

the estate of William Black, deceased, \$13,302.40, and interest at 6 per cent. per annum from December 14, 1892, (instead of the \$10,070.88 named in the former decree,) to be paid out of the lands allotted to the defendants by the commissioner, Parker C. Ewan, substantially as provided in the former decree. The complainant, John Gunn, will recover of the defendants three-fourths of his costs in this court in each of these appeals.

GUNN v. BLACK et al.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

No. 347.

CIRCUIT COURT OF APPEALS—APPELLATE JURISDICTION.

An order made for the purpose of executing a decree, after an appeal from such decree has been perfected, but reserving final action until a commissioner should report his proceedings to the court at a subsequent term, is not subject to review on appeal.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

George Gillham, for appellant.

John J. Hornor and M. L. Stephenson, (Jacob Trieber, on the brief,) for appellees.

Before SANBORN, Circuit Judge, and THAYER, District Judge.

SANBORN, Circuit Judge. For convenience, the appellant is termed the complainant, and the appellees the defendants, here, as in the preceding opinion in cases No. 277 and No. 278, between the same parties. 60 Fed. 151.

After both the complainant and the defendants had appealed to this court from the decree made December 14, 1892, (the appeals from which decree have just been decided,) and after the complainant had given an appeal bond, which had been approved by the court, and which operated as a supersedeas per se, the circuit court, on the motion of the defendants, made an order for the purpose of executing the decree below, to the effect that unless the complainant should select by May 1, 1893, from certain lands allotted to the defendants, those which he would accept, at their appraised value, in satisfaction of the amount of money decreed to be due to him from the defendants, a commissioner appointed by the court should make the selection, should execute deeds of the lands selected to the parties in accordance with the order, and report his proceedings to the court at its next succeeding term. The appeal now before us is from this order.

The order was undoubtedly erroneous. Both parties had appealed from the decree. That decree was in the complainant's favor, so that it is difficult to see how the defendants could suffer any damages through the complainant's appeal. Moreover, his appeal bond, which was approved by the judge, was conditioned that he should prosecute his appeal to effect, and answer all damages and

costs if he failed to make good his plea; and a bond so conditioned, when the appeal is perfected in time, as this was, operates as a supersedeas per se, and suspends the power of the court below to proceed further in the case by executing its decree. Rev. St. §§ 1000, 1007, 1012; Supp. Rev. St. p. 904, § 11; *Gay v. Parpart*, 101 U. S. 391. Upon a proper application presenting these facts, a writ of supersedeas might have been issued by this court, staying the proceedings of the court below until the decision of the appeals from the decree. Supp. Rev. St. p. 904, § 11; *Hardeman v. Anderson*, 4 How. 640; *Adams v. Law*, 16 How. 144; *Ex parte Milwaukee R. Co.* 5 Wall. 189.

But the act establishing this court gives it no jurisdiction to review such an order as that now before us upon an appeal. That act provides "that the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act." 26 Stat. c. 517, § 6; Supp. Rev. St. p. 903, § 6.

Under this statute, a final judgment or decree which determines all the matters in controversy in the suit, or a judgment or decree that finally determines the rights of some of the parties to the litigation who are claimed to be separately, not jointly, liable with others against whom the litigation continues, (*Hill v. Railroad Co.*, 140 U. S. 52, 11 Sup. Ct. 690,) or a decree which determines a collateral matter distinct from the general subject of litigation, and finally settles that controversy, (*Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 224, 10 Sup. Ct. 736,) is subject to review in this court by writ of error or appeal, (*Forgay v. Conrad*, 6 How. 201, 204; *Bronson v. Railroad Co.*, 2 Black, 524, 529; *Thomson v. Dear*, 7 Wall. 342, 345; *Trustees v. Greenough*, 105 U. S. 527; *Williams v. Morgan*, 111 U. S. 684, 689, 4 Sup. Ct. 638; *Central Trust Co. v. Hiawasse Co.*, 2 U. S. App. 1, 1 C. C. A. 116, 48 Fed. 850; *Grant v. Railroad Co.*, 2 U. S. App. 182, 1 C. C. A. 681, 50 Fed. 795; *Potter v. Beal*, 5 U. S. App. 49, 2 C. C. A. 60, 50 Fed. 860.)

But with the exception of orders granting or continuing injunctions, this statute gives no jurisdiction to this court to review any order made in the progress of the case, before or after judgment or decree, which does not embody in itself a final decision of the substantial rights of some of the parties to the suit, or to the controversy it affects. *McLish v. Roff*, 141 U. S. 661, 665, 666, 12 Sup. Ct. 118; *Railway Co. v. Roberts*, 141 U. S. 690, 12 Sup. Ct. 123; *Hohorst v. Packet Co.*, 148 U. S. 262, 13 Sup. Ct. 590.

The order here in question was certainly not a final decree. It was not based upon, and did not embody, any final decision of any of the rights of the parties to this suit. It expressly provided that the commissioner, after selecting the lands, and executing the deeds of them to the parties, should report his proceedings to the court at the succeeding term. This was an express reservation of final action until the report should be received. The order was a mere direction of the court concerning the method of executing its decree, —an order that would have been entirely within its discretion,

if the decree had not been superseded by the appeal. It was not subject to review by appeal in this court. *Smith v. Trabue*, 9 Pet. 4, 7; *Callan v. May*, 2 Black, 541; *Barton v. Forsyth*, 5 Wall. 191.

For want of jurisdiction in this court, this appeal is dismissed, with costs.

CITY OF DETROIT v. DETROIT CITY RY. CO. et al.

(Circuit Court, E. D. Michigan. January 31, 1894.)

No. 3,320.

1. HORSE AND STREET RAILROADS—VOID ORDINANCE—ESTOPPEL.

A grant, by ordinance, to a street-railway company, was extended, by subsequent ordinances imposing new obligations, to a period beyond the limit of the corporate life of the company. The franchises of the company were thereafter transferred in turn to two different corporations, whose charters did not expire within the term of the extended grant. *Held*, that the extended grant was void upon the ground that it could not exceed the normal life of the original company, and that the enforcement of new obligations, discharged at great expense by the new companies, would not estop the city, in view of statutory restrictions, from denying a grant in the streets by any other act than an ordinance "duly enacted for the purpose." *How. Ann. St. Mich.* § 3548.

2. SAME.

An ordinance, imposing new obligations, extended a grant beyond the limit of the corporate life of a street-railway company. *Held*, that such ordinance constituted a valid, subsisting contract during the term of the corporate life of such railway company, and that the city was not thereby estopped from asserting the right to oust the grantee of such railway company (whose charter did not expire within the term of the extended grant) from the occupation of the streets after the expiration of such term.

In Equity. Suit in the circuit court of Wayne county, Mich., by the city of Detroit against the Detroit City Railway Company, the Detroit Citizens' Street-Railway Company, Sidney D. Miller and William K. Muir, trustees, and the Washington Trust Company of the City of New York, for an injunction to compel the removal of tracks from the streets, and to restrain respondents from operating a street railway therein. The Washington Trust Company of the City of New York removed the cause to this court, and a motion to remand was thereafter denied. 54 Fed. 1. A motion by complainant to postpone the hearing on bill and answer, or to dismiss the complaint, was also denied. 55 Fed. 569. The cause was afterwards heard on bill and answer, and the injunction was refused as to certain lines of rails, and a further hearing ordered in respect to the remaining lines (56 Fed. 867), which hearing is now accordingly had.

C. A. Kent and Benton Hanchett, for complainant.

Russell & Campbell, Brennan, Donnelly & Van de Mark, Henry M. Duffield, Otto Kirchner, F. A. Baker, Ashley Pond, and Sidney T. Miller, for defendants.

Before TAFT, Circuit Judge, and SWAN, District Judge.