses in any form that will bring them before the court. And as there is no distinction in its courts between cases at law and equity, it has been insisted in this case on behalf of the defendant in error that this Court may regard the plaintiff's petition either as a declaration at law or as a bill in equity.

Whatever may be the laws of Texas in this respect, they do not govern the proceedings in the courts of the United States. And although the forms of proceedings and practice in the state courts have been adopted in the district court, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. The Constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity,[13] and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the state court. But if the claim is an equitable one, he must proceed according to rules which this Court has prescribed under the authority of the Act of August 23, 1842, regulating proceedings in equity in the courts of the United States.

There is nothing in these proceedings which resembles a bill or answer in equity according to the rules prescribed by this Court, nor any evidence stated upon which a decree in equity could be revised in an appellate court. Nor was any equitable title set up by Butterworth, the plaintiff in the court below. He claimed in his petition a legal title to the negroes, which the defendant denied, insisting that he himself was the legal owner. It was a suit at law to try a legal title.

[13] Here the Chief Justice refers to the opening sentence in Article III, §2: "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority…"

Six years later, the Court took up the challenge of *Holcombe v. McKusick*.

iii. *Holcombe v. McKusick*
60 U. S. (20 How.) 552 (1858).

Professor Swisher did not cite *Holcombe* in his history of the Taney Court, but he might have. Justice Nelson's concluding lecture, where he repeated the common refrain that the Minnesota code was an "experiment" leading to absurd results, echoes the earlier skepticism of Justice Grier and Chief Justice Taney of the codes.

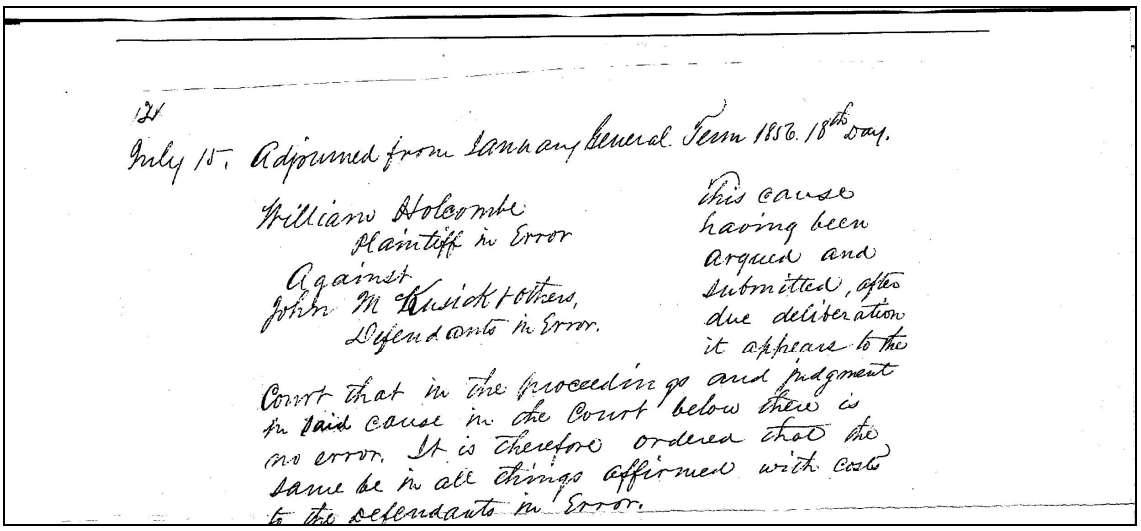
The controversy arose in October 1854 when John McKusick, who was the City Marshall of Stillwater, notified William Holcombe that his "dwelling-house" obstructed Main Street, and that it was to be removed immediately under a new ordinance, passed in August, barring nuisances. Holcombe, who had built the house in 1848, refused. On November 4, 1854, McKusick and others removed the house or, as they stated in their answer, "abate[d] the nuisance." Holcombe filed suit three weeks later, alleging they not only damaged his house but also "seized, took, and removed" carpeting, three chairs, two sofas, four bedsteads, two sets of crockery, four looking glasses, and other chattels. He sought damages of $5,000. And so it began.

Anyone reading McKusick's answer and Holcombe's reply today would be as appalled by them as Justice Nelson was in 1858. [14] Minnesota lawyers at that time seemed to have an aversion to using ellipsis when quoting documents. Thus, in his answer, McKusick quoted all sixteen sections of a March 1854 act of the territorial legislature incorporating the city, and followed with a recitation of all seven sections of the city's "nuisance" ordinance. In his reply, Holcombe denied that the 1854 act incorporating the city was ever published, and then quoted another sixteen sections of the law incorporating the city that was published; he alleged that he did not

[14] Years later, when the case was appealed to the U. S. Supreme Court, the parties' pleadings, motions, affidavits, and the court orders were typed and printed to form the official appellate record; and so we can read today exactly what Justice Nelson read in 1858. That record can be found at National Archives Microfilm Publication M499, Roll 4, Images 784-806, U. S. Territorial Papers, Territory of Minnesota Records, in the Ronald M. Hubbs Microfilm Room of the Minnesota Historical Society (hereafter "M499, Roll___, Images____").

have "sufficient knowledge" as to whether the nuisance ordinance was ever passed, and then quoted that entire act even though it already appeared in McKusick's answer; and he concluded by reciting a lengthy July 1848 report of a citizens' committee setting rules for securing title to land within the city, signed by John McKusick himself. A demurrer by McKusick to portions of the reply was sustained by Chief Justice William Welch. Judgment on this order, with $35.39 in costs, was entered and an appeal taken to the territorial supreme court.

If the case gave Justice Nelson ample grounds for being irate, it did not raise the hackles of the territorial judges. The supreme court affirmed the Chief Justice on July 15, 1856, as attested by George Prescott, the clerk of court:[15]



July 15. Adjourned from January General Term 1856. 18th day.

William Holcombe
Plaintiff in Error
Against
John McKusick & others,
Defendants in Error.

This cause having been argued and submitted, after due deliberation it appears to the Court that in the proceedings and judgment in said cause in the Court below there is no error. It is therefore ordered that the same be in all things affirmed with costs to the defendants in Error.

The appeal from this judgment to the U. S. Supreme Court took almost two years. When Justice Nelson released his opinion in *Holcombe* on May 18, 1858, he knew Minnesota territory was extinct. The new state was admitted

[15] Minute Book, Territorial Supreme Court, Territorial Records, at 121, Minnesota Historical Society. It appeared later in James Gilfillan's compilation of the Territorial Supreme Court's decisions in a slightly different format:

> WILLIAM HOLCOMBE vs. JOHN MCKUSICK, et al. -
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> The judgment of the court below was affirmed, but no opinion filed.

1 Minn. (Gil. 251) 334 (1856).

in May 11th. *Holcombe* was remanded to a new state court.[16]

In the territorial courts, Holcombe was represented by the St. Paul firm of Wilkinson, Babcock & Brisbin, and Samuel J. R. McMillan, while Holcombe was represented by Thompson & Parker, also of St. Paul.[17]

To argue before the Supreme Court, the parties retained prominent counsel: Holcombe retained Joseph P. Bradley, who later would serve on the court, while McKusick retained Caleb Cushing, who had just completed four years of service as Attorney General under President Pierce.[18]

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[16] Section 3 of the Act of Admission (May 11, 1858); see also the last sentence of Section 4 the Schedule to the 1857 Constitution which provided, "All actions at law and suits in equity which may be pending in any of the courts of the territory of Minnesota at the time of the change from the territorial to a state government may be considered and transferred to any court of the state which shall have jurisdiction of the subject matter thereof."

[17] The appellate transcript lists the names of the firms.

For Holcombe: Morton S. Wilkinson (1819-1894) practiced in St. Paul at the time of this case. He served as U. S. Senator form 1859-65.

Lorenzo A. Babcock was the territory's first attorney general and was the secretary of the constitutional convention in 1857.

John B. Brisban (1827-1898) was a St. Paul lawyer, who served as President of the Minnesota Senate in 1856-57, and mayor of St. Paul in 1857-58.

Samuel J. R. McMillan (1826-1897) practiced in Stillwater when this case arose; he was elected district court judge in 1858, and served to 1864, when he was appointed associate justice of the supreme court; he later served as chief justice, resigning in 1875.

For McKusick: Levi E. Thompson (1829-1887) may have been one of the defendants' lawyers. The identity of Mr. Parker is not known.

[18] The Lawyers Edition of the opinion of the court states that Holcombe was represented by "Lawrence, Bradley, Brisbin, and Stevens" while the defendants were represented by "Gillet, Horn and Cushing."

For Holcombe: The identity of Mr. Lawrence" is not known.

"Mr. Bradley" was likely Joseph P. Bradley (1813-1892) who later served on the Supreme Court from 1870 to 1892.

Hiram F. Stevens (1852-1904), practiced law in St. Paul for many years. At the time of his death he was nearing completion of his two volume *History of the Bench and Bar of Minnesota* (Legal Pub. and Engraving Co., 1904).

For McKusick: The background of "Mr. Gillet" is not known.

Caleb Cushing (1800-1879), a prominent lawyer and political figure in Massachusetts and Washington, served as Attorney General in the Pierce administration, 1853-57.

Henry J. Horn (1821-1902), a prominent St. Paul lawyer, served as city attorney form 1857 to 1860, and county attorney form 1864-1866.

iv. *McFaul v. Ramsey*
61 U. S. (20 How.) 523 (1858)

McFaul v. Ramsey may be one of the most unbalanced opinions ever released by the court: the first 70% is dicta, the final 30% addresses the merits, but even there Justice Grier could not resist taking a few swipes at the parties' pleadings. He began with "a few introductory remarks" about the common law and the codes that are worth repeating in their entirety because they are the most eloquent expression of why the justices opposed the codification movement:

> Ramsey, the plaintiff below, instituted this suit in the District Court of the United States for the District of Iowa. The parties have been permitted by that court to frame their pleadings not according to the simple and established forms of action in courts of common law, but according to a system of pleadings and practice enacted by that state to regulate proceedings in its own courts. This code commences by abolishing "all technical forms of actions," prescribing the following court rules for all cases, whether of law or equity:
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> > "Any pleading which possesses the following requisites shall be deemed sufficient:"
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> > "1st. When to the common understanding it conveys a reasonable certainty of meaning."
> >
> > "2d. When, by a fair and natural construction, it shows a substantial cause of action or defense."
> >
> > "If defective in the first of the above particulars, the court, on motion, will direct a more specific statement; if in the latter, it is ground of demurrer."
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> If the right of deciding absolutely and finally all matters in controversy between suitors were committed to a single tribunal, it might be left to collect the nature of the wrong complained of, and the remedy sought from the allegations of the party *ore tenus* or in any other manner it might choose to adopt. But the common law, which wisely commits the decision of questions of law to a court supposed to be learned

in the law and the decision of the facts to jury, necessarily requires that the controversy, before it is submitted to the tribunal having jurisdiction of it, should be reduced to one or more integral propositions of law or fact; hence it is necessary that the parties should frame the allegations which they respectively make in support of their demand or defense into certain writings called pleadings. These should clearly, distinctly, and succinctly state the nature of the wrong complained of, the remedy sought, and the defense set up. The end proposed is to bring the matter of litigation to one or more points, simple and unambiguous. At one time, the excessive accuracy required, the subtlety of distinctions introduced by astute logicians, the introduction of cumbrous forms, fictions, and contrivances, which seemed only to perplex the investigation of truth, had brought the system of special pleading into deserved disrepute, notwithstanding the assertion of Sir William Jones that "it was the best logic in the world except mathematics." This system is said to have come to its perfection in the reign of Edward III. But in more modern times it has been so modified by the courts and trimmed of its excrescences, the pleadings in every form of common law action have been so completely reduced to simple, clear, and unambiguous forms, that the merits of a cause are now never submerged under folios of special demurrers, alleging errors in pleading which, when discovered, are immediately permitted to be amended. This system, matured by the wisdom of ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our states, who have rashly substituted in its place the suggestions of sciolists, who invent new codes and systems of pleading to order. But this attempt to abolish all species, and establish a single genus, is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things; it is absolutely inseparable from the correct administration of justice in common law courts.

The result of these experiments, so far as they have come to our knowledge, has been to destroy the certainty and

simplicity of all pleadings and introduce on the record an endless wrangle in writing, perplexing to the court, delaying and impeding the administration of justice. In the case of *Randon v. Toby,* 11 How. 517, we had occasion to notice the operation and result of a code similar to that of Iowa. In a simple action on a promissory note, the pleadings of which, according to common law forms, would not have occupied a page, they were extended to over twenty pages, requiring two years of wrangle, with exceptions and special demurrers, before an issue could be formed between the parties. In order to arrive at the justice of the case, this Court was compelled to disregard the chaos of pleadings, and eliminate the merits of the case from a confused mass of *fifty* special demurrers or exceptions, and decide the cause without regard to these contrivances to delay and impede a decision of the real controversy between the parties. In the case of *Bennet v. Butterworth,* 11 How. 667, originating under the same code, the Court was unable to discover from the pleading the nature of action or of the remedy sought. It might with equal probability be called an action of debt, or detinue, or replevin, or trover, or trespass, or a bill in chancery. The jury and the court below seem to have labored under the same perplexity, as the verdict was for $1,200, and the judgment for four negroes. In both these cases, this Court has endeavored to impress the minds of the judges of the district and circuit courts of the United States with the impropriety of permitting these experimental codes of pleading and practice to be inflicted upon them. In the last-mentioned case, the Chief Justice, in delivering the opinion of the Court, says:

> "The Constitution of the United States has recognized the distinction between law and equity, and it must be observed in the federal The Constitution of the United States has recognised the distinction between law and equity, and it *must* be observed in the Federal courts."

In Louisiana, where the civil law prevails, we have necessarily to adopt the forms of action inseparable from the system. But in those States where the courts of the United States administer the common law, they cannot adopt these novel

> inventions, which propose to amalgamate law and equity by enacting a hybrid system of pleadings unsuited to the administration of courts."
>
> We have made these few introductory remarks before proceeding to notice the merits of the controversy, as developed by the record, in order that the bar and courts of the United States may make their records conform to these views, and not call upon us to construe new codes and hear special demurrers or pleadings, which are not required to conform to any system founded on reason and experience. To test such pleadings by the logical reasoning of the common law, after requiring the party of disregard all forms of action known to the law under which he seeks a remedy, would be unwarrantable and unjust.

Unburdened, Grier turned to the merits: McFaul alleged that he sold and delivered of hundreds of hogs to Ramsey, who refused to accept many, and did not pay for the rest. Justice Grier described Ramsey's response to McFaul's three count complaint, each sounding in contract: "To this catalogue of grievances the defendant, in his answer, pleads thirty-three distinct denials of the averments in the petition. A jury was called to try these thirty-three issues, and found a verdict for plaintiff, and assessed his damages. No exception was taken on the trial to the admission." Affirming the judgment, Grier ended on a wry note:

> The cavils to the sufficiency of the plaintiff's statement, under the name of a special demurrer, were overruled by the court below, and justly, because the code permits a demurrer only when the petition 'by a fair and natural construction does not show a substantial cause of action.' As we have already shown, it contains a dozen.

iv. *Green v. Custard*
64 U. S. (23 How.) 476 (1860)

Green v. Custard was argued on February 29, 1860, and decided March 12, 1860. In Texas state court, Custard attached property of Green to recover a judgment against him arising from a mortgage on land in California. Green removed the case to federal court on grounds of diversity, but it was

dismissed after Custard filed an amended pleading adding a new claim. Justice Grier again was handed the assignment. He devoted one-third of his opinion to lamenting what the syllabus called "The evils…arising from the courts of the United States permitting the hybrid system of pleading from the state codes to be introduced on their records":

> It is probably because this case originated in a state court that the court below permitted the counsel to turn the case into a written wrangle instead of requiring them to plead as lawyers in a court of common law. We had occasion already to notice the consequences resulting from the introduction of this hybrid system of pleading so called into the administration of justice in Texas. See *Toby v. Randon,* 11 How. 517, and *Bennett v. Butterworth,* 11 How. 667, with remarks on the same in *McFaul v. Ramsey*, 20 How. 525. This case adds another to the examples of the utter perplexity and confusion of mind introduced into the administration of justice by practice under such codes.
>
> Without attempting to trace the devious course of demurrers, replications, amendments &c., &c., which disfigure this record, it may suffice to say that the plaintiff, beginning after some time to discover that he could not recover on his original cause of action, among other amendments set forth an entirely new cause of action, . . .
>
> After further demurrers, exceptions &c., and after taking testimony in California wholly irrelevant to any possible issue in the case, the record exhibits the following judgment: [the federal court remanded the case to state court] . . . .

Reversing, Grier held that once a federal court had jurisdiction by virtue of the diversity of the parties, it could not lose that by an amendment by a party to his pleadings.

C. The Inevitable Aftermath

After discussing *Green v. Custard* and its predecessors, though not *Holcombe v. McKusick*, Carl Brent Swisher described the aftermath:

> If it was not apparent to Justice Grier, however, it must have been manifest to others, and it is evident from the point of view

> of history, that the Supreme Court was fighting a losing battle to preserve the rituals of the common law in the trial of cases in federal courts. It was becoming increasingly difficult in the growing number of code states for lawyers to practice in both state and federal courts—and few able and ambitious lawyers cared to be segregated according to the courts m which cases arose. New district judges were coming to be appointed in code states from among lawyers who knew code practice much better than they knew practice according to the antiquated procedures of the common law. If code practice initially caused confusion even in the courts of the enacting states, as it gradually matured it achieved greater efficiency. The 1860s saw appointment to the Supreme Court itself of men from code states. These included Noah H. Swayne, from Ohio, Samuel F. Miller, from Iowa, and Stephen J. Field, from California. Justice Field, it will be recalled, had adapted his brother's codes of civil and criminal procedure to the needs of California and had brought about their adoption. With complete freedom from personal modesty he said as chief justice of the Supreme Court of California in 1860, "It is not within the wit of man to devise more simple rules of pleading than those prescribed by the Practice Act of this State, and there is no excuse for any departure from them." Such emphatic acceptance of codified procedure would at least break the solidity of ranks on the Supreme Court and make tolerable or even desirable the Conformity Act of 1872 requiring federal courts to conform practice and pleadings in the common law area to the pattern currently prescribed in the states for their own courts.[19]

D. The Layers of *Holcombe v. McKusick*

An appellate opinion, like a poem or novel, can be interpreted on several levels. It has, in other words, layers which can be peeled away, each one providing a different perspective not only on the decision but also on the intentions of its author.

Coming midway between *Randon* and *Bennett*, the first two appeals, and *McFaul* and *Green*, the last two, *Holcombe* reveals a court composed of

[19] Carl Brent Swisher, supra note 8, at 355-56.

men who could not suppress their exasperation when they found the fruits of a burgeoning reform movement on their docket. These opinions are notable for their sarcasm, contempt, and ridicule of procedural and pleading innovations in the states. They reveal the justices to be oblivious of the defects in common law actions, and utterly dismissive of the codification movement. At one level, therefore, *Holcombe* and its inseparable companions reveal the rigid mindsets of members of the antebellum court.

Yet what disturbed Justice Nelson by *Holcombe* is also a revelation: for what purpose did the defendants quote legislation that created Stillwater in their answer? And why did Holcombe quote an old report of a citizen's committee on which McKusick served? This is a layer of the other cases as well. In *Randon v. Toby*, Justice Grier noted that "the true merits of the case are overwhelmed and concealed under a mass of worthless pleadings and exceptions presenting some fifty points." In *McFaul v. Ramsey*, he calculated "that defendant, in his answer, pleads thirty-three distinct denials of the averments in the petition." In *Green v. Custard*, Grier wearied of tallying denials, demurrers and exceptions, and simply referred to "the devious course of demurrers, replications, amendments &c., &c., which disfigure this record."

If *Holcombe* and its companions tell us something about the mentality of the justices, they also tell us a great deal about practice under the new codes. Many lawyers had difficulty making the transition from using common law forms of action to practice under the codes.[20] Uncertain as to

[20] In Minnesota Territory, it was an uneven transition because members of the bar, especially recent migrants from New York, who were familiar with the Field Code had tactical advantages over those who lacked this experience. This can be seen in this description of Judge Lloyd Barber, who arrived in Winona in 1858:

> A number of lawyers, among others Stiles P. Jones, Colonel James George, Judge Elza A. McMahon, and John W. Remine, had already preceded him. They were all trained in the old common law practice and held in contempt the new code in which law and equity were merged, but Judge Barber had studied and practiced the Field code in New York where it originated and whence it came through Wisconsin into Minnesota upon the organization of the latter as a territory. His familiarity with this new practice gave him a decided advantage over old practitioners.

Charles C. Willson, "Lloyd Barber," 1 *Minnesota Historical Bulletin* 200, 261 (Minn. Hist. Soc., 1916).

how to proceed under the new rules, and fearful of having their cases dismissed because of an omission in their pleadings, they drafted detailed complaints, answers and replies which occasionally contained irrelevant allegations.[21] While the justices blamed the codes for the messy results, the overly cautious nature of the trial bar may have been a greater factor.

Justice Nelson may have thought that his strident critique would encourage Minnesota's bench and bar to improve their pleading practices—or even abandon the code altogether—but that could only happen if his opinion was circulated in legal circles in Minnesota. This did not likely happen.

The lawyers who represented Holcombe and McKusick in Minnesota courts could not be expected to tell other lawyers about such a humiliating ruling. In fact, they might not even have received a copy for many weeks, only notice that the appeal had been dismissed. In the 1850s, a justice read the court's decision from the bench, and then delivered it to the clerk, who entered it on the court's rolls and later relayed it to the official court reporter for printing. In these pre-typewriter days, the court did not employ scriveners to copy their opinions, but they were "allowed" to use clerks to perform this task.[22] As a result, copies of a ruling were available to the public soon after it was announced. [23] Joseph Bradley and Caleb Cushing probably received copies very quickly and at some point forwarded copies to their co-counsel in Minnesota. When a case such as *Holcombe* was reversed, a copy of the opinion was sent to the clerk of the lower court. [24] A

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[21] E.g., McKusick, whose answer was hardly a model of a concise pleading, alleged in his demurrer that portions of Holcombe's reply "renders the whole of said reply in-comprehensible, and contradictory of itself." because:

> 2. The said portion of said reply, instead of being a defence against the new matter stated in the answer of the defendants, is, if it amounts to any thing, an admission of the truths of the facts alleged in said answer, . . .
> 3. Because the said portion of the said reply is not in conformity with the statutes, as it does not allege any new matter constituting a defence to the new matter stated in the answer of the defendants.

M499, Roll 4, Image 799.

[22] Carl Brent Swisher, supra note 8, at 311.

[23] Id. at 298-99.

[24] In the microfilmed records of Minnesota's Territorial Supreme Court at the Historical Society, a printed copy of Justice Nelson's opinion appears followed by a handwritten copy can be found. The latter is ten pages long. Nelson's signature does not appear at the end of this opinion, suggesting that it is a copy, not the original. It has numerous

bound volume of the opinions for that term would be published by Benjamin Howard, the official court reporter, months later.

But few lawyers in the territory possessed a library that included decisions of the Supreme Court. Territorial justices, however, received the annual volume of the Supreme Court decisions from the State Department, which had jurisdiction over the territories at this time. [25] Later, the federal judge who presided over the Minnesota District, would receive copies. Not by coincidence, the son of Associate Justice Samuel Nelson, the author of *Holcombe*, was an associate justice on the territorial supreme court in 1858 and, after statehood, was United States District Court judge. And this brings us to the last layer, perhaps the core, of *Holcombe*.

With the support of Justices Grier and Nelson, Rensselaer R. Nelson was appointed to the territorial supreme court by President Buchanan on April 21, 1857.[26] Minnesota was admitted to the union on May 11, 1858. On May 18, the U. S. Supreme Court remanded *Holcombe*. Two days later, President Buchanan nominated and commissioned Rensselaer Nelson to be United States District Court Judge for the District of Minnesota.[27] The Senate confirmed Nelson's nomination on May 30th.[28] Surely, when he drafted *Holcombe*, Justice Nelson knew that when his son received a copy,

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proofing marks—misspelled words are crossed out and corrections written above, or a letter or word that was inadvertently omitted is added above. This likely is a Supreme Court clerk's copy of Nelson's opinion sent to the clerk of the territorial supreme court. See M499, Roll 5, Images 1559-74 (copy also on file with MLHP).

[25] See, e.g., letter from Associate Justice David Cooper to Secretary of State Daniel Webster, May 28, 1851, acknowledging "the receipt of the Ninth volume of Howards Reports...' He closed with a request: "If convenient, I should be pleased should the eighth volume be sent me." M499, Roll 8, Image 78. And letter from Associate Justice Bradley Meeker to Secretary Webster, September 8, 1852: "I have rec'd the 12th vol. of Howard Reports of the delivery of which I hasten to notify you." M499, Roll 8, Image 174.

[26] For documents of Nelson's recess appointment to the court, see "Documents Regarding the Terms of the Justices of the Supreme Court of Minnesota Territory, 1849-1858: Part Two-E" 7-10 (MLHP: 2009-2010).

The extent to which the recommendations of Justices Grier and Nelson influenced the President is explored in my article "'Rotation of Office' and the Territorial Supreme Court" 56-64 (MLHP 2010).

[27] Justice Samuel Nelson wrote the President on January 12, 1858, recommending his son for the federal judgeship. M499, Roll 7, Images 1455-58.

[28] Why the President issued a commission to Judge Nelson ten days before the Senate confirmed him is discussed in "Documents: Part Two E," at 10-14.

he would be a federal judge, albeit a new and inexperienced one.

And this raises the intriguing but unanswerable question of whether Samuel Nelson saw *Holcombe* as an opportunity to instruct his son on certain values he held dear, to warn him against conducting "experiments" in his courtroom, to demand a high level of practice from the lawyers who appeared before him, and to maintain a reverence for the common law. Was his strident lecture at the end of *Holcombe*, in other words, directed as much to his son as to the bar and bench of the new state of Minnesota?

E. Conclusion

Is there a lasting legacy to *Holcombe*? There is. Samuel Nelson's biting criticism of territorial pleading practices will continue to stimulate the study of that brief period of Minnesota history. And the case affirms a basic principle of research into Minnesota legal history: it cannot be studied apart from the history of the country.

APPENDIX

WILLIAM HOLCOMBE, PLAINTIFF IN ERROR, *v*. JOHN McKUSICK, JONATHAN E. McKUSICK, CHRISTOPHER CARLE, HORACE K. McKINSTRY, ELIAS McKEAN, and JOSEPH C. YORK.

60 U. S. 552 (1857)

Where there was a demurrer to some parts of a replication, and a motion to strike out other parts, still leaving in the replication some essential allegations, a judgment upon the demurrer and motion to strike out was not such a final judgment as can be reviewed by this Court.

This case was brought up, by writ of error, from the Supreme Court of the Territory of Minnesota.

The case is stated in the opinion of the court.

It was argued by *Mr. Bradley* for the plaintiff in error, upon which side there was also a brief filed by *Mr. Brisbin* and *Mr. Stevens*, and by *Mr. Cushing* and *Mr. Gillet* for the defendants.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Supreme Court of the Territory of Minnesota.

The suit in the court below was brought to recover damages for wrongfully entering the plaintiff's dwelling-house at Stillwater, Minnesota Territory, and doing great injury to the same, removing it from its foundations, damaging and destroying the personal property therein, &c.

The defendants, in their answer, set forth an act of the Legislature of the

Territory of Minnesota, incorporating the city of Stillwater, and conferring upon the municipal authorities the usual powers for the well government of the inhabitants thereof; the organization of the government of the city under its charter, and the election of its officers, and, among others, that one of the defendants, J. E. McKusick, was elected marshal. The answer set forth, also, an ordinance passed by the city council, in pursuance of authority given by the charter, which, among other things, provided for the removal of ob-[553]-structions in the public streets and landing places, and conferred authority upon the marshal to remove such obstructions. The answer then sets forth that the plaintiff's dwel1ing was erected upon Main street in the city, and obstructed the free use of the same, and had become a public nuisance; and that the marshal removed the said obstruction, in pursuance of the authority conferred upon him by the ordinance, which is the act complained of by the plaintiff; and that the other defendants were called in to his assistance in the performance of this duty. The answer then denies the special damage set up in the Complaint.

The plaintiff, in reply to the new matter set forth in the answer, denies, according to the formula prescribed by the Minnesota code, the existence of the charter of the city of Stillwater, set forth in the answer; and avers that no act of incorporation was ever published, as prescribed by the laws of the Territory. The plaintiff then sets out at large a charter of the city, which was published according to law; denies the election of the municipal authorities under the charter, also the existence of any city ordinance passed by the city council; and the election of the defendant, McKusick, his qualification in the office, or that he ever entered upon his duties. The plaintiff also denies that his dwelling house was erected on Main street, or that it obstructed the same.

There is also a long statement respecting the title to the land embraced within the corporate limits of Stillwater, which it is not material to set forth. The plaintiff further denies that, in making the removal of the dwelling-house, the defendants used proper care and caution to prevent unnecessary damage.

The defendants have demurred to all that portion of the reply which commences with denying the existence of the act of incorporation of the city of Stillwater, and including the charter set forth in the answer. They demur also to the allegation in the answer, stating that the dwelling house was erected prior to the 12th day of September, 1848; and, also, to all that

part of the answer relating to the title to the land embraced within the city of Stillwater.

The defendants also made a motion to strike out certain portions of the reply, which was granted, but it is not material to notice the portions particularly.

The District Court of the Territory sustained the demurrer of the defendants to the portions of the plaintiff's reply above referred to, with leave to the plaintiff to amend to amend. Final judgment having been made; judgment upon the demurrer was made absolute, with costs. An appeal was taken to the Su-[554]-preme Court of the Territory, where the judgment below was affirmed, with costs. The case is now here on a writ of error to this court.

The portions of the reply demurred to, and also those stricken out on motion, must be regarded as disposed of, and it will be necessary to look at those portions left, which have neither been demurred to nor stricken out, and therefore remain unanswered. One portion of the reply in this predicament is as follows: "And the plaintiff denies that the said dwelling-house obstructed Main street, in the city of Stillwater, or that the same was kept or maintained as a public nuisance."

Another is, a denial of the existence of the ordinance of the city council of Stiliwater, conferring authority upon the marshall to remove obstructions in the public streets; also a denial that the defendant, J. E. McKusick, was elected marshal, or had qualified as such; and, further, a denial by the plaintiff of the allegation in the answer, that the removal of the dwelling-house was made, doing no unnecessary damage, &c.

All these matters, in reply to allegations in the answer, constitute issues of fact upon the record, undisposed of; and it is quite clear, until disposed of in favor of the defendants, the plaintiff would be entitled to recover. They put in issue the authority of the defendants to remove the dwelling-house, which is set up in the answer; and also present a case, in which, if the general authority to remove obstructions from streets existed, it would not protect the defendants, as the dwelling-house was not within the limits of the street as claimed; also, if within it, unnecessary force was used, and unnecessary damage done to the building in the act of removal.

On the trial before the jury, the defendants would be obliged to meet these

several issues, and maintain the allegations in their answer, before they would be entitled to a verdict, as either of them, if found for the plaintiff, would have displaced the justification set up in the answer.

The whole of the cause, therefore, in the court below, was not disposed of, and no final judgment rendered, upon which a writ of error from this court would lie. It is the settled practice of this court, and the same in the King's Bench in England, that the writ will not lie until the whole of the matters in controversy in the suit below are disposed of. The writ itself is conditional, and does not authorize the court below to send up the case, unless all the matters between the parties to the record have been determined. The cause is not to be sent up in fragments. (11 How., 82; 21 Wend., 667.)

The statutes of Minnesota have provided for an appeal from [555] the District to the Supreme Court, on an interlocutory order affecting the merits. (Stat. Minn., p. 414, sec. 7.) It was, therefore, properly taken to the Supreme Court of the Territory; but that practice cannot govern this court in revising the judgments of the court below in this court.

We have rarely in our experience examined a case, which in its principles is common and readily understood, so complicated and confused by the mode of pleading which has been pursued, and which it is understood is in conformity with the system adopted in this Territory. The pleadings raise many immaterial and even trivial questions of fact and law, which have nothing to do with the substantial merits of the case, and seem, in practical operation, whatever may be the system in theory, to turn the attention of courts and counsel to small matters as of serious import, which are undeserving a moment's consideration, overlooking or disregarding the most material and controlling questions involved.

The demurrers are put in to detached statements in the answer, the statements thus demurred to loosely made, and often incongruous in themselves, and upon which no principle of law can be raised or applied to govern the decision.

The system is anomalous, and involves the absurd and impracticable experiment of attempting to administer common law remedies under civil-law modes of pleading, and these very much perplexed and complicated by emendations and additions.

The case must be dismissed for want of jurisdiction, there being no final judgment in the court below.

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