

WEBB et al. v. YORK.

(Circuit Court of Appeals, Eighth Circuit. May 18, 1896.)

No. 796.

CIRCUIT COURT OF APPEALS—JURISDICTION—APPEAL FROM ORDER OF DISTRICT JUDGE.

The circuit court of appeals has jurisdiction of an appeal from a final decision of a district judge at chambers in a habeas corpus case, as well as from a final decision of a district court.

Appeal from an Order of the Judge of the District Court of the United States for the District of Colorado.

Tyson S. Dines (Charles J. Hughes, Jr., and Branch H. Giles were with him on the brief), in support of the motion.

James H. Blood (Gustave C. Bartels was with him on the brief), contra.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a motion by Emma G. York, the appellee, to dismiss the appeal. It is shown by the record that the appellee, being in the custody of Elias H. Webb and others, under a warrant issued for her arrest by the governor of the state of Colorado, in obedience to a requisition made by the governor of the state of California for her apprehension and return to that state, applied to the Honorable Moses Hallett, United States district judge for the district of Colorado, for a writ of habeas corpus to secure her release from imprisonment; that such writ was issued, and that, after a hearing had before the district judge at chambers, the appellee was discharged from custody, whereupon Elias H. Webb and others, the appellants, prosecuted an appeal from the order directing a discharge. The present motion to dismiss said appeal raises the question whether an appeal lies to this court from an order made by a district judge at chambers in a habeas corpus proceeding, directing the discharge of a prisoner. Prior to the act of March 3, 1891, creating circuit courts of appeals (26 Stat. 826, c. 517), an appeal lay from such orders to the circuit court for the district by virtue of section 763, Rev. St. U. S., which reads as follows:

"Sec. 763. From the final decision of any court, justice or judge inferior to the circuit court, upon an application for a writ of habeas corpus or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard. * * *"

In the case of *U. S. v. Fowkes*, 3 U. S. App. 247, 3 C. C. A. 394, 53 Fed. 13, it was held that the act of March 3, 1891, supra, operated to divest the circuit courts of their appellate jurisdiction in habeas corpus cases, under section 763, and that by virtue of the provisions of the act of March 3, 1891, the various circuit courts of appeals had acquired the jurisdiction to review the decisions of district courts in habeas corpus cases that had previously been exercised by the circuit courts. This conclusion, we think,

was fairly warranted by the following clause of section 4 of the act of March 3, 1891, to wit:

"Sec. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error or otherwise, from said district courts shall only be subject to review in the supreme court of the United States or in the circuit court of appeals hereby established. * * *

See, also, *Duff v. Carrier*, 5 C. C. A. 177, 55 Fed. 433.

The result is that, unless the act of March 3, 1891, is construed as lodging in the circuit courts of appeals the appellate jurisdiction, under section 763, for final decisions of district judges, that was previously exercised by the circuit courts, the right of appeal, plainly granted by that section, from final decisions of district judges at chambers in habeas corpus cases is lost, and becomes valueless, because no court has been designated to which appeals in such cases may be taken. We think it clear that it was not the purpose of congress to thus legislate. If it had intended to abolish the right of appeal from the decisions of district judges in habeas corpus cases, it would doubtless have done so in plain and direct terms. The fact that the right of appeal was not thus abolished furnishes a persuasive inference that congress intended to designate a court to hear and determine such appeals. In *McLish v. Roff*, 141 U. S. 661, 666, 12 Sup. Ct. 118, and in *Lau Ow Bew v. U. S.*, 144 U. S. 47, 12 Sup. Ct. 517, it was said, in substance, by the supreme court of the United States that it was the purpose of the act of March 3, 1891, to distribute the entire appellate jurisdiction theretofore exercised by the federal courts between the supreme court of the United States and the circuit courts of appeals that were thereby established. This intent, we think, is plainly apparent from the terms of the act. Moreover, the act in question very much enlarged the right of appeal, and that was one of its chief objects. In no single instance, so far as we are aware, was a previous right of appeal abolished. We think, therefore, that it may be fairly concluded that it was the intention of congress to confer on the circuit courts of appeals the right to hear appeals from final orders made by district judges in habeas corpus cases, as well as to hear appeals from final decisions of district courts made in such cases. We can conceive of no reason why the right should be denied in the one case and granted in the other, and such we believe was not the intent of the lawmaker. In the case of *U. S. v. Gee Lee*, 7 U. S. App. 183, 1 C. C. A. 516, 50 Fed. 271, it was held that the words "the judge of the district court for the district" as used in an act of congress, were equivalent to the words "district court for the district." By a similar latitude of construction, the intent being clear, we think that section 4 of the act of March 3, 1891, may be held to authorize an appeal to the United States circuit court of appeals from a final decision of a district judge at chambers in a habeas corpus case, as well as from a final decision of a district court. The motion to dismiss the appeal is accordingly denied.

TEFFT et al. v. STERN.

(Circuit Court of Appeals, Sixth Circuit. May 18, 1896.)

No. 348.

1. PETITION FOR WRIT OF ERROR—ASSIGNMENTS OF ERROR.

The petition for a writ of error, under rule 11 of the circuit court of appeals for the Seventh circuit, is intended merely to ask for a writ of error in general terms, and need not specifically mention each order or judgment complained of; but it is enough if such orders and judgments are excepted to, and assigned for error in the assignments of error.

2. SAME—WAIVER OF OBJECTIONS.

After defendant in error has argued, both orally and in his brief, errors assigned in respect to an order amending the judgment originally entered, it is then too late to set up an alleged defect in the petition for a writ of error, in that it did not specifically mention such amending order or judgment.

3. FEDERAL APPELLATE COURTS—FOLLOWING STATE DECISIONS.

A judgment in a federal court, in favor of a garnishee, was amended, on his application and in supposed compliance with the state statute, so as to award him his personal expenses and attorney's fees. Afterwards the state supreme court, in a case pending before it, decided that the statute did not apply in such cases. *Held*, that this decision was binding on the federal appellate court, and required a reversal of the amending order, notwithstanding that the amendment was applied for in good faith by the garnishee. 73 Fed. 591, reaffirmed.

4. SAME—COSTS ON APPEAL—APPORTIONMENT.

The appellate courts cannot undertake to apportion the costs therein, between the parties, in all cases in which the judgment is affirmed in part and reversed in part.

On Motion to Modify Opinion and Order.

George P. Wanty, for plaintiffs in error.
Dallas Boudeman, for defendant in error.

BARR, District Judge. The defendant in error, Henry Stern, has moved the court to modify the opinion and order rendered and made on the 14th of April, 1896 (73 Fed. 591), (1) so that said opinion and order shall affirm the judgment of the circuit court in toto, and without modification, for the reason that no appeal was taken by the plaintiff from the judgment of said circuit court, so far as relates to the question of costs and expenses, as allowed by the amended judgment of June 18, 1895, and entered June 20, 1895; (2) if the court should not grant the above, then to modify said opinion and order so as to adjudge no costs of this court against the defendant, for the reason that said application was made in good faith by the defendant for the allowance of his costs and expenses in the court below; and, (3) should the court determine not to grant either of the foregoing motions, then that the court modify its opinion, order, and judgment entered herein so as to adjudge against the defendant only such a proportion of the taxable costs herein as would legitimately arise in presenting to this court the question relating to the amended judgment, by having had embraced in the same the costs and expenses of defendant defending said cause.

We find from the record that in filing the petition for the writ of

error, as required by rule 11 of this court (11 C. C. A. cii., 47 Fed. vi.), plaintiffs in error alleged that they were aggrieved by the judgment rendered on the 22d of March, 1895, and omitted to specially mention the amendment of said judgment of March 22d entered on the 20th of June, 1895; but they on July 16, 1895, took an exception to said amended judgment of June 20, 1895, and had the trial court sign a bill of exceptions therefor, and in the assignment of errors Nos. 27 and 28 they specifically alleged this amended judgment as one of the errors complained of. The writ of error is in general terms, and carried up the entire record. We think it unnecessary, under the rule, that the plaintiff in error, in his petition, should allege specially the particular judgment or the orders that he complains of, and for which he asks a writ of error or appeal. It is necessary that exception should be taken to errors in the record, and that an assignment should be specially made for any and all alleged errors; but the mere omission to name in the petition for writ of error a special order or judgment we think is not material, if such order or judgment be excepted to, and assigned as error in the assignment of errors. In this case this amended judgment was argued by counsel, both orally and in their brief, and considered by the court, and there was no suggestion made of the alleged defect in the petition for the writ of error; and it is now too late to complain of the failure to specifically ask for the reversal of this amended order. See *Michigan Cent. R. Co. v. Consolidated Car-Heating Co.*, 16 C. C. A. 106, 69 Fed. 1. The rule is, "The plaintiff in error or appellant shall file with the clerk of the court below with his petition for the writ of error or appeal an assignment of errors which shall set forth separately and particularly each error asserted and intended to be urged." The petition is intended simply to ask for a writ of error in general terms. The assignment of errors is intended to particularly assign the errors which are asserted and intended to be urged.

The second and third grounds for a modification of the judgment would be, we think, applicable to any and all other cases at law brought to this court by writ of error. It must be assumed by this court that all judgments obtained in the lower court are applied for in good faith. In this particular case it was an open question, under the Michigan statute, whether these extra costs and expenses should be allowed. The trial court allowed them, and this court reversed that order, holding that a subsequent opinion of the supreme court of Michigan, which held that they were not allowable under the statute, was binding upon this court. But we see no reason why this fact should make any difference in the adjudication of costs in this court.

The third motion, asking for an apportionment of the costs, is impracticable, and would throw upon the court the burden of separating and apportioning the costs, as between the plaintiffs in error and the defendant, in all cases where a part of the judgment of the lower court was adjudicated to be correct, and other parts erroneous, and a reversal had thereon. Defendant in error's motion will be therefore overruled.

The defendant in error, Henry Stern, having on the 27th of April, 1896, in pursuance of the direction of the opinion herein, filed in the circuit court of the Western district of Michigan, Southern division, a remittitur of so much of the judgment entered in his favor as relates to special costs and expenses entered on the 20th of June, 1895, and thus leaving the judgment as it was originally entered on the 22d of March, 1895, and having filed a transcript of said remittitur in this court on the 22d of April, 1896, it is now ordered that said judgment of the 22d of March, 1895, be, and the same is, affirmed, and that the plaintiff in error recover of the defendant in error his costs in this cause.

SNIDER et al. v. DOBSON et al.

(Circuit Court of Appeals, Eighth Circuit. May 11, 1896.)

No. 772.

APPEAL—QUESTION OF FACT—FINDING OF CIRCUIT COURT.

Where a decision of the circuit court turns solely upon an issue of fact, and the evidence is fully adequate to justify the finding made by the court, though different, unprejudiced minds might draw from it different inferences and reach different conclusions, the circuit court of appeals will not overrule such finding, or reverse the decree entered thereon.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Judson N. Cross (Henry G. Hicks, Frank H. Carleton, and Norton M. Cross with him on the brief), for appellants.

Arthur M. Keith and Robert G. Evans (Lewin W. Barringer, Charles T. Thompson, and Edwin K. Fairchild with them on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This suit was brought by John Dobson and James Dobson, the appellees, against Samuel P. Snider, Austin F. Kelley, and the Union National Bank of Minneapolis, the appellants, to cancel two deeds conveying large tracts of pine land, situated in Hubbard and Cass counties, Minn., on the ground that they had been fraudulently contrived and executed. The deeds, which were absolute conveyances in fee simple, were executed by the defendant Samuel P. Snider on November 21, 1890, in favor of the defendant Austin F. Kelley, who was vice president of the Union National Bank, to secure an indebtedness of Snider to said bank in the sum of about \$44,000. Said conveyances were not filed for record in the counties where the pine lands were situated until November 23, 1891, and December 5, 1891, respectively. In the meantime—that is to say, in May, 1891—Snider executed and negotiated two notes in the sum of \$5,000 each, which were purchased by the complainants below some time in the month of July, 1891, as they claimed, in the belief that Snider was still the owner of the pine lands in question. These notes matured on November