

& Co., have been collected and sold, and all the debts paid or satisfied, discharged or acquired by complainant, who has frequently called upon the defendant to adjust and settle the partnership accounts, and pay complainant the amount due him, which he avers is \$46,364.77, with interest, but defendant refuses. The prayer is for an account and decree for the balance due complainant.

The objection that the bill is multifarious is not well founded. All the assets of both firms having been applied towards the payment of the debts, the only business remaining is to settle the accounts of the partners *inter sese*. That there were two firms, and that their transactions were entirely disconnected, does not matter. Each item of each account is the record of a separate and independent transaction. Had two bills been filed, as defendant insists there should have been, it would have been the duty of the court, under section 921, Rev. St. U. S., to consolidate the two causes, or at least to set them down for hearing together. There is no danger of confusion in attempting to settle in one cause and by one decree. The bill is for the settlement of mutual accounts between the parties. The mutuality is the basis of the jurisdiction in equity. It is not material whether they grew out of the transactions of one firm in which they were the only partners, or two firms, or half a dozen. In any event there could be but one decree, and that for the balance.

The demurrer will be overruled. The defendant will be allowed until the 1st of October, proximo, to prepare an answer, and present it to the court with an application for leave to file, provided that, whereas it is shown to the court that the defendant stipulated to file his answer in July, and that the time for taking testimony should date from September 15th, the leave to prepare answer and present it to the court as above shall be on condition that defendant stipulate that the taking of testimony may begin Tuesday, September 15, 1891.

THE SYDNEY.

THE WILLIAM WORDEN.

PROVIDENCE WASHINGTON INS. Co. *et al.* v. THE SYDNEY AND THE WILLIAM WORDEN.

(Circuit Court S. D. New York. September 4, 1891.)

1. MANDATE ON APPEAL—PROCEEDINGS IN COURT BELOW.

Where an appeal to the supreme court from a decree of the circuit court is dismissed, and a mandate issued directing the court to proceed according to right and justice, the court may proceed as if no appeal had been taken, and the time for so doing, specified in the decree, had expired.

2. APPEAL-BOND—SUMMARY JUDGMENT.

In admiralty, stipulations for costs and for value upon the release of vessels, and a *supersedeas* bond on appeal, are securities taken under the order of court; and,

where an appeal has been dismissed, the circuit court may enter summary judgment against the obligors of such stipulations and bond.

3. SAME—STIPULATION FOR VALUE—INTEREST.

Under a stipulation for value upon the release of a vessel, the obligors are not liable for interest on the sum stipulated, except on default in complying with the terms of the stipulation.

4. SAME—LIABILITIES OF SURETIES.

Where an appeal was dismissed, without awarding interest or cost, the obligors of the *supersedeas* bond, who were stipulators for the release of the vessel and for costs, satisfy their obligations by payment of the costs awarded by the decree of the court appealed from, the stipulation of release having been complied with.

In Equity. Motion to settle a decree.

Edward D. McCarthy, for Insurance Company.

Hyland & Zabriskie, for The Sydney and The William Worden.

WALLACE, J. This cause is here upon the settlement of a decree to be entered upon the filing of a mandate of the supreme court. Upon the libel filed in the district court, both vessels were seized under the process issued. The claimant entered into the usual stipulation for costs in the sum of \$250, with sureties. The Worden was released upon the filing of a stipulation dated August 28, 1883, by the claimant, with sureties, for \$1,000; that sum having been fixed as her value by the consent of the libelants and claimant. The Sydney was sold by order of the court for \$2,100, and the proceeds of the sale were paid May 3, 1884, into the registry of the district court. After a hearing upon the merits, there was a decree in the district court dismissing the libel as against both vessels, with costs. The libelants appealed from that decree to this court. After the hearing of the appeal, this court allowed the claimant to reopen the hearing, and introduce further testimony, upon furnishing a bond, with sureties, for additional costs in the amount of \$300. Subsequently this court reversed the decree of the district court, and condemned both vessels, awarding the libelants \$8,252 damages, and \$656 costs. 27 Fed. Rep. 119. The decree provided that, unless an appeal should be taken and perfected by the claimant within a specified time, the stipulators for costs and for the value of the Worden, and the sureties in the bond for additional costs, should cause their engagements to be performed, or show cause, within four days after the expiration of the time to appeal, why summary judgment should not be entered into against them. Within the specified time the claimant appealed from that decree to the supreme court, and, upon the allowance of his appeal, executed and filed the usual *supersedeas* bond, with sureties, in the sum of \$2,500, conditioned to prosecute the appeal to effect, and answer all damages and costs, "including just damages for delay, and for the use and detention of the property, and the costs of the suit, and costs and interest on the appeal, awarded against the appellant therein." That appeal was dismissed by the supreme court for want of jurisdiction, (139 U. S. 331, 11 Sup. Ct. Rep. 620;) and that court, by its mandate to this court, directed that such proceedings be had herein as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwith-

standing. The same persons were the sureties in the stipulation for costs, in the stipulation for value, in the bond for additional costs, and in the *supersedeas* bond.

The well-established rule that on a mandate from the supreme court, containing a direction to this court to enter a specific judgment, this court has no authority to do anything but execute the mandate, and enter such a judgment or decree as it directs, has no application to the present case. The supreme court has not considered the merits of the cause, but has refused to consider them, because it was without jurisdiction to do so. The mandate merely informs this court that the appeal is no longer pending, and directs this court to proceed as it should do in view of that fact. This court is therefore at liberty to enforce the engagements of the claimant and his sureties as completely as it could if no appeal had been perfected, and the time for doing so, specified in the original decree, had now expired. Like the stipulation for costs and the stipulation for value given upon the release of the Worden, the bond for additional costs and the *supersedeas* bond are securities taken under the direction of the court for the benefit of the libelants, and constitute a fund to be applied by the court according to the rights of those interested therein. Bonds are, to all intents and purposes, stipulations in the admiralty, and the liability of parties thereto is the same whether the instrument is in form a bond or a stipulation. *The Alligator*, 1 Gall. 145. The power of the court to award summary judgment against the obligors in an appeal-bond, given upon an appeal in an admiralty cause from the district court to the circuit court, was treated as unquestionable by the supreme court in the case of *The Wanata*, 95 U. S. 600; and it has long been the practice in this court, upon entering a decree in an admiralty cause which has been taken by appeal to the supreme court, when the mandate has been received from that court, to give summary judgment against the obligors in the *supersedeas* bond. *Sawyer v. Oakman*, 11 Blatchf. 65; *The Blanche Page*, 16 Blatchf. 1, 17 Blatchf. 221; *The New Orleans*, 17 Blatchf. 216; *Ex parte Sawyer*, 21 Wall. 235; *The Belgenland*, 108 U. S. 153, 2 Sup. Ct. Rep. 864. The practice has been so uniform, and has become so well established, that it is too late for this court to question its propriety. The obligors in such bonds, sureties as well as the principal, are deemed to be stipulators who have consented to submit to summary judgment requiring them to make good their engagements. Under the stipulation for costs and the bond for additional costs, the stipulators are liable for the sum of \$550, that being the aggregate amount which they have undertaken to pay by the terms of the two instruments. Under the stipulation for the value of the Worden, which is a substitute for the vessel itself, they are liable for the sum of \$1,000, and no more. Stipulators are liable for interest upon the stipulated sum only in case of default in complying with the terms of the stipulation. *Brown v. Burrows*, 2 Blatchf. 240; *The Ann Caroline*, 2 Wall. 538; *The Webb*, 14 Wall. 406; *The Wanata*, 95 U. S. 600. The contrary was decided in the case of *The Belle*, 5 Ben. 57, in view of the special recital in the stipulation, and

the rule of court, which in effect required stipulators to pay interest. But the recital and rule of court in the cases of *The Ann Caroline*, *The Steamer Webb*, and *The Wanata* were the same, as appears from an examination of the records, as in the case of *The Belle*; and, although no reference was made to their distinguishing features by the supreme court, it is not reasonable to suppose that on three occasions they escaped the attention of that tribunal. The stipulators are not in default. *Ex parte Sawyer*, 21 Wall. 235. Until the adjudication vacating the appeal made by the supreme court becomes, by the mandate, the decree of this court, the time allowed to them by the original decree in which to perform their engagements does not expire.

Inasmuch as the obligors in the *supersedeas* bond are the sureties in the other stipulations, and the proceeds of the sale of the Sydney are intact in the registry of the court, and no costs or interest were awarded by the supreme court upon the appeal, their engagements under that bond will be satisfied by paying the costs of the libelants awarded by the decree appealed from in excess of the amount covered by the stipulation for costs and the bond for additional costs. Such bonds are given pursuant to statutory provisions to indemnify the prevailing party from loss in case the appeal is not prosecuted with effect. They are to be conditioned to answer all damages and costs if the appellant fails to make his plea good. Rev. St. U. S. §§ 1000-1012. The nature and extent of the indemnity contemplated by the statute is indicated by supreme court rule No. 29. When a personal judgment or decree is appealed from, the "damages and costs" which the appellant is to answer for are the money recovery in the judgment, including interest as an incident of the judgment. *Catlett v. Brodie*, 9 Wheat. 553. The "costs and interest on appeal" are those which may be awarded by the supreme court pursuant to its rule No. 23. The "just damages for delay," of the twenty-ninth rule, is a provision for other indemnity than that included in the terms "damages and costs," or "costs and interest on appeal;" otherwise, there would be no occasion for such a provision in the rule. When the decree appealed from is like that in this cause, the *supersedeas* is to be indemnity for the costs of the suit, and just damages for delay, and costs and interest on the appeal. The liability of obligors upon a *supersedeas* bond given in a suit to foreclose a mortgage was considered elaborately in *Kountze v. Hotel Co.*, 107 U. S. 378, 2 Sup. Ct. Rep. 911, and the true meaning of the term "just damages for delay" defined as those arising from the deterioration of property pending an appeal, by waste, want of repair, or the accumulation of taxes or other burdens upon it. In a case like the present, just damages for delay might also include any loss arising from insolvency of stipulators. According to the doctrine of that decision, it is entirely plain that the obligors in the present case are not liable for any damages for delay.

A decree will be entered according to those views.

MILLER'S ADM'R v. NORFOLK & W. R. Co.

VAN GUNDEN v. VIRGINIA COAL & IRON Co.

(Circuit Court, W. D. Virginia. May 18, 1891.)

1. CONSTITUTIONAL LAW—SECURITY FOR COSTS—VIRGINIA STATUTE.

Rev. St. U. S. § 914, provides that the practice, pleadings, forms, and modes of procedure in civil causes, other than equity and admiralty causes, in the United States courts, shall conform as near as may be to the practice, pleadings, forms, and modes of procedure existing at the time in like causes in the courts of record of the state within which the United States courts are held, notwithstanding any rule of court to the contrary. Code Va. § 3539, provides that in any suit, except those wherein plaintiff sues *in forma pauperis*, there may be a suggestion on the record in court, or on the rule docket if the case be at rules, by a defendant or any officer of the court, that plaintiff is not a resident of the state, and that security for costs is required of him. *Held*, that these statutes do not impose a restriction on the constitutional right of non-residents to sue in the United States courts, and that such security may be required in such courts from a non-resident plaintiff.

2. SAME—TIME OF APPLICATION FOR SECURITY.

Code Va. § 3539, designating no particular time when the motion for security for costs shall be made, the rule may be entered at any time when no prejudice to plaintiff is caused by defendant's delay in moving therefor.

3. SAME—SUIT BY ADMINISTRATOR.

The fact that in such case the plaintiff is an administrator who has given bond as such in a state court will not relieve him from giving the required security, since he is liable on his official bond only to the extent of the assets received.

At Law. On motion for rule for security for costs.

Geo. W. Ward and Danl. Trigg, for Miller's Adm'r.

Fulkerson, Page & Hurt, for Norfolk & W. R. Co.

Blair & Powell, for Van Gunden.

Ayres & Pridemore, for Virginia Coal & Iron Co.

PAUL, J. In each of these cases a motion is made by the defendant for a rule for security for costs on the part of the plaintiff, the plaintiff being a non-resident of the state of Virginia. The motion is made under the provisions of section 3539, Code Va. 1887. This statute provides:

"In any suit, except where such poor person is plaintiff, [referring to section 3538, where provision is made for suing *in forma pauperis*,] there may be a suggestion on the record in court, or (if the case be at rules) on the rule docket, by a defendant or any official of the court, that the plaintiff is not a resident of the state, and that security is required of him."

Section 914 of the Revised Statutes of the United States provides:

"The practice, pleadings, and forms and modes of procedure in civil causes, other than equity and admiralty causes in the circuit and district courts, shall conform as near as may be to the practice, pleading, and forms and mode of procedure existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

This provision of the United States Statutes incorporates the Virginia statute as to non-resident plaintiffs into the practice and proceedings of the United States courts in common-law cases. The purpose and