11/631. Questnd. in Yell v. Outlaw, 14/415. & Ovrld. in Rice v. Reed, 29/321-2-3.

CLAY'S ADR. *vs.* NOTREBE'S EXRS.

Where a party appeals from the judgment of a circuit court, makes the necessary affidavit, the appeal is granted, and he enters into recognizance, the case is not thereby transferred to this court, but it remains in the court below, with the judgment suspended, until it is removed to this court in the mode prescribed by law.

A judgment so stayed by recognizance will remain superseded until the supersedeas is discharged by some action of this court, and it cannot be removed by operation of law, as erroneously intimated in *Dixon vs. Watkins et al.* 4 *Eng.* 158.

When the appellant fails to prosecute the appeal within the time prescribed by law, the appellee is not bound to apply for affirmance at the first term of this court held more than thirty days after the appeal is taken, as decided in *Cheny vs. The State,* 4 *Eng. R.* 129.

Nor does the appellant necessarily forfeit his appeal by failing to file the transcript, and prosecute it, at the term of this court to which it is taken as held in *Jordan Ex parte,* 3 *Eng. R.* 285.

As to motions for new trials, bills of exception &c., same state of facts, and same decision as in *Berry vs. Singer,* 5 *Eng. R.* 483.

Writ of Error to Arkansas Circuit Court.

This was covenant on articles of agreement made on the 11th February, 1844, between Frederic Notrebe and wife and Henry M. Clay. Notrebe and wife thereby sold Clay certain lands, for 450

bales of cotton, each 400 lbs. New Orleans weight, which Clay agreed to deliver at the landing, on the place sold, by the instalments, at the times, and of the qualities following:

On or before January 1st, 1846, 100 bales of crop of 1845, one half of first picking and first quality, and one half second picking and good second quality.

Same payment in all respects on 1st January, 1847, and on 1st January, 1848; 150 bales on 1st January, 1849—same qualities and pickings.

These payments to be taken at time of delivery out of the first and second qualities of Clay's crop of the preceding year, by fair division, so far as the quantity or number of bales of each year's crop would admit.

In case of failure to pay any instalment, the amount unpaid to become a money demand, to be computed from the number of bales undelivered, of 400 lbs. each, one half at the price of "Fair," and the other between the price of "good-middling" and "middling-fair," according to the New Orleans quotation of prices, and classification of the cotton of the year's growth out of which the instalment might be due—this payable in current money with 10 per cent. damages and interest at 6 per cent. per annum until paid: *Provided,* that if in any year, on account of high water or other casualty, Clay should fail to make a crop, the payment out of that year's crop should be postponed to the next year, and bear interest at 10 per cent. per annum.

And provided that, in case of a short crop, if Clay should deliver the requisite number of bales for the year, though not in equal proportions of pickings and quality, no damage should arise; but Notrebe might take it at its ascertained value, or postpone the payment until the next year, and it should bear interest at 10 per cent. per annum.

To prevent misunderstanding it was further agreed, that the weight should be ascertained from the New Orleans account of sales.

That if any difference arose as to the picking and quality of any of the cotton offered, it should be marked with Notrebe's

brand, shipped at his risk, classified in N. Orleans by the cotton-brokers, one selected by each, and their classification determine the value: that if, on such valuation, the instalment paid fell short, Clay should pay the difference, on being furnished an account, with such classification; and if there was an overplus, Notrebe should pay it.

On full payment, Notrebe and wife covenanted to convey, and each party bound himself to perform in a penalty of $15,000.

The declaration averred that possession was given to Clay: that in 1845 he made a crop, and that he failed to pay, either in cotton or money the instalment due out of that crop, or the damages or interest.

The 2d breach made the same averments as to the crop and instalment for 1846.

Suit was commenced August 30, 1847. At the return term Clay filed seven pleas:

1. That on the 1st January, 1847, and before suit commenced he had performed his covenant in full.

2. That on the 1st January, 1847, he delivered to Notrebe, out of the crop of 1846, at the proper landing, 100 bales of cotton, New Orleans weight, half of first picking and quality and half of second picking and quality, which was marked to Notrebe, and set apart for and by him.

3. That on the 1st January, 1847, he did deliver 100 bales, each 400 lbs. according to New Orleans weight, which Notrebe refusing to receive, it was shipped to Dick & Hill, New Orleans, sampled by them and turned out to be, one half of first picking and quality, class "fair" and sold as "fair," the other half second picking and good second quality and class "good-middling" and "middling-fair" and sold accordingly.

4. That in 1846 a casualty happened to the crop of Clay, it being "shortened by the caterpillars or worms," whereby he was released from the obligation of paying on the 1st January 1847.

5. That on the 1st day of March, and before suit commenced, he delivered 100 bales, each 400 lbs. New Orleans weight, half

first and half second picking, at the place sold, which was marked to Notrebe according to his instructions.

6. That the crop was short by casualty in 1846, and on the 1st of February, "according to said plaintiff's letter to Joseph W. Clay" he delivered to Notrebe "that portion and quality of cotton as required by said covenant in case of a short crop, and the same was equal to the weights and amount of cotton required of said defendant in case of a short crop."

7. Delivery, and receipt by Notrebe of the instalment out of crop of 1845, on the 1st January, 1846.

Replication to 1st and 7th pleas--demurrer to the others. Demurrer to 2d overruled, and replication. Demurrer to 3d, 4th, 5th and 6th sustained. Issue to each replication.

At the next term an additional plea was filed, averring a delivery on the 1st March, 1847, of the instalment out of crop of 1846, and receipt of the same in satisfaction. Replication to this, and issue.

Trial by jury—verdict $4,838 damages. Before verdict, the plaintiff entered "a discontinuance" as to the first breach, and the verdict was rendered on the 2d alone, finding it true—judgment accordingly.

Motion for new trial overruled, motion in arrest of judgment overruled. Exception and appeal.

The transcript contains a motion for a new trial, in which reference is made to "Exhibits A. B. and C."

Exhibit A. is a statement of the testimony in the case, certified by the judge to be all the testimony given. It has no date.

Exhibit B. is in form a bill of exceptions taken *at the trial.* It states that the defendant moved the court to instruct the jury that if they believed from the testimony "that said 100 bales of cotton was weighed, marked and sampled to the plaintiff in his name, by his agent, on the instruction of said agent, is a delivery of the same in law." The court declined to give it, and instructed the jury that they had the testimony and must judge of the minds and intentions of the parties.

Exhibit C. was another bill of exceptions taken *at the trial.* It

shows that the plaintiff offered in evidence "the New Orleans price-current from the 1st January, 1847, to 1st February, 1847," to show the prices of cotton, and a witness testified that the papers so offered were compared in New Orleans with those filed in the office from whence issued, and were correct reprints, and the same he had been in the habit of receiving from his commission merchant in New Orleans as the price-current and classification of cotton there: and the court allowed it to be read in evidence.

The motion in arrest of judgment was on the ground that the judgment was founded on a declaration "where the damages are not specifically averred and claimed, nor the non-payment thereof specifically negatived in the breach."

Then follows a bill of exceptions, simply stating the overruling of these motions for a new trial and in arrest of judgment.

Clay prayed an appeal, filed the necessary affidavit and it was granted, and he entered into recognizance to stay execution.

The cause was determined at the April term, 1848.

On the 9th day of December, 1848, Clay sued out a writ of error, returnable to the January term of this court following, which was returned not executed for want of time. On the 6th April, 1849, an alias writ of error was sued out, returnable to the July term following. At the return term the death of both Notrebe and Clay was suggested, and the cause revived in the name of the executors of the former and the administrator of the latter.

At the same term Notrebe's executors filed the following plea in abatement:

And the said Terence Farrelly, A. B. K. Thetford and Lewis L. Refeld as executors of the last will and testament of Frederic Notrebe deceased, come and defend &c., and say that they ought not to be held to answer to the said writ of error, of the said plaintiffs in error against them, but the said writ ought to abate, because they say that before the impetration and issuance of said writ of error or of the original writ of error issued in this case, to-wit, at the very same term of said circuit court

of the county of Arkansas, at which the said judgment of said circuit court herein complained of was given, to-wit, at the April term of that court, in the year 1848, on a day of said term subsequent to the giving of said judgment, to-wit, on the sixth day of April, A. D. 1848, the said Henry M. Clay filed such affidavit in said circuit court as is and was required by law for obtaining an appeal, and therefore prayed an appeal from the judgment aforesaid to this Honorable court; which appeal so prayed was then there forthwith by said circuit court allowed and granted; and the said Henry M. Clay then also with security approved by that court, entered into such recognizance as is required by law for obtaining supersedeas or appeal, and thereupon and by the order of that court the said appeal so prayed and granted became and was and still is a supersedeas to the judgment aforesaid: which said appeal is now pending in this court and remains undetermined; all which by the record of said suit in said circuit court remaining, and the transcript thereof now here on file in this Honorable court, more fully and at large appears. All which the said defendants in error are ready to verify: wherefore they pray judgment if they ought to be held to make any answer to this writ, and that the same may abate and they be allowed their costs. PIKE.

To this plea a replication was filed, denying that said appeal was pending in this court and undertermined as alleged in the plea.

After the decision of the court upon the plea, errors were assigned, and the cause proceded to final determination.

FOWLER, for the plaintiff.

PIKE & CUMMINS, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

The plea alleges that in this case there is in this court an appeal pending and undetermined; which fact is denied, and the record is to settle this issue. This shows that in April term,

1848, of the circuit court for the county of Arkansas an appeal was then regularly prayed and granted to this court and that the appellant in the same term entered into a recognizance to supersede the judgment agreeably to the provisions of the statute. No transcript, however, of the judgment and proceedings in the cause was ever filed in the office of the clerk of this court until the 7th July, 1849, and the transcript then filed was that brought here by the writ of error now pending. Is that appeal then pending here?

We apprehend that the solution of this question will be found in ascertaining what is the true nature of an appeal from the law side of the circuit court to this court.

It has been long settled that when a case is in this court by appeal, it will be treated here identically as if it had been brought here by writ of error. And it would seem to be clear that the appellate jurisdiction of this court is derived exclusively from the constitution, and that none of it can be an emanation from the circuit court. When a circuit court renders a final judgment in a controversy within its jurisdiction, it confers no jurisdiction of that case upon this court, nor is any case thereby sent here. It but prepares the controversy to be brought and heard here on error—the legislature having restricted the action of the appellate powers of this court to final judgments. In this condition a party agrieved by such final judgment may invoke the appellate power of this court, and by means of a writ of error have his case brought here, and when so brought here, it will necessarily be pending until dismissed or determined.

If, in addition, he will execute the recognizance provided by statute, a quasi-statutory supersedeas of the judgment below will be the result, which can be discharged only by the action of this court. This quasi-statutory supersedeas not being an inseparable incident of the writ of error, as was the common law supersedeas before *St. 3d of Jac.* 1, *ch.* 8; but, nevertheless, when procured in a proceeding in error, is necessarily pending with the cause in error out of which it grew.

And we conceive that, in the same sense that a final judgment

thus prepares a cause to be brought into this court by writ of error, an appeal prepares it to be brought in by the mode pointed out in the statute of appeals. And when in addition to the appeal, a recognizance of appeal has been entered into the additional legal effect is but to create a purely statutory supersedeas of the judgment appealed from, which, like the supersedeas we have spoken of, can be discharged only by the action of this court. The judgment itself is in no way affected either by the writ of error with supersedeas, or the appeal with the like adjunct, otherwise than in its execution being stayed by means of the legal effect of the recognizance. But it may be remarked that these supersedeas are unlike in one particular: that which accompanies a writ of error grows out of a proceeding in error which has its origin in this court, while the purely statutory supersedeas accompanying the appeal is procured under the auspices of the circuit court unaided by any movement whatever in this court.

Now can it be that the appeal and supersedeas, or either is, under such circumstances, pending in this court? As to an appeal without supersedeas, if we are correct, as we think we are, in holding that it is under our statute but the preparing of a judgment below to be brought here in a statutory mode, the cause can be no more considered as pending here after such preparation than before, without some further steps to bring it into this court: and this is in accordance with the repeated decisions of this court that to authorize an affirmance on certificate it must appear that the judgment had been superseded by recognizance. (*Tindall vs. Jordan*, 3 *Eng.* 267.) And when the additional step of procuring the statutory supersedeas has been taken the cause seems no nearer to this court than before unless it be for the reason that that supersedeas cannot be discharged otherwise than by some action in this court.

Now if the necessity of some action in this court, in order to discharge that supersedeas, should be the foundation of supposing that at least the supersedeas must be pending here, the identical same process of reasoning would prove that immedi-

ately on every final judgment in the State being rendered, the cause would be pending here, because nowhere else can such final judgment be set aside or reversed. A party, against whom a final judgment may be rendered, may never institute in this court any proceedings to have it reversed. So a plaintiff, whose judgment has been superseded under the statute, may never institute proceedings here to have that supersedeas discharged; and in neither case, we apprehend, would there be any case pending in this court until such proceedings had been commenced.

An appeal with recognizance from the circuit court is unlike a change of venue from one circuit court to another or an appeal from a justice of the peace to the circuit court in this, that in each case the tribunal, from which the case goes, in the act of ordering the change of venue in the one case and allowance of appeal in the other, entirely exhaust their jurisdiction over the case, while an appeal from the circuit court with recognizance has no such effect, but the execution of the judgment is suspended only. Yet in neither of the two cases will the court, to which the cause has been removed, take any steps with the cause until it has been authentically advised what has been done in the court from whence the cause is sent. And it has been frequently held in this court of such cases, that, until such authenticated advice, the circuit court cannot exercise its jurisdiction over such case so transferred. (*Stone vs. Robinson*, 4 *Eng.* 469. *Stringer vs. Jacobs*, *ib.* 499.) And so it has been held, in effect, of cases of unauthenticated transcripts in this court. *Heard et al. vs. Lowry*, 5 *Ark.* 474 and other cases.

Now it would seem to be going a great way beyond reason to hold a cause pending and undetermined in a tribunal before the advent of the facts and circumstances, that must transpire as a pre-requisite to the exercise of jurisdiction of that very cause.

In the light of these views, then, we hold that there is no appeal pending and undetermined here in this case and that the writ of error should not abate and render judgment accordingly.

But inasmuch as in the elucidation of the question just decidded, we have held, after mature deliberation, that the statutory

supersedeas, of which we have spoken, can only be discharged by some action in this court, and, consequently cannot "be removed" in the manner indicated there, by mere "operation of law," as was said, by way of illustration, in *Dixon vs. Watkins,* (4 *Eng. on page* 158) by the same judge who delivers this opinion; and therefore is in conflict with that dictum, as well as in conflict with the ruling of this court in *Cheney vs. The State,* (4 *Eng.* 129), and also inconsistent with the case of *John A. Jordan, Ex parte,* (3 *Eng.* 285); in so far as this latter case seems to indicate from the language used that cause for failure to file a transcript of the record and proceedings can only be shown at the "return term," we think it incumbent on us to say of that dictum, that, in our opinion, it did not express the law; of the case of *Cheney vs. The State,* that it did not decide the law; on the contrary, we think the motion of the Attorney General was well made after the return term, there being no reason, as we can perceive after looking into the statute, for confining the motion to that term and no possible injustice can be done by allowing it afterwards, as the affirmance under the statute is not until after the return of a rule to show cause to the contrary. (*Dig.* 825, *sec.* 24.) And of the case of *Ex parte, John A. Jordan,* we see no good reason for confining the showing to excuse lachese to the return term: on the contrary, the whole statute, being purely remedial in its nature and designed to facilitate suitors, should not, we think, have a constitution so strict as to defeat in any case the end of its enactment. If on the contrary abuses should seem to arise in any case from a reasonably liberal construction, such abuses might be restrained to some extent by imposing the damages on affirmance within the discretion of the court. *Digest* 824, *sec.* 40.

PIKE & CUMMINS. The record presents nothing on the motion for a new trial for the consideration of this court—the paper setting out the testimony being no part of the record. *Sawyers vs. Lathrop,* 4 *Eng.* 67.

Mr. Justice WALKER: In this case we are called upon to review the decision of the court below in refusing to sustain the defendant's motion for a new trial. In order to enable us to do so, it is indispensably necessary that all of the evidence presented for the consideration of the court below should be presented upon the record, so that this court may determine from the evidence, whether or not the court below correctly decided the questions of law arising upon the facts presented for its consideration. And in the absence of the whole of the evidence upon which the court below decided, this court will presume in favor of the correctness of the decision of the circuit court.

No part of the evidence in this case is preserved of record by any of the modes known to the law. The record in this respect presents precisely such a case as that of *Berry vs. Singer,* (5 *Eng.* 483) where it was decided that the evidence in the case was not preserved of record. This question of practice was carefully examined in that case, and the former decisions of this court reviewed, and we do not hesitate to re-affirm that decision as expressive of the true rule of practice in such cases.

The defendant, by moving for a new trial, waived his right to insist upon his exceptions taken in the progress of the trial, and as he has failed to bring before us the evidence upon which the circuit court made its decision, we must presume that such a state of case existed there as warranted the decision of that court, and we do not hesitate to affirm it. We have not overlooked the motion in arrest of judgment, but find no error in the record which could avail the defendant under it.

Let the judgment of the Arkansas circuit court be in all things affirmed with costs.