The Protector

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Decided On : 1870

Appeal No. : 78 U.S. 82

Appellant : The Protector

Judgement :

The Protector - 78 U.S. 82 (1870)
U.S. Supreme Court The Protector, 78 U.S. 11 Wall. 82 82 (1870)

The Protector

78 U.S. (11 Wall.) 82

ON MOTION DISMISS AN APPEAL

SYLLABUS

An *appeal* dismissed because taken in the name of William A. Freeborn *& Co.,* the court holding that no difference existed between writs of error and appeals as to the manner in which the names of the parties should be set forth.

By the 22d section of the Judiciary Act it is enacted that decrees in civil actions may be brought here by *writ of error.* By the 32d section of the act it is enacted:

"That no summons, writ, declaration, return, process, judgment, or *other proceeding* in civil causes in any of the courts of the United States, shall be *abated, arrested, quashed,* or reversed, for any defect or want of form, but the said courts respectively shall proceed and give judgment according as the right of the cause and matter in law shall appear unto them, without regarding any imperfections, defects, or want of form in such writ, declaration, or other pleadings, return, process, judgment, or course of proceeding whatsoever, except those only in cases of demurrer which the party demurring shall specially set down. . . . And the said courts respectively shall and may . . . from time to time amend all and every such imperfection, defect, and want of form, except &c.;, and may at any time *permit either of the parties to amend any defect in the process or pleadings,* upon such conditions as the said courts respectively shall in their discretion and by their rules prescribe."

An Act of March 3, 1803, enacts that decrees in admiralty must, if brought here, be brought by *appeal,* and enacts:

"Such appeals shall be subject to the *same* rules, regulations, and *restrictions,* as are presented in law in cases of *writs of error,* and that the said Supreme Court shall be and hereby is authorized and required to receive, hear, and determine such appeals."

In this state of statutory law William A. Freeborn, James F. Freeborn, and Henry P. Gardner, of the city of New

York, merchants, filed a libel in the District Court for the Southern District of Alabama against the ship *Protector.* That court dismissed the libel "at the costs of the libellants, and ordered execution therefor to issue against the libellants." This decree was confirmed by the circuit court. An appeal was then taken to this Court. The petition for appeal was entitled William A. Freeborn *& Co.,* and prayed for an appeal in the name of William A. Freeborn *& Co.* The allowance of the appeal was in the same name and style. The bond recited the appeal in the name of

William A. Freeborn *& Company.* The citation also directed the party to appear in the cause wherein William A. Freeborn *& Company* were appellants.

Who constituted the Co. or Company, nowhere appeared in the proceedings *on appeal.*

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MR. JUSTICE NELSON had thus delivered it:

The motion made by the appellees to dismiss the case from the docket for want of jurisdiction, is grounded upon a defect of the title of the parties in the appeal as allowed. The title is, *"William A. Freeborn & Co. v. Ship Protector and Owners."* This defect in a writ of error has been held fatal to the jurisdiction of the Court since the case of *Deneale v. Stump's Executors,* [Footnote 1] down to the present time. [Footnote 2] Nor can the writ be amended, according to repeated decisions of this Court. [Footnote 3] The only question before us is, whether the same rule applies to appeals in admiralty. Originally, decrees in equity and admiralty were brought here for reexamination by a writ of error, under the twenty-second section of the Judiciary Act. This was changed by the act of March 3, 1803, by which appeals were substituted in place of the writs of error in cases of equity, admiralty, and prize; but the act

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provides "that the appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in law in cases of writs of error."

In *Owings v. Andrew Kincannon,* [Footnote 4] the appeal was dismissed because all the parties to the decree below had not joined in it. Chief Justice Marshall, in delivering the opinion of the Court, referred to the case of *Williams v. Bank of the United States,* [Footnote 5] which was a writ of error, where it was held that all the defendants must join, and applied the same rule to the ease of an appeal. He cited the act of 1803, and observed that

"the language of the act which gives the appeal appears to us to require that it should be prosecuted by the same parties who would have been necessary in a writ of error."

But the case of *Francis O. J. Smith v. Joseph W. Clark,* [Footnote 6] is more direct to the point before us. It was a motion to docket and dismiss in the case of an appeal under the 43d rule of the Court. The certificate of the clerk, upon which it was founded, described the parties as in the title above. Chief Justice Taney, in giving the opinion of the court, stated that the certificate conformed to the rule in all respects but one, and that was in the statement of the parties. The respondents were stated to be Joseph W. Clarke *and others,* from which it appeared that there were other respondents, parties to the suit, who were not named in the certificate. He then referred to the case of a writ of error, [Footnote 7] where it was held that all the parties must be named in the writ, and the name of one or more of them, *and others,* were not a sufficient description, and also to the case of *Holliday v. Baston,* [Footnote 8] where the same principle was applied to a writ of error docketed under the 43d rule, and observed the same reason for requiring all the parties whose interests were to be affected by the judgment, to be named in the writ of error, applied with equal force to the case of an appeal from a decree. And the motion to docket and dismiss for the above defect was overruled. The opinion of the court in the present case is, that no distinction in respect

to the question before us can be made between the case of an appeal under the act of 1803, and of a writ of error; and that the decisions referred to directing the dismissal of the latter from the docket for want of jurisdiction, apply with equal force to the former. This result disposes of the motions on the part of the appellant to amend the petition of appeal, citation, and bond, and also the motion to amend the libel.

Motion to dismiss granted.

[Footnote 1]

33 U. S. 8 Pet. 526.

[Footnote 2]

Heirs of Wilson v. Life & Fire Insurance Company of New York, 12 Pet. 140; *Smyth v. Pevine & Co.,* 12 How. 327; *Davenport v. Fletcher,* 16 How. 142.

[Footnote 3]

Porter v. Foley, 21 How. 393; *Hodge v. Williams,* 22 How. 87.

[Footnote 4]

32 U. S. 7 Pet. 403.

[Footnote 5]

24 U. S. 11 Wheat. 414.

[Footnote 6]

53 U. S. 12 How. 21.

[Footnote 7]

Deneale v. Stump, 8 Pet. 526.

[Footnote 8]

45 U. S. 4 How. 645.

MR. JUSTICE SWAYNE (with whom concurred MR. JUSTICE BRADLEY) dissenting:

I dissent from the conclusions announced by the court in this case. The defect objected to is, in my judgment, amendable under the 32d section of the Judiciary Act of 1789, and I think an amendment should be permitted to be made.