

Case No. 7,545.

{Abb. Adm. 481.}¹

THE JOSEPHINE.

District Court, S. D. New York.

Feb., 1849.

APPEAL—MOTION TO DISMISS—WHERE MADE.

1. A motion to dismiss an appeal taken from a decree in the district court to the circuit court, must be made in the circuit court.
2. The authority of the district court, in cases pending on appeal, extends only to the protection of parties against unreasonable delay.

This was a libel in rem, by Joseph Smith and others, against the brig Josephine. The final decree in the cause, which was in favor of the claimants, was rendered March 8, 1847. An appeal from this decree was taken in due time by the libellants. The claimants now moved that they be discharged from their stipulations given on the appeal, and that the appeal be dismissed. In support of this motion they produced the certificate of the clerk of the circuit court, that the notice of appeal and affidavit of service, with the papers required to be returned with the appeal, had not been filed in the circuit court, as late as February 3, 1849.

Mr. Bliss, for the motion.

E. C. Benedict, opposed.

BETTS, District Judge. The application for relief in this matter must be addressed to the circuit court; as the question relates to the regularity and sufficiency of the proceedings to vest that court with cognizance of the cause. That court, and not the district court, must determine whether the rules of the circuit court have been complied with, and whether the cause is to remain with that tribunal or to be dismissed from it. The authority of the district court in appealable cases extends only to the protection of suitors against unreasonable delays therein. Ten days after notice of the decree is allowed to the failing party to appeal. Dist Ct. Rules, 152. If he omits to enter an appeal within that time, the successful party may proceed and execute the decree rendered in his favor. Id. 153. So, if after regularly entering the notice of appeal, the appellant neglects for thirty days to have the proceedings transcribed in order to be transmitted to the circuit court, the decree may be executed in the court below. Id. 155. It is not charged that either of these steps have not been regularly taken; and it is only on the failure to take them that relief can be sought in this court. The relief given by this court in the cases indicated does not act upon the appeal itself. With that this court has no concern. The relief extends no further than to allow the prevailing party to proceed upon his decree in this court as if no movements for an appeal had been signified to the court. The present motion, therefore, cannot be granted in this form. Order accordingly.

{See Case No. 7,546.}

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¹ [Reported by Abbott Brothers.]