

United States Vs. Curry

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SooperKanoon Citation : sooperkanoon.com/80022

Court : US Supreme Court

Decided On : 1848

Appeal No. : 47 U.S. 106

Appellant : United States

Respondent : Curry

Judgement :

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United States v. Curry

47 U.S. (6 How.) 106

APPEAL FROM THE DISTRICT COURT OF

THE UNITED STATES FOR LOUISIANA

SYLLABUS

The 9th section of the Act of 26 May, 1824, relative to the action of the Attorney General in cases of appeal, is only directory, and its nonobservance does not vitiate an appeal provided it be taken by the district attorney and sanctioned in this

Court by the Attorney General.

An attorney or solicitor cannot withdraw his name, after it has been entered upon the record, without the leave of the court, and the service of a citation upon him, in case of appeal, is as valid as if served on the party himself

The opinion of the Court to the case of *Villabolos v. United States*, ante, p. [48 U. S. 81](#) , again asserted -- viz., that the appellant must prosecute his appeal to the next succeeding term of this Court, and whenever the appeal is taken by entering it in the clerk's office, the adverse party must be cited to appear at that time.

Therefore, where an appeal was filed in the clerk's office in November, 1846, and there was no citation to the adverse party to appear on 7 December, 1846 (the commencement of the succeeding term of this Court), the case was not removed upon that appeal.

A party may take a second appeal where the first has not been legally prosecuted. But to the present case the order of the court cannot be construed as a grant of a second appeal.

The appeal must therefore be dismissed on motion.

This was an appeal from the District Court of the United States for Louisiana involving the title to a large body of land in that state. The proceedings of the district court are sufficiently set forth in the opinion of the Court and in the argument of Mr. Curry, to which the reader is referred.

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MR. CHIEF JUSTICE TANEY delivered the opinion of the Court.

A motion has been made to dismiss this case for want of jurisdiction.

The appeal was taken from a decree of the District Court of the United States for the Louisiana District confirming to the appellees certain lands which they claimed under a Spanish grant. The decree was made on 2 May, 1846. But a new trial was

afterwards granted in order that third persons who also claimed title to the land might have an opportunity of intervening in the suit according to the practice of the Louisiana state courts. Subsequently, however, the petition of the interveners was withdrawn and another decree was passed and signed on 26 June, 1846, again confirming the title of the present appellees. It is not material to this inquiry whether the first or second decree is to be regarded as the final one in the district court.

This proceeding by new trial (instead of rehearing, as in chancery) and intervention was irregular. And the court seems to have followed the Louisiana state practice, when the acts of Congress direct that the proceedings in such cases shall be conducted according to the rules of a court of equity. 5 Stat. 676; 2 Stat. 53.

On 5 November, 1846, the district attorney presented a petition to the district judge praying an appeal, who thereupon passed an order, endorsed on the petition, directing it to be filed and the appeal granted. Further orders of the district judge are also endorsed on the petition -- one directing the appeal to be returnable to the second Monday of January, 1847, another extending the time of the third Monday in February, and another dated 13 February, 1847, in the following words:

"Upon motion of Thomas J. Durant, United States District Attorney, that the land cause No. 1, and entitled as above, appeal has been granted from the judgment rendered therein to the Supreme Court of the United States, at Washington, and that the said appeal has been made returnable on a subsequent day during the present session of the Supreme Court, and not

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on the first day of said term, as the practice generally is, to the end that said case of appeal might have its chance of being tried during the present session, and as no object will be gained by issuing citation to the appellees directing them to appear at any other time than on the first day of the said term of said court, it is therefore ordered that the order upon the said petition of appeal in said cause be

so amended as to make it returnable on or before the commencement of the next annual session of the Supreme Court."

Afterward, on 14 August, 1847, a citation was issued requiring the appellees to appear in this Court on the first Monday in December then next following. The citation states the decree from which the appeal was made to have passed on May 2, 1846, and refers to the order above recited as an appeal granted on the day the order bears date. It was served, as appears by the return of the marshal, on 8 September following on the attorney whose name appeared on the docket as the attorney for the petitioners, who are the present appellees. But the affidavit of the attorney has been filed here stating that he was not at that time their attorney -- that his fee had been paid, and he had been discharged from all duty as attorney or counsel for the parties, and had so informed the marshal at the time of the service.

In this state of the facts, several objections have been made to the validity of this appeal. Two of them may be disposed of in very few words.

It is said that the record does not show that this appeal was taken by the direction of the Attorney General, according to the provisions of the 9th section of the Act of May 26, 1824. We think there is no force in this objection. That section is merely directory to the officers of the United States, and intended to guard more effectually the public interests. And if the appeal is taken by the district attorney and sanctioned in this Court by the Attorney General, it is sufficient, even though it should appear (which it does not in this instance) that the appeal was taken without his previous direction.

So too as to the service of the citation on the attorney. It is undoubtedly good and according to the established practice in courts of chancery. No attorney or solicitor can withdraw his name after he has once entered it on the record without the leave of the court. And while his name continues there, the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notice upon him is as valid as if served on the party himself. And we presume that no court would permit an attorney who had appeared at the trial with the sanction of the party,

express or implied, to withdraw

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his name after the case was finally decided. For if that could be done it would be impossible to serve the citation where the party resided in a distant country or his place of residence was unknown, and would in every case occasion unnecessary expense and difficulty unless he lived at the place where the court was held. And so far from permitting an attorney to embarrass and impede the administration of justice by withdrawing his name after trial and final decree, we think the court should regard any attempt to do so as open to just rebuke.

The remaining objection is a more serious one. Has this appeal been taken and prosecuted within the time limited by the acts of Congress? The district court appears to have acted in relation to the appeal as it did in its previous proceedings, under the erroneous impression that it must follow the practice of the Louisiana state courts, without adverting to the acts of Congress which conferred on the court the special jurisdiction it was exercising, and which prescribe the manner in which it shall be exercised. There was no necessity for the petition to the district judge to grant the appeal. It was a matter of right given by law after final decree, which the court could not refuse. Nor had it any power to prescribe the time or manner in which the record was to be transmitted and the case brought before this Court. That, too, is regulated by acts of Congress which the court can neither change nor modify. All the orders, therefore, upon this subject were unauthorized and void. And the validity of the appeal depends altogether upon the laws of the United States, without reference to the laws of Louisiana or orders of the district court.

The acts of Congress concerning appeals in cases of this description were fully considered by the court in the case of [*Villabolas v. United States*](#), decided in the early part of the present term, and the previous decisions of this Court referred to and examined. And the Court in that case held that the appellant must prosecute his appeal to the next succeeding term of this Court, and the adverse party be cited to appear at that time, whenever the appeal is taken by entering it in the

clerk's office. In the case before us, the appeal was filed in the clerk's office November 5, 1846. The next succeeding term of this Court commenced on 7 December in the same year. But there was no citation to the adverse party to appear at that time, and consequently the case was not removed to this Court upon that appeal. The citation which issued on 27 August, 1847, would not bring up an appeal returnable to December term, 1846.

It is true that although this appeal was not prosecuted, yet the district attorney might have taken another appeal at any

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time within a year from the date of the decree, and brought it up by a citation returnable to the December term, 1847. The right of a party to take a second appeal where the first had not been legally prosecuted was decided in the case of [*Yeaton v. Lenox*](#), 8 Pet. 123. In that case, the first appeal was dismissed by the Court for the want of a proper citation. And the appellant, before the expiration of the time limited by law for appealing, entered a second appeal in the circuit court, and cited the adverse party to appear at the term of this Court next following the second appeal, and the second appeal was held good. If, therefore, the order of February 13, 1847, could, as contended for in the argument, be regarded as a second appeal, the case would be regularly before the Court upon the citation issued in the August following. But after very carefully considering that order, the Court thinks that no just construction of its language will authorize us to regard it as a second appeal. It was evidently nothing more than a motion to extend the time for returning the appeal previously taken, and the Court directs that its former order be so amended as to make the citation returnable to the next term of this Court. The citation which afterwards issued in August, 1847, calls this order an appeal, and speaks of it as an appeal granted on the day it bears date. But this description in the citation cannot change the meaning of the language used in the order. It appears, like the preceding ones, to have been made under the impression that the district court had the power to regulate the time and manner of bringing up the appeal.

It has been said that this objection is a mere technicality, and may be regarded rather as a matter of form than of substance. But this Court does not feel itself authorized to treat the directions of an act of Congress as it might treat a technical difficulty growing out of ancient rules of the common law. The power to hear and determine a case like this is conferred upon the Court by acts of Congress, and the same authority which gives the jurisdiction has pointed out the manner in which the case shall be brought before us, and we have no power to dispense with any of these provisions, nor to change or modify them. And if the mode prescribed for removing cases by writ of error or appeal be too strict and technical and likely to produce inconvenience or injustice, it is for Congress to provide a remedy by altering the existing laws, not for the Court. And as this appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be

Dismissed for want of jurisdiction.

MR. JUSTICE WOODBURY dissented.

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ORDER

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof and it appearing to the Court that this appeal has not been prosecuted in the manner directed and within the time limited by the acts of Congress, it is therefore now here ordered and decreed by this Court that this appeal be and the same is hereby dismissed.