

We are of opinion that the second ground on which the dismissal of this appeal is moved is also well taken. Appeals from the circuit courts shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error. Rev. St. § 1012. There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party. Rev. St. § 997. Our rule 11, (47 Fed. Rep. vi.) based on these provisions of the statute, requires the plaintiff in error or appellant to file with the clerk below, with his petition for writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. The first clause of subdivision 5 of rule 24 (Id. xi.) provides that when, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion. The counsel for the appellants insists that this rule can never have been intended to relate to any appeals except appeals from admiralty causes. There is, however, nothing in the language of the statutes or of our rules, or in the nature of the case, restricting the application of the rule to appeals in admiralty. The purpose of the rule is twofold: to advise the adversary as to what he is to defend, and to aid the appellate court in reviewing the case. It is so far not jurisdictional that the court may, in a proper case, entertain the appeal, and notice a plain error not assigned or specified; but we consider the better practice is to require a compliance with the rule in all cases of appeals in equity, as well as of writs of error in cases at law. We conclude, therefore, that the motion to dismiss this appeal is well taken, and should be granted, and it is so ordered.

HUMES et al. v. THIRD NAT. BANK.

(Circuit Court of Appeals, Fifth Circuit. February 20, 1893.)

No. 88.

APPEAL—APPEALABLE JUDGMENTS—PARTIES—SEVERANCE.

The sureties upon a supersedeas bond, after affirmance by the appellate court, cannot have the judgment thereafter entered against them in the trial court reviewed on writ of error without joining the principal and all other defendants in the writ, or obtaining a severance or other equivalent proceedings giving them the right to proceed alone. *Hardee v. Wilson*, 13 Sup. Ct. Rep. 39, 146 U. S. 179, followed.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

Action by the Third National Bank of Chattanooga against Eugene C. Gordon. Judgment was given for plaintiff, and affirmed upon writ of error. 12 Sup. Ct. Rep. 657, 144 U. S. 97. On motion in the trial court, judgment was entered against defendant and his sureties upon the supersedeas bond, C. C. Harris and Milton Humes,

who thereupon sued out this writ of error. On motion by defendant in error to dismiss the writ for the nonjoinder of defendant below. Granted.

R. C. Brickel and W. A. Gunter, for plaintiffs in error.

William Richardson, (White & Martin, on the brief,) for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. The Third National Bank of Chattanooga, in April, 1888, recovered in the circuit court of the United States for the northern division of the northern district of Alabama a judgment against Eugene C. Gordon in the sum of \$5,286.67 and costs. To reverse this judgment, Gordon sued out a writ of error to the supreme court of the United States, giving a supersedeas bond, with Milton Humes and C. C. Harris sureties thereon. In March, 1892, the supreme court affirmed the judgment. In May, 1892, the certificate of affirmance and the mandate of the supreme court in common form was issued. On the 12th of October, 1892, at the regular term of the circuit court, the Third National Bank of Chattanooga, having given previous notice, moved the court for judgment against the said E. C. Gordon and his sureties on said supersedeas bond, C. C. Harris and Milton Humes. To this motion, Harris and Humes appeared and interposed a demurrer, assigning three separate causes: (1) That this court is without jurisdiction to order the issue of an execution against these defendants, as prayed for in said petition or motion; (2) that the said motion or petition does not make a case of which this court can take cognizance; (3) that the statutes of the state of Alabama allowing damages on judgments affirmed on writ of error or appeal are not applicable to judgments affirmed by the supreme court of the United States. The demurrer was overruled, and, the motion coming on to be further heard, Harris and Humes proposed to interpose a plea of payment, suggesting that since the rendition of the original judgment payments on said judgment have been made to plaintiff to a large amount, exceeding one half of the said judgment. The plaintiff denied that any such payment had been made, and the court thereupon refused to permit the said plea of payment to be interposed, or to hear any evidence touching such payments. The plaintiff in the court below (the defendant in error here) then read in evidence the supersedeas bond executed by the defendants E. C. Gordon as principal and Milton Humes and C. C. Harris as sureties, and the mandate of the supreme court of the United States, showing the judgment of the supreme court as follows:

"On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs, and interest until paid, at the same rate per annum that similar judgments bear in the courts of the state of Alabama; and that the said plaintiff recover against the said defendant E. C. Gordon for its costs herein expended, and have execution thereof."

And the following mandate:

"You therefore are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding."

—And thereupon, without any other evidence, the court rendered judgment, and directed issue of execution against the defendants Milton Humes and C. C. Harris, as sureties on said bond, for the principal and interest and costs as shown in said judgment; the formal judgment of the court being as follows:

"It is therefore ordered, adjudged, and decreed that the plaintiff, the Third National Bank of Chattanooga, recover of said defendants, E. C. Gordon, principal, and C. C. Harris and Milton Humes, sureties, the sum of seven thousand two hundred and four and eighty-five one hundredths dollars, being said judgment and the interest thereon from date rendered to this date, October 3, 1892, and a further amount of one hundred and twenty-seven dollars, the costs herein, being in all seven thousand three hundred and thirty-one and eighty-five one hundredths dollars, for which execution will issue."

Milton Humes and C. C. Harris, without obtaining any severance as to Gordon, applied for and obtained a writ of error to this court, assigning errors as follows:

"(1) The court erred in the judgment rendered. (2) The court erred in overruling the first ground of defendants' demurrers to plaintiff's said motion. (3) The court erred in overruling the second ground of defendants' demurrers to plaintiff's said motion. (4) The court erred in overruling the third ground of defendants' demurrers to plaintiff's said motion. (5) The court erred in not allowing the defendants to file and interpose to said motion a plea alleging that since the rendition of said original judgment payments on said judgment have been made to a large amount to plaintiff, exceeding one half of said judgment. (6) The court erred in not allowing the defendants to offer evidence showing that since the rendition of the original judgment in said cause payments on said judgment have been made to plaintiff to a large amount, exceeding one half of said judgment. (7) The court erred in sustaining the motion of the plaintiff, and entering up judgment against the defendants C. C. Harris and Milton Humes."

The cause coming on for hearing, the defendant in error filed a motion to dismiss the writ of error—

"Because the defendant E. C. Gordon, against whom there is a joint judgment with plaintiffs in error, has not joined in said writ of error, and no reason is shown in the record for his not doing so, nor does the record show that any request was made of him to join, or refusal on his part to do so."

We are of opinion that the motion to dismiss the writ of error is well taken. It is apparent on the face of the record that the judgment of the court below was a joint judgment against E. C. Gordon, C. C. Harris, and Milton Humes. It is immaterial that Gordon was principal and the others sureties. If a writ of error could bring that judgment to this court,—a question not free from doubt,—the long-settled practice requires that all of the joint defendants should join in the writ, or that there should have been a summons and severance, or equivalent proceedings, to entitle the plaintiffs in error to proceed alone, and the successful party below proceed to enforce his judgment against the defendant who does not desire to have it reviewed, and this court not be required to decide a second time the same question on the same record. The following cases

amply illustrate and fully settle the doctrine and practice here stated: *Owings v. Kincannon*, 7 Pet. 399; *Todd v. Daniel*, 16 Pet. 521; *Williams v. Bank*, 11 Wheat. 414; *Mussina v. Cavazos*, 6 Wall. 355; *Masterson v. Herndon*, 10 Wall. 416; *Feibelman v. Packard*, 108 U. S. 14, 1 Sup. Ct. Rep. 138; *Downing v. McCartney*, appendix to 131 U. S. 98; *Mason v. U. S.*, 136 U. S. 581, 10 Sup. Ct. Rep. 1062; and *Hardee v. Wilson*, (decided at the October term, 1892,) 146 U. S. 179, 13 Sup. Ct. Rep. 39,—in which all of the foregoing cases are cited and discussed, and the opinion concludes:

"The state of facts shown by the record brings the present case within the scope of the cases above cited, and it follows that the appeal must be dismissed."

On the authority of these cases, this writ of error must be, and is, dismissed.

WARNER v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. January 30, 1893.)

No. 96.

1. WRITS OF ERROR—ALLOWANCE—INDORSEMENT OF THE PETITION AND WRIT BY JUDGE.

An indorsement by the judge of the allowance of a writ of error upon the petition therefor is sufficient although the judge does not indorse his allowance upon the writ itself, but the better practice is to follow the usual course of making the indorsement upon both the petition and the writ.

2. SAME—DUTIES OF CLERK.

It is no part of the duty of a clerk of a federal court to procure the allowance of writs of error, and the approval of bonds for appeals and writs of error, and if parties intrust this matter to his voluntary action they have no right to complain of delay therein.

3. SAME.

Where a clerk prepares a writ of error, bond, and citation, and sends them to the judge, who signs them without inserting the date of his signature, the clerk has no authority on the return of the papers to erase the dates originally written therein, and insert the date of the actual signing; nor has he any authority to change the file marks on papers filed by him; but it would not be improper to add a memorandum, signed by him officially, of any facts which, as to him, might be or become material.

4. CIRCUIT COURT OF APPEALS—ALLOWANCE OF APPEALS—POLICY OF THE LAW.

The policy of the law creating the circuit court of appeals shows marked liberality in allowing appeals in all cases, and, on the other hand, requires a speedy prosecution thereof.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Action by Charles Warner against the Texas & Pacific Railway Company to recover damages for breach of contract. The court directed a verdict for defendant, and entered judgment thereon. Plaintiff brings error. Heard on motion to dismiss the writ of error. Denied.

H. Chilton, for plaintiff in error.

Wm. Wirt Howe and T. J. Freeman, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.