The Mabey

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Decided On : 1871

Appeal No. : 80 U.S. 738

Appellant : The Mabey

Judgement :

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80 U.S. (13 Wall.) 738

ON MOTION

SYLLABUS

A commission from this Court to take testimony refused on an appeal in a collision case in admiralty where the party moving had in the district court the same witnesses whom he proposed to examine here, and did not examine them only because he had agreed with a co-defendant who was apparently as between themselves alone liable -- he, the co-defendant, having led the other defendant into the fault for which the libel had been filed -- that he, the co-defendant, would

manage the whole case and pay the sums awarded by any decree (the purpose of this agreement having apparently been to keep from the court below a full knowledge of the case), and where especially the party now moving did not appeal from the decree of the district court.

The owners of the *Chapman* had libeled in the district court at New York the steam tug *Mabey* and the sailing vessel *Cooper,* which the tug had been towing out to sea, for injuries caused to the *Chapman* by collision on the way out. The owners of both the tug and sailing vessel appeared in the district court with their witnesses, but the owners of the tug soon withdrew from court, and gave no evidence in defense of the tug. This course, it appeared, had been done upon a written agreement between the owners of the tug and sailing vessel, that the owner of the tug should take no active part in the conduct of the suit; that no evidence should be offered in behalf of the tug, and that the owners of the sailing vessel would assume the whole defense for both, and would pay whatever damages should be awarded against either or both, for the performance of

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which agreement the owners of the sailing vessel entered into bond of $10,000 to the owners of the tug, with two sureties, whose solvency was then unquestioned. The district court decreed heavy damages against both tug and sailing vessel, and an appeal was taken to the circuit court, where the decree was affirmed.

The case was now brought here.

Being here, Mr. W. W. Goodrich in behalf of the owners of the tug, moved that a commission issue to take the testimony of certain witnesses named. The grounds of the motion were the fact of the agreement above set forth; that the sureties in the bond had now become insolvent, and that four witnesses whose names were given, and whom it was proposed to examine, were "material witnesses in behalf of the appellants, without whose testimony they could not safely proceed." There was no statement of what facts it was that the persons proposed to be examined could probably prove.

A counteraffidavit stated that the answer of the owners of the tug alleged that before taking the sailing vessel in tow, the master of the tug informed the agents of the sailing vessel that it was not safe to proceed to sea in the then condition of the weather and tide, and that the agents told the master to proceed and that their owners would assume all risks and pay all damages. It represented further that the witnesses in behalf of the tug had been brought into the district court and had abundant opportunity to testify, and had been sent away on the agreement and because the owners of the tug and sailing vessel

"combined to keep from the knowledge of the court evidence which would have tended more clearly to establish the right of the libellants to recover, and in the hope, by doing so, to throw upon the libellants the whole of the damage;"

that the witnesses now proposed to be examined were entirely within the control of the owners of the tug at the hearing in the district court, and that the testimony proposed to be taken was no more important now than it had been then, and that the owners of the tug had not appealed from the decree of the district court.

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MR. JUSTICE CLIFFORD delivered the opinion of the Court. [Footnote 1]

Damages were claimed by the owners of the ship *Isaac F. Chapman* for injuries which the ship received in a collision that occurred between the ship while she was lying at a dock in the port of New York, and the steam tug *R. S. Mabey* and the ship *Helen R. Cooper,* which, at the time of the collision, was in tow of the steam tug, as more fully set forth in the libel filed in the district court. Serious injury resulted to the ship of the libellants, and they alleged that the steam tug and the ship *Helen R. Cooper* were both in fault. Separate answers were filed by the claimants of the tug and tow, and both, it seems, made preparation for defense, but before the day for the hearing arrived, they entered into the following stipulation, which is an exhibit in the motion before the court. Omitting the names of the parties to the suit and the signatures of the proctors, the stipulation reads as follows:

"It is hereby stipulated by and between the parties representing the claimants of the vessels respondent in the above action that said ship, *Helen R. Cooper,* shall and does hereby assume the conduct of the defense and that all and any judgment ordered against the said vessels or either of them shall be assumed and paid by said ship *Helen R. Cooper.* "

Application for the same purpose as that described in the motion was made to this Court by the appellants on a prior occasion during the present term of the Court, but it was refused, as no excuse was shown in the petition or accompanying papers why the witnesses were not examined either in the district of circuit courts, and the Court said some excuse

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should be shown satisfactory to this Court for the failure to examine them in the courts below -- such as that the evidence was discovered when it was too late to procure such examination, or that the witnesses had been subpoenaed and failed to appear and could not be reached by attachment, and the like.

Commissions for such a purpose cannot be allowed as of course under the twelfth rule, as it would afford an inducement to parties to keep back their testimony in the subordinate courts, and the effect would be to convert this Court into a court of original jurisdiction. Admonished to that effect by the prior decision of this Court, the parties have filed with the present application an affidavit as a compliance with that requirement. Unsettled as the practice was prior to that decision, the parties are right in supposing that this Court would entertain a second application in the same case.

Governed by these views, the Court has examined the affidavit and the reasons given why the testimony was not taken prior to the hearings in one of the subordinate courts, but the Court is constrained to say that the reasons given are not satisfactory, as they show that the witnesses were in court, and that they were not examined because the party now asking for the commission agreed that they would not introduce any testimony in the case, and the affidavit shows that they

did not introduce any in the district court and did not appeal from the decree, and of course they did not and could not introduce any in the circuit court, as it is well settled law that the losing party in the subordinate court cannot be heard in the appellate court in opposition to the decree in the subordinate court unless he himself also appealed from the decree. [Footnote 2] Instead of being satisfactory, the reasons set forth in the affidavit why the testimony was not introduced in the trials below are persuasive and convincing that the motion ought not to be granted. Having accepted the bond

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of indemnity and failed to make any defense, the risk as to the sufficiency of the sureties was upon the present appellants, and the fact that they misjudged or are disappointed in that behalf furnishes no reason for the motion before the court.

Motion denied.

[Footnote 1]

This case was decided at the last term.

[Footnote 2]

The William Bagaley, 5 Wall. 412; *The Maria Martin,* 12 Wall. 31.