Jerome Vs. Mccarter

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Court : US Supreme Court

Decided On : 1874

Appeal No. : 88 U.S. 17

Appellant : Jerome

Respondent : Mccarter

Judgement :

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Jerome v. McCarter

88 U.S. (21 Wall.) 17

ON MOTION TO INCREASE

AMOUNT OF APPEAL BOND

SYLLABUS

1. The amount of a supersedeas bond as well as the sufficiency of the security are matters to be determined by the judge below, under the provisions of the twenty-ninth rule.

2. The discretion thus exercised by him will not be interfered with by this Court.

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3. If, however, after the security has been accepted, the circumstances of the case or of the parties or of the sureties upon the bond have changed so that security which at the time it was taken was "good and sufficient" does not continue to be so, this Court, on proper application, may so adjudge and order as justice may require.

McCarter, the holder of a third mortgage, given by the Lake Superior Ship Canal, Railroad, and Iron Company on about 400,000 acres of lands -- pine lands, hardwood lands, iron lands, copper lands, and farming lands -- in Michigan, filed a bill in the Circuit Court for the Eastern District of Michigan to foreclose his mortgage. Subsequently to this, the company was decreed bankrupt and, one Jerome and another having been appointed its assignees, they were brought in by supplemental bill. On the 15th of June, 1874, the complainant got a decree of foreclosure.

The decree directed the sale of the canal, corporate franchises, and two land grants to pay $1,057,686, and also what might be due to one hundred and twenty bondholders whose debts were not included in the above amount.

The sale was to be made subject to prior liens of $1,500,000 and upwards (apparently about $2,000,000), so that with the decree of $1,057,686, the property, if sold, would, in order to pay all charges against it, have to produce $3,057,686, or at least $2,500,000. The prior encumbrances were carrying interest at the rate of 10 percent a year.

An appeal was soon afterwards applied for to SWAYNE, J., to operate as a supersedeas. A body of affidavits was produced on the side of the defendant, from men of business, men of science, and men of wealth to show an immense value in the mortgaged property, that its value far exceeded the amount of the decree and all prior liens, taking these at their principal sums and adding all the interest that

had already accrued or would accrue during the litigation, and moreover that the property, from the anticipation of finding new mines on it, was rising in value. A body of

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affidavits, nearly or quite as large and from a similar class of persons, was produced to show the contrary; the highest value given to the lands by any of these being $2,500,000. After hearing and considering these affidavits, an appeal was allowed by SWAYNE, J., to operate as a supersedeas, and the security fixed at $10,000, with two persons, named Wells and Crosby, as sureties. An appeal bond was given accordingly.

There was no allegation in making the present motion that there was any altered condition of the mortgaged property or of the sureties in the appeal bond. The case, however, was No. 655 on the calendar, the case last argued prior to the date of the motion having been No. 96, and it appearing that the present case would hardly, in regular course, come on to be heard for two years.

Affidavits by the same persons who had made them before, and affidavits by numerous other persons on both sides, were now produced and laid before the court; there being now, as before, vast differences in the estimates of the property mortgaged, and as to whether it would be found more valuable than it now was or not.

To understand the arguments in the case, it is necessary to advert to certain statutes and to the twentieth rule of this Court.

The twenty-second section of the Act of 1789, [Footnote 1] confers upon this Court the power to review the final judgments and decrees of the circuit court by means of a writ of error, and the judge who signs the citation is directed to take good and sufficient security from the plaintiff in error, "to answer all damages and costs if he fail to make his plea good."

The twenty-third section prescribes the mode by which this writ of error may operate as a supersedeas and stay execution, and when the writ so operates, this Court is directed, when they affirm the judgment or decree, to adjudge to the respondent in error, "just damages for his delay, and single or double costs, at their discretion."

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THE CHIEF JUSTICE delivered the opinion of the Court

This is a bill filed by a junior mortgagee of the Lake Superior Ship-Canal, Railroad and Iron Company against the company, a bankrupt, and its assignees in bankruptcy for the foreclosure of his mortgage and a sale of the mortgaged property, subject to certain prior encumbrances. The decree appealed from ordered the payment of $1,057,686 to the complainant by the company or the assignees and, in default of such payment, the sale of the mortgaged property, subject to an encumbrance thereon of $1,500,000 and upwards. From this decree both the company and the assignees have appealed. The justice who granted the appeal and signed the citation accepted the supersedeas bond in the sum of $10,000. The appellee now moves to increase the amount of the bond and require additional sureties.

The twenty-second section of the Judiciary act of 1789 provides that every justice or judge signing a citation or any writ of error shall take good and sufficient security that the plaintiff shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good. The twenty-third section provides that if the judgment or decree is affirmed upon the writ of error, the court shall adjudge and decree to the respondent in error just damages for his delay, and single or double costs, at its discretion. [Footnote 2] The act of 1803 [Footnote 3] provides that appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in cases of writs of error.

Under the Act of 1789, the amount of the security to be taken is left to the discretion of the judge or justice accepting it. The statute is satisfied if in his

opinion the security is "good and sufficient."

Doubts having arisen as to the extent of the security to be required where there was no supersedeas or stay of execution, an act was passed directing that in such cases the amount should be such as in the opinion of the judge would be sufficient to answer all such costs as upon the affirmance

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of the judgment or decree might be adjudged or decreed to the respondent in error. [Footnote 4]

In Catlett v. Brodie, [Footnote 5] decided in 1824, this Court held that in cases where the writ of error operated as a supersedeas, the security ought to be sufficient to secure the whole amount of the judgment. Mr. Justice Story, in delivering the opinion of the Court, said,

"It has been supposed at the argument that the act meant only to provide for such damages and costs as the court should adjudge for the delay. But our opinion is that this is not the true interpretation of the language. The word 'damages' is here used not as descriptive of the nature of the claim upon which the original judgment is founded, but as descriptive of the indemnity which the defendant is entitled to if the judgment is affirmed. Whatever losses he may sustain by the judgment's not being satisfied and paid after the affirmance, these are the damages which he has sustained and for which the bond ought to give good and sufficient security,"

Accordingly it was ordered that the suit stand dismissed unless security should be given to an amount sufficient to secure the whole judgment.

That was a judgment in an action at law for the recovery of money not otherwise secured, and the decision established a rule of practice for that class of cases. Afterwards, in Stafford v. Union Bank, [Footnote 6] decided in 1853, the court, with one dissenting judge, held that a supersedeas which had been allowed upon an appeal from a decree for the foreclosure of a mortgage on slaves should be vacated unless a bond was given which would secure the payment of the decree.

Mr. Justice McLean, who delivered the opinion of the Court, after referring to the case of *Catlett v. Brodie,* said,

"If this construction of the statute be adhered to, the amount of the bond given on the appeal must be the amount of the judgment or decree. There is no discretion to be exercised by the judge taking the bond where the appeal or writ of error is to operate as a supersedeas."

Thus the rule which had been adopted in respect to judgments at law was extended

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to decrees in chancery. It was a rule controlling to some extent the discretion of the judge in such cases, and to be observed so long as it continued in force.

It did continue until the case of *Rubber Company v. Goodyear,* [Footnote 7] decided in 1867, and the adoption at the same time by the court of the present rule twenty-nine. That rule provides that where the judgment or decree is for the recovery of money not otherwise secured, the security must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all cases where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for the delay and costs and interest on the appeal. Such was the established rule of practice under the act when the bond now in question was taken. To some extent, the old practice had been changed. The act itself remained the same, but experience had shown that the rules which had been adopted to give it effect were not suited to all the cases arising under it, and the new rule was made for the better adaptation of the practice to the protection of the rights of litigants.

This is a suit on a mortgage, and therefore, under this rule, a case in which the judge who signs the citation is called upon to determine what amount of security will be sufficient to secure the amount to be recovered for the use and detention of the property, and the costs of the suit, and just damages for the delay and costs and interest on the appeal. All this, by the rule, is left to his discretion.

In *Bluck v. Zacharie,* [Footnote 8] it was held that in such a case, the

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justice taking the security was the sole and exclusive judge of what it should be. Since then, in *Rubber Company v. Goodyear,* and *French v. Shoemaker,* [Footnote 9] remarks have been made by judges announcing the opinion of the Court which, if considered by themselves, would seem to indicate that this discretion could be controlled here upon an appropriate motion. The precise point involved in this case was not, however, before the Court for consideration in either of those, and we think was not decided. We all agree that if, after the security has been accepted, the circumstances of the case or of the parties or of the sureties upon the bond have changed so that security which, at the time it was taken, was "good and sufficient" does not continue to be so, this Court may, upon a proper application, so adjudge and order as justice may require. But upon facts existing at the time the security was accepted, the action of the justice within the statute and within the rules of practice adopted for his guidance is final. And we will presume that when he acted, every fact was presented to him that could have been. So while we agree that in a proper case, after an appeal or writ of error taken here, this Court may interfere and require additional security upon a supersedeas, it will not attempt to direct or control the discretion of a judge or justice in respect to a case as it existed when he was called upon to act, except by the establishment of rules of practice. If we can be called upon to inquire into the action of the justice in respect to the amount of the security required, we may as to the pecuniary responsibility of the sureties at the time they were accepted.

We understand the counsel for the appellee to contend, however, that in this case, the justice did not act within the established rule, and that on this account we may

review his action. The claim is that the rule requires indemnity for interest upon the appeal, and this is construed to mean that the security must be such as to secure the payment of all the accumulation of interest upon the mortgage indebtedness

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pending the appeal and supersedeas. This we think is not the requirement of the rule. The object is to provide indemnity for loss by the accumulation of interest consequent upon the appeal, not for the payment of the interest. What the loss is likely to be depends upon the facts. As to this the justice, after consideration of the case, must determine.

In this case, there can be no loss to the appellee if, as is contended by the appellants, the value of the mortgage security is sufficient to pay all the encumbrances, with accruing interest, when a decree of affirmance shall be rendered upon the appeal. Neither can there be if, as is contended by the appellee, the value of the property is much less than the amount of the prior encumbrances. If, upon the case made by him, the property depreciates in value during the continuance of the appeal, he will suffer no loss, because if sold now, upon his theory, he would receive nothing. Not being worth as much as the amount of the prior encumbrances, it is not to be supposed that a purchaser can be found to take it at a price that would yield anything to apply on his debt. The appellee may lose the opportunity of bidding in the property at a reduced price and speculating upon its rise, but the loss of such profits is not recognized by the court as legitimate "damages for the delay." In either view of the case, therefore, a judge would be justified in accepting a bond for a comparatively small amount.

There is another consideration which will justify the action of the judge under the rule. As has been seen, the suit is brought for the foreclosure of a mortgage. The debtor is a bankrupt corporation. Its whole property, including its corporate franchises, has passed to its assignees in bankruptcy. It is in no condition to accumulate property which can be subjected to the payment of its debts. It is, to all intents and purposes, dead. No damage can result, therefore, from the appeal by reason of the delay in obtaining an execution against the company under the

provisions of Rule Ninety-two, regulating the practice in courts of equity, for the collection of any balance that may remain due to the

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complainant upon the mortgage debt after the security is exhausted. If the company were not in bankruptcy, the pendency of this suit would not prevent an action at law to recover the debt from other property pending the appeal. For these reasons, a judge, in the exercise of a reasonable discretion, might properly accept security less than would be sufficient to insure the payment of accumulating interest, even upon an appeal by the corporation itself.

But it is apparent that the corporation is only a nominal party to this appeal. The real parties in interest are the assignees. The complainant is a creditor of the estate. Upon proof of his claim, he will be entitled to receive his dividend with the other creditors. The accumulated interest will participate in this dividend as well as the principal of his debt. He has, therefore, without any further security, all the indemnity which the assignees can give him without they or their sureties assume personal responsibility.

All these facts were proper for the consideration of the judge when he determined upon the amount of security necessary to indemnify the appellee against loss by the appeal. We think, therefore, upon the case made, the action of the justice approving the bond is conclusive.

Motion denied.

[Footnote 1]

1 Stat. at Large 85.

[Footnote 2]

1 Stat. at Large 85

[Footnote 3]

2 *id.* 244.

[Footnote 4]

1 Stat. at Large 404.

[Footnote 5]

22 U. S. 9 Wheat. 553.

[Footnote 6]

57 U. S. 16 How. 139.

[Footnote 7]

73 U. S. 6 Wall. 156.

[Footnote 8]

44 U. S. 3 How. 495

[Footnote 9]

12 Wall. 79 U. S. 86 , 79 U. S. 99 .