DUTCHER v. WOODHULL et al.

Case No. 4,204.
{7 Ben. 313.}[1]

District Court, E. D. New York. April, 1874.

EFFECT OF APPEAL ON JUDGMENT—SUPERSEDEAS—POWER OF THE COURT.

1. The effect of an appeal to the circuit court, from a decree of the district court in admiralty, when security for damages is given on the appeal, is, to make the decree of the district court of none effect.

2. Where such an appeal is taken, but security for damages is not given, the decree of the district court may remain of effect.

3. The district court, sitting in equity, has power to restrain the enforcement of a decree made by the same court sitting in admiralty.
4. A decree was rendered in an admiralty cause. Notice of appeal was served, but no security for damages was given, and judgment was entered against the stipulators, and execution issued, and a levy made. Thereafter, security for damages was given, and the return duly made to the circuit court, and proceedings stayed, the execution and levy being ordered to stand. The appeal was heard in the circuit court, and the decree of the district court was affirmed. An appeal with due security was taken to the supreme court, which affirmed the decree of the circuit court. Thereafter, the libellants sought to enforce the execution and levy: *Held,* that the judgment was destroyed by the subsequent proceedings, and that a perpetual injunction must issue, preventing such enforcement.

This was a bill in equity by [Silas B. Dutcher] an assignee in bankruptcy, for a perpetual injunction to prevent the sale by the marshal of certain land in the bill described, by virtue of an execution issued out of the district court for this district, sitting in admiralty, in a certain cause wherein Joshua Atkins and others were libellants against the ship Helen R. Cooper and the steamtug R. L. Mabey, and to prevent the enforcement of a certain decree in admiralty made by such district court in that cause. The facts were as follows: On the 19th day of September, 1806, a libel was filed in the district court for this district, sitting in admiralty, by Joshua Atkins and Edwin Atkins against the ship Helen R. Cooper and the steamtug R. L. Mabey, in a cause of collision. In that cause John K. Pruyn became the stipulator for value for the Helen R. Cooper. The cause was tried in the district court, and such proceedings therein had, that, on the 17th day of April, 1868, a decree was made in favor of the libellants, for the sum of $15,563.78 with the usual provision, that, unless an appeal was taken within the time limited by law, the stipulators should cause their stipulation to be fulfilled, and, in default thereof, the libellants should have execution against them, to enforce satisfaction of the decree. Notice of appeal from this decree was given, and a bond for costs filed, on April 21st, within the time fixed by the rules of court, and, by order of the court, the time for giving a bond for damages on appeal, to act as a supersedeas, was extended to the 22d day of May. On the 22d day of July, no other bond than the bond for costs having been given, a judgment, was entered up against the stipulators, and, on the 4th of August, an execution on that judgment was issued, for the amount of the decree, and a levy made by the marshal upon the lands described in the bill.

On the 7th day of September, 1868, after the entry of the judgment, and the making of the levy in question, a bond for damages on the appeal, in the proper form to give the appeal effect as a supersedeas, was presented for approval to Judge Blatchford, then holding the district court, and the same was approved by him and filed in the cause, after which, on the 10th day of October, on the application of the appellants, a stay of proceedings on the judgment till December 9th, 1868, was directed by the district court, the execution and levy to stand meanwhile. The case being in this position, on the 6th day of

November, 1868, the clerk of the district court made his return on appeal to the circuit court, where it was duly received and filed on the same day. The return contained all the matters and things required by law to be transmitted on appeal, including the bond for damages on appeal. Upon such return, the cause was thereafter heard in the circuit court on the appeal, and the decree of the district court affirmed, whereupon, and on motion of the libellants, a decree was entered in the circuit court affirming the decree of the district court, and directing, that, unless an appeal from the decree of the circuit court be taken within the time limited by the rules and practice of the court, the stipulators on appeal cause their stipulations to be performed.

From this decree an appeal was taken to the supreme court, and the bond required by law, to obtain the effect of a supersedeas, duly given, which appeal was thereafter heard by the supreme court, and that court, in due time, issued its mandate to the judges of the circuit court, directing that the decree of the circuit court be affirmed, and that a decree be entered in favor of the libellants, whereupon, in pursuance of such mandate, and on motion of the libellants, a final decree was entered in the circuit court in accordance with the mandate.

In the meantime Pruyn, the original stipulator against whom the judgment of July 22d, 1868, had been entered, being indebted to the Central Bank of Brooklyn, mortgaged the lands in question to that bank. The bank was thereafter declared an involuntary bankrupt, on a petition filed October 1st, 1870, and the plaintiff in this action was appointed assignee. He took proceedings to foreclose the mortgage in question, and obtained a decree of foreclosure, under which the property in question was advertised for sale. The defendants in this action, who had become possessed of the judgments and decrees in the case of Atkins v. The Helen R. Cooper, sought to collect the amount, by directing the marshal to sell the lands in question, under the levy made by him in July, 1868. Thereupon, by agreement between them and the assignee, $25,000 of the purchase money of the lands was deposited subject to the lien of the judgment, and this action was commenced by the assignee.

Charles Jones, counsel for complainant, argued as follows:

First Point. The appeal taken from the decree in the district court to the circuit court superseded and suspended that decree altogether. The cause thereby was removed to

the circuit court to be heard there de novo, as if no decree had been made in the district court. Yeaton v. U. S., 5 Cranch [9 U. S.] 281; The Collector, 6 Wheat. [19 U. S.] 194; U. S. v. Preston, 3 Pet. [28 U. S.] 57; Montgomery v. Anderson, 21 How. [62 U. S.] 386; The Alicia, 7 Wall. [74 U. S.] 571; The Roarer [Case No. 11,876]; Harris v. Wheeler [Id. 6,130]; The James A. Wright [Id. 7,191]. The same rule is laid down in the text books, and results from the course of procedure and practice in maritime and admiralty cases, when the proceeding is in rem. "After the circuit court is possessed of the cause, by the receipt of the return from the district court, the cause is no longer in the district court. That court cannot make any order whatever in relation to it." Ben. Adm. Pr. § 588. By an appeal from the district court to the circuit court, the circuit court becomes possessed of the cause, which is no longer in the district court. The circuit court alone can make orders in it, and executes its own judgment, without any intervention of the district court; and, if there be a further appeal to the supreme court, that court does not execute its own judgment, but sends a special mandate to the circuit court, to award execution thereon. The regular order of proceedings there requires, that the property should follow the cause into the circuit court, not only with a view to its own action, but also that of the supreme court. The vessel or other property, the funds and original stipulations follow the cause and are sent up to the circuit. Ben. Adm. § 589; Cir. Ct. Rules, 121–123. The circuit court is possessed of the cause from the time of filing the appeal with the documents required to be returned therewith (rule 125), and, if the appellee does not enter his appearance within the first two days in term succeeding the filing of the appeal, &c., the appellant may proceed exparte in the cause, and have such decree as the nature of the case may demand (rule 126). New allegations may be made in the circuit court, new rulings sought, and new evidence taken. Either party may bring on the cause for hearing, and the cause is thus heard in the appellate court de novo, as if no decree or sentence had been passed. Rule 131, &c. There being no cause in the district court, there can be no decree in that court to be executed, and, if there were, it could only be executed by the circuit court, where the cause was. If the Helen R. Cooper had been in the custody of the marshal at the time the appeal was perfected in the circuit court, or if she had been sold, and the proceeds were in the registry of the district court, it cannot be doubted that both would have been sent and transferred to the circuit, there to abide the order and decree of the circuit court. The bail or stipulation, which is a substitute and stands for the property, will necessarily follow the cause into the circuit court, and all remedies therein will be enforced in that court.

Second Point. The right of appeal to the circuit court from final decrees in a district court, in causes of admiralty and maritime jurisdiction, when the matter in dispute exceeds the sum of fifty dollars, is absolute, and the claimants of the Helen R. Cooper complied with all the provisions of the statute regulating appeals in such cases. Under the

provisions of the 21st, 22d, and 23d sections of the judiciary act of 1789 [1 Stat. 83], and the act of 1803 [2 Stat. 244], it will be seen, that, while security and a supersedeas were specially provided for by the statute in the case of a writ of error, and an appeal from the circuit to the supreme court, no security, for costs or otherwise, is required by the statute in terms, in the case of an appeal from a decree in admiralty from the district to the circuit court. In the case in question, there was an appeal—it was taken from the decree of the district court to the next circuit court, and the appeal was received, heard and determined by the circuit court. Thus, all the statutory requirements were complied with.

Third Point. The point is made, that the claimant of the Helen R. Cooper, having failed to give security within ten days, as prescribed by rule 73, and a summary decree having been entered against the stipulators under rule 66, this decree was unaffected by the appeal afterwards perfected, and can be enforced by the execution issued out of the district court.

1. This point is not tenable, and is sufficiently answered by the decisions above cited as to the effect of an appeal. The cause, when the appeal was taken, or, at any rate, when it was perfected, no longer remained in the district court, but it and all its incidents were removed to the circuit. The district court could make no order in it. The liability of the parties could be determined and enforced only in the circuit, and the decree against the stipulators was as much superseded as any other order or decree in the cause.

2. Security was given and the bond was approved. All the proceedings required by the rules and practice of the court, in order to perfect the appeal and stay execution, were taken. It is too late now to object that the security was not given within the time required by the rules of the court. That was a mere matter of practice, and was waived by the libellants' not objecting and making no motion to dismiss the appeal. It is a familiar principle, that all irregularities are waived by acquiescence, and when no objection is made. Pearson v. Lovejoy, 53 Barb. 407. And a party will be deemed to waive the objection that an appeal was not taken within the time allowed by law, when he is guilty of laches in not moving to dismiss. Stevenson v. McNitt, 27 How. Pr. 335. And in the case of The Dos Hermanos, 10 Wheat.

{23 U. S.} 306, the point was made that the appeal was not in time. The appeal was prayed for within five years, and allowed by the court within that period. The security allowed by law was not given until after the lapse of five years. Marshall, C. J., says: "Under such circumstances, the court might have disallowed the appeal and refused the security; but, as the court accepted it, it must be considered as a sufficient compliance with the order of the court, and that it had relation back to the time of the allowance of the appeal. The mode of taking the security and the time for perfecting it are matter of discretion, to be regulated by the court granting the appeal, and, when its order is complied with, the whole has relation back to the time when the appeal was prayed. We must presume the security was given in this case according to the rule prescribed by the district court, and the appeal was, therefore, in time.

3. In the present case, the bond for security was approved by the district Judge, and, if it had no relation back to the time when appeal was entered, it yet operated as a stay from the time it was approved. The district court could not, and, indeed, did not, attempt thereafter to execute the decree against the stipulators. This being followed by the appeal being perfected, and heard and determined in the circuit, estopped the district court from thereafter proceeding in the cause.

4. The libellants in the admiralty court are clearly estopped. They appeared and argued the appeal in the circuit, and entered a decree in the cause. They appeared and argued the appeal in the supreme court, and have entered a decree in the circuit in pursuance of the mandate of the supreme court. This is the final decree in the cause, and superseded all other decrees made. If not, there are three decrees in the same cause, all enforceable.

5. But the right of appeal is a statutory right. It cannot be taken away by any order or rule of the court. The most that the court can do is to prescribe the manner in which the appeal may be taken, and, if this is not strictly followed, all defects are cured by the court's receiving, hearing and determining the appeal.

Benedict, Taft & Benedict, for defendants, argued as follows:

First Point. There are cases in which, although an appeal has been taken from an admiralty decree of this court to the circuit court, the decree remains in this court and may, nevertheless, be enforced in this court. The 73d and 75th rules of this court expressly provide for such cases. And the 66th rule expressly provides for the mode of procedure in such enforcement. It is not pretended but that this case is exactly the case in the 73d rule, nor but that the proceedings to enforce this decree followed rule 66. That rule provides how the judgment and execution against the stipulators may be discharged. No other mode is provided either by statute or rule. Unless those rules are set aside, this bill must be dismissed.

Second Point. It is claimed that an appeal in admiralty destroys the decree below. But the 133d rule of the circuit court provides for the "carrying into effect" of the decree of

the district court. The appeal, therefore, cannot destroy that decree and make it no decree. An "order" of the circuit court might direct the enforcement of an existing decree, but it could not make that a decree which had been by the appeal made no decree, as the complainant insists. That rule of the circuit court, therefore, recognizes the existence and validity of the decree made in the district court, notwithstanding an appeal from it has been taken. That rule provides for the enforcement of the decree appealed from, by permission of the circuit court. An affirmance of the decree may well be held as giving that permission.

Third Point. It is, doubtless, to be understood, that there is no limitation of ten days within which the security on an appeal in admiralty must be given, to stay execution. That time may be extended. But, the effect of the failure to give such security within the extended time should be the same as where the time is statutory. The rules of the courts which we have cited are made to meet such cases, and to give the same relief which the statute gave the party, in cases where the time was fixed by statute.

Fourth Point. No matter, therefore, whether the effect of an appeal which is duly perfected by the giving, within the ten days or the further time granted by the court of the security which shall operate as a supersedeas, is to remove the cause to the circuit court, with the decree and its lien, in such wise as to destroy the decree, or not. No such power can be claimed for an appeal which is not thus duly perfected. On such an appeal, the proceedings under the 66th rule of this court may clearly be taken. Otherwise, an appeal without security has the same effect as an appeal with security.

Fifth Point. The counsel for complainant has not ventured to urge that the mere entry of an appeal, without any security whatever, has the effect of setting aside the decree in the district court. He must, then, admit, that such a result can only follow an appeal perfected by the giving of security in time. But here is no such appeal. The time to perfect it expired on May 22, by the order of May 19. The subsequent filing of a bond in the case could not perfect it, so as to give it the effect of a duly perfected appeal. An appeal thus imperfect could not destroy the judgment against stipulators, entered after the time to perfect the appeal had expired. It was not treated by the judgment debtors themselves as having any such effect. No application was made to the circuit

court to prevent this court from proceeding to enforce the judgment, as being a judgment which had been transferred to that court. But an application was made to this court to stay execution, and this court made a temporary stay, ordering the execution and the levy under it to stand. No order has been made by this court, since then, which sets aside the execution and levy which it thus ordered to stand. An assignee of a creditor of the party against whom the judgment was entered, cannot now, in this collateral proceeding, attack that execution and levy thus ordered to stand. He must procure the order directing them to stand to be set aside in the cause in which they were entered.

Sixth Point. The circuit court was not possessed of the cause when the judgment of July 22d was entered. It became possessed of it only on the filing of the return on November 6th, 1868. Rule 125, Cir. Ct. This court, then, had power to enter the judgment of July 22d. No appeal has ever been taken from that judgment. How could an appeal previously taken have any effect whatever upon that judgment?

Seventh Point. But again, if we were to concede that the effect of the appeal and the giving of the security in the case of the Cooper was to transfer the cause to the circuit court, still the result cannot follow which the complainant claims. If it transferred the cause, it must have transferred it as it was when the transfer was effected. It transferred it, therefore, with this judgment against stipulators and this execution and levy still standing. How does it appear that such transfer destroyed all these? Suppose a sale under a decree of the district court. A subsequent appeal would not destroy the sale. How, then, could it destroy the levy under which the sale was made? and, if that levy stands, why should this court interfere with it?

Eighth Point. And yet again, if this judgment, execution and levy were, by the appeal, transferred to the circuit court, what power has this court over them? Has this court, as a court of equity, more power than as a court of admiralty? If it has no power to make any decree or order in the cause, because the cause is not in this court, what power has it to restrain proceedings in a cause which is not in this court, on a judgment and execution which are not in this court?

Ninth Point. The intention of congress, as shown by the acts, and of the courts, as shown by the rules, is, that the decree is enforceable against the party himself, and, also, that the decree shall be entered against the stipulators and enforced against them, unless the party appeals and gives the security within the ten days given by the rule, or such further time as the court shall grant. If he does not do that, he has no remedy against such enforcement. This court, on cause shown, might stay proceedings on the execution, by order. But the very supposition that this court could do so, includes the idea that the judgment is in this court and enforceable. This court does not stay proceedings in causes in the circuit court.

Tenth Point. The rules are a part of the stipulation (The Belle [Case No. 1,270]), it being "entered into" pursuant to them. It is clear, upon the rules, that it was the intention, that, if a defendant allowed the proceedings in the district court to get so far that judgment was entered against the stipulators, that judgment was enforceable, and the respondent was left to his right to obtain restitution in case the decree was finally reversed. It cannot be claimed, that the effect of an appeal is to destroy the security taken in the court below. The complainant's counsel has not maintained that it has that effect. He claimed that an appeal transferred the security, whether bond or stipulation, into the circuit court, and that, after an appeal, the security is enforceable only in the circuit court. But, when a judgment has been entered on such a stipulation, the stipulation is merged in the judgment and is functus officio. Another judgment could not be entered upon it. And, since the effect of an appeal cannot be to destroy the security, it cannot destroy the judgment. It matters not, then, whether the effect of an appeal in such case is to carry to the circuit court all the incidents of the cause, or not. The security is not destroyed, whether it be bond, stipulation or judgment.

BENEDICT, District Judge. The question here presented is, whether the decree and levy made in the district court were, in law, vacated and rendered of no effect by the subsequent proceedings in the cause.

In determining this case, it is not necessary to say whether, under some circumstances, a decree in admiralty, made by the district court, cannot remain of effect after an appeal is taken to the circuit court. It would seem that such may be the case where an appeal is taken, but no bond for damages on appeal is given. Under such circumstances, the failure of the appellant to give a bond for damages would seem to change the aspect of the case, and render it thereafter a proceeding to obtain a decree of restitution, and the numerous cases heretofore determined both in the circuit court and the supreme court of the United States do not appear to me to furnish authority for determining that, after an appeal without security for damages on the appeal, no effect whatever can be given to the decision of the district court. The general language of these decisions can only be understood by referring to the position of the cases then under consideration, which were not cases of appeal without security.

The adjudged cases do however decide, that where, in an admiralty cause, an appeal

is taken from the decree of the district court, and security on appeal is given, then the decree of the district court is, by such appeal, rendered of no effect, and they furnish authority for determining this case in favor of the plaintiff, because the appeal under consideration was an appeal with security. Here, a bond for damages on appeal was offered and approved by the district court, and the same was transmitted to the circuit court, where, on the motion of the libellants, a decree was thereafter entered, directing that the stipulators upon it perform their stipulation. All the proceedings required by the rules and practice of the court, in order to cause the appeal to act as a supersedeas, were done, and the appeal was thus brought within the rule declared by the supreme court in the decisions referred to.

It is no answer to this to say, that the bond for damages on appeal, which alone would give to the appeal the effect of a supersedeas was not given within the time required by the rules of the district court. The district court had power to extend the time for giving the bond, and when, in this case, the bond for damages was taken and approved by the court, its effect related back to the time of taking the appeal, and it rendered the appeal effective to supersede the execution issued in the district court, and in legal effect to vacate the decree. Moreover, no objection was made to the filing of the bond for damages, nor to its transmission to the circuit court, and, after omitting thus to object in the district court, and after availing themselves of the benefit of the bond by entering judgment upon it in the circuit court, it is not open to the libellants to say that the bond was not duly and in time given in the district court, to give to the appeal the effect of a supersedeas.

Nor is the case of the libellants changed by the fact that the appellants, prior to the transmission of the return to the circuit court, applied for an order directing a stay of execution, on the granting of which order the district court then directed that the judgment, execution and levy stand. Such a provision in the order of the district court would be powerless to take from the appeal its legal effect, and I may be permitted to say, that the object of the provision was to avoid prejudging, upon a motion, the very question to determine which this action is brought.

But, it is objected, that the district court, sitting in equity, in the exercise of the jurisdiction conferred by the bankrupt act [of 1867 (14 Stat. 517)], has no jurisdiction to stay the hand of the admiralty court, in the execution of its own decrees. As to this I concede that much may be said, but, inasmuch as, entertaining the views above expressed in respect to the effect of the appeal in question, I should be obliged, on application to me, sitting in admiralty in the district court, to direct a perpetual stay of the execution in question, from which action relief might be difficult, whereas, by granting the relief in this case, any error I may commit can be corrected by an appeal, I have little hesitation in maintaining, for this purpose, the jurisdiction of the district court, sitting in equity, to grant the relief prayed for by this bill.

The plaintiff must, therefore, have a decree in accordance with the prayer of the bill.

[1] {Reported by Robert D. Benedict, Esq., and here reprinted by permission.}